Georgia Law Review

Volume 57 | Number 1 Article 2

11-18-2022

A Short Treatise on College-Athlete Name, Image, and Likeness Rights: How America Regulates College Sports' New Economic Frontier

John T. Holden
Oklahoma State University

Marc Edelman
City University of New York

Michael McCann
University of New Hampshire

A Short Treatise on College-Athlete Name, Image, and Likeness Rights: How America Regulates College Sports' New Economic Frontier

Cover Page Footnote

All authors contributed equally to this Article. * Associate Professor, Spears School of Business, Oklahoma State University. ** Professor of Law, Baruch College, Zicklin School of Business, City University of New York. *** Professor of Law, Director of the Sports and Entertainment Law Institute, University of New Hampshire, Franklin Pierce School of Law.

A SHORT TREATISE ON COLLEGE-ATHLETE NAME, IMAGE, AND LIKENESS RIGHTS: HOW AMERICA REGULATES COLLEGE SPORTS' NEW ECONOMIC FRONTIER

John T. Holden,[*] Marc Edelman,[**] Michael A. McCann[***]

For the past seventy years, intellectual property law's right of publicity has allowed for celebrities to monetize their names, images and likenesses for commercial gain. Until recently, the National Collegiate Athletic Association's (NCAA) internal Principle of Amateurism excluded college athletes from the endorsement marketplace, keeping the wealth of college sports in the hands of a select few administrators, athletic directors, and coaches.

Following years of mounting pressure from the college-athletes' rights movement, a number of states recently announced new laws to ensure college athletes the right to endorse products free from NCAA interference. As such, the NCAA begrudgingly relented on June 30, 2021, and deregulated certain aspects of its Principle of Amateurism. For the first time, the NCAA allowed individual schools and conferences, rather than the association itself, to dictate what name, image, and likeness (NIL) deals their athletes may enter.

A great deal of confusion and ad hoc development of policies by people who have never before been responsible for policing these types of activities has followed. In an ironic twist, many states that passed and implemented NIL laws have been placed in a position where they have more restrictions on college athletes in place than schools in states that never passed NIL laws. This Article, or perhaps more accurately, this Short

---

All authors contributed equally to this Article.

* Associate Professor, Spears School of Business, Oklahoma State University.

** Professor of Law, Baruch College, Zicklin School of Business, City University of New York.

*** Professor of Law, Director of the Sports and Entertainment Law Institute, University of New Hampshire, Franklin Pierce School of Law.

Treatise, provides a comprehensive overview of the history of the right of publicity and discusses the legal risks facing the NCAA, collegiate conferences, schools, and athletes in this new world of college sports.

TABLE OF CONTENTS

I. INTRODUCTION 5

II. A BRIEF OVERVIEW OF THE RIGHT OF PUBLICITY 7
A. ORIGINS OF THE RIGHT OF PUBLICITY 8
1. A Balancing Act 10
2. An Evolution 11
B. THE MODERN RIGHT OF PUBLICITY 14

III. SPORTS AND THE RIGHT OF PUBLICITY 15
A. THE ROLE OF IMAGE RIGHTS IN SPORTS 16
B. PROFESSIONAL SPORTS AND THE RIGHT OF PUBLICITY 18
C. BALANCING ATHLETE PUBLICITY RIGHTS AGAINST THE FIRST AMENDMENT 20

IV. THE AMATEURISM MODEL AND COLLEGE SPORTS INDUSTRIAL COMPLEX 22
A. A BRIEF HISTORY OF THE NCAA 23
B. THE CREATION OF AMATEURISM 29
C. THE CHANGING TIDE 31

V. THE EMERGENCE OF COLLEGIATE NAME, IMAGE, AND LIKENESS RIGHTS 32
A. STATE LAWS 33
B. THE NCAA'S ANNOUNCEMENT 36
C. SCHOOL AND CONFERENCE POLICIES 37

VI. LEGAL AND STRATEGIC RISKS FOR THE NCAA AND CONFERENCES 39
A. ANTITRUST CHALLENGES TO NIL RULES 40
1. Antitrust Challenges Against the NCAA Based on Current NIL Rules 41
2. Antitrust Challenges Against Athletic Conferences Based on Current NIL Rules 43

3. Antitrust Challenges Against Athletic Conferences Based on Past NIL Rules 44
B. COLLECTIVE BARGAINING AND PACKAGING RIGHTS 46
C. STOPPING ILLEGITIMATE ARRANGEMENTS 49

VII. LEGAL AND STRATEGIC RISKS FOR SCHOOLS 50
A. PRIVACY RISKS 51
B. INTELLECTUAL PROPERTY 53
C. DUE PROCESS 55
D. FREE SPEECH RISKS 57
E. UNAUTHORIZED PRACTICE OF LAW 59
F. TITLE IX 60

VIII. LEGAL AND STRATEGIC RISKS FOR ATHLETES 63
A. FAILING TO FOLLOW SCHOOL POLICIES 63
B. BAD CONTRACTS 66
C. RISKING ELIGIBILITY 68
D. USING SCHOOL MARKS 70
E. IMMIGRATION LAW 70
F. TAXES 72

IX. OTHER CONSIDERATIONS 73
A. AGENTS AND ADVISORS 73
B. BOOSTERS 75

X. CONCLUSION 76

I. INTRODUCTION

In December of 2010, the Ohio State University football team became embroiled in a college football scandal.[1] The team had not cheated on the playing field, nor had they failed to attend classes.[2] Rather, their alleged wrongdoing was that the team's star quarterback, Terrelle Pryor, and four of his teammates had sold their championship rings and jerseys for money.[3] These players also signed autographs at a tattoo parlor in exchange for free tattoos.[4]

Finding this conduct in violation of the National Collegiate Athletic Association's (NCAA) Principle of Amateurism,[5] the NCAA suspended these players for five games each and required the Ohio State football team to vacate their victories for the season.[6] The NCAA enforced these punishments even though Pryor and his teammates were from relatively low-income families,[7] the economic value they obtained from selling merchandise and signing autographs was less than $40,000,[8] and the value of the economic

---

[1] Dan Lyons, *Terrelle Pryor, Ohio State "Tattoo 5" Call on NCAA to Restore Their Legacy*, SPUN (July 13, 2021, 11:23 AM), https://www.aol.com/terrelle-pryor-ohio-state-tattoo-152344814.html.

[2] *See id.* (explaining that the scandal seems "quaint" now that rules have changed); Jake Elman, *The NFL Once Suspended Terrelle Pryor for His Behavior at Ohio State*, SPORTSCASTING (May 21, 2020), https://www.sportscasting.com/the-nfl-once-suspended-terrelle-pryor-for-his-behavior-at-ohio-state/ (describing the players' actions as "relatively harmless").

[3] Elman, *supra* note 2.

[4] *Id.*

[5] *See Amateurism*, NCAA, https://www.ncaa.org/sports/2014/10/6/amateurism.aspx (last visited Jan. 20, 2022) (describing the NCAA's vision for the term "amateurism" and providing examples of conduct in violation of the principle).

[6] Mark Schlabach, *Terrelle Pryor, 'Tattoo 5" Call for Ohio State to Restore Ohio State Football Records*, ESPN (July 13, 2021), https://www.espn.com/college-football/story/_/id/31812359/terrelle-pryor-tattoo-5-call-ncaa-restore-ohio-state-records.

[7] *See* Mary Kay Cabot, *Terrelle Pryor's Untold Story: From Homeless in PA to Browns Star Receiver*, CLEVELAND.COM (Jan. 01, 2017, 10:00 AM), https://www.cleveland.com/browns/2017/01/terrelle_pryors_untold_story_f.html (stating that Pryor "came from humble beginnings"); *see also Ohio State Football Players Sanctioned*, ESPN (Dec. 23, 2010), https://www.espn.com/college-football/news/story?id=5950873 (describing the players' motivations to use the money they received to assist their low-income families).

[8] *See* Tom Farrey & Justine Gubar, *Terrelle Pryor Signings Netted Thousands,* ESPN (June 8, 2011, 1:49 PM),

payments the players received was truly *de minimis* in light of the size of the college football industry.[9]

The Ohio State University football players' punishment is only one recent example of the NCAA's century-long quest to tie college sports to the dubious notion of amateurism, under which the NCAA has long disallowed college athletes from receiving any compensation beyond the cost of tuition, room, and board.[10] Of course, the NCAA's restrictions on athlete compensation have always been hypocritical. As coaching salaries and television revenues have grown substantially in the past generation and many college sports executives today are earning multimillion dollar annual salaries, it has become increasingly difficult to ignore the disparities between the realities of undercompensated college athletes versus every other member of the college community who are free to license the rights to their names, images, and likenesses (NILs) to interested third parties.[11]

Faced with growing pressure from state legislatures, the NCAA reluctantly surrendered its steadfast opposition to athletes monetizing their publicity rights on June 30, 2021.[12] In a short press release posted to the NCAA's website mere hours before the new state laws were to take effect, the NCAA ended more than a century of opposition to athletes being able to earn money off of their own NILs.[13] The NCAA's interim policy is deferential to schools and

---

https://www.espn.com/espn/print?id=6637444&type=HeadlineNews&imagesPrint=off (stating that Pryor made between $20,000 and $40,000 autographing memorabilia in a year).

[9] *See* Felix Richter, *U.S. College Sports Are a Billion-Dollar Game*, STATISTA (July 2, 2021), https://www.statista.com/chart/25236/ncaa-athletic-department-revenue/ (showing that the NCAA generated almost $19 billion in revenue in 2019).

[10] *See* Jason Kirk, *The Endless Argument at the Center of College Football*, BANNER SOC'Y (Oct. 4, 2019, 9:31 AM), https://www.bannersociety.com/2019/10/4/18716003/college-football-amateurism-history (describing the long and confounding history of upholding the principles of amateurism).

[11] *See* Steve Berkowitz, *Senators Frustrated by NCAA's "Striking Hypocrisy" in Failure to Act on Athletes' Benefits*, USA TODAY (Jan. 14, 2021, 7:02 PM), https://www.usatoday.com/story/sports/ncaaf/2021/01/14/college-sports-senators-frustrated-ncaas-striking-hypocrisy/4157662001/ (noting congressional frustration over the NCAA's reluctance to adopt changes).

[12] 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.

[13] *See* John Holden, *Opinion: How NCAA Concession on NIL Rules Could Affect U.S. Sports Betting Industry*, LEGAL SPORTS REP. (July 29, 2021), https://www.legalsportsreport.com/54286/analysis-ncaa-nil-sports-betting/ ("About eight

individual conferences while at the same time maintains a limited number of association-wide mandates that continue to limit college athletes' licensing freedom.[14]

This Article, or perhaps more accurately stated, Short Treatise, provides a comprehensive overview of how changes to the NCAA's NIL policy will affect college athletes, universities, athletic conferences, and the NCAA itself. Part II of this Article provides an overview of the right of publicity. Part III discusses the special application of the right of publicity to sports. Part IV describes the NCAA's governance model. Part V analyzes the movements that led to NCAA athletes gaining the ability to monetize their rights of publicity. Part VI highlights risks for the NCAA and college athletic conferences that seek to regulate the commercial activities that athletes engage in. Part VII underscores the legal and strategic risks that schools face. Part VIII considers the risks that athletes face by seeking to monetize their image rights, and last, Part IX discusses ancillary areas of concern following the adoption of the NCAA's new policy on athletes' NIL rights.

II. A BRIEF OVERVIEW OF THE RIGHT OF PUBLICITY

The right of publicity is based on the concept that an individual should have control over the commercial use of their image or identity.[15] Despite the simplicity of the idea that an individual should dictate how their own image is used commercially, scholars have historically disagreed over whether this right should be protected via torts (as was in many cases historically argued)[16] or

---

hours before various state laws were to take effect, the NCAA released an interim policy acquiescing to defeat on a century-long effort to stop athletes from being compensated with little more than their scholarships.").

[14] *See NCAA Approves Interim NIL Policy for College Athletes*, ATHLETIC (July 1, 2021, 1:27 PM), https://theathletic.com/news/ncaa-approves-interim-nil-policy-for-college-athletes/HSSJIy9wkRMg/ ("The new policy . . . reinforces key principles of fairness and integrity across the NCAA and maintains rules prohibiting improper recruiting inducements.").

[15] *See* Andrew T. Coyle, *Finding a Better Analogy for the Right of Publicity*, 77 BROOK. L. REV. 1133, 1133 (2012) ("The right of publicity is the simple idea that there 'is [an] inherent right of every human being to control the commercial use of his or her identity.'" (quoting 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2011))).

[16] *See, e.g.*, Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891, 905–06 (2017) ("The 1977 Restatement of Torts says, 'One who appropriates to his own use

intellectual property (as is becoming more of the dominant paradigm today).[17] This Part explores the origins of the right of publicity and its evolution before concluding with a discussion of the modern right of publicity.

A. ORIGINS OF THE RIGHT OF PUBLICITY

The Second Circuit first explicitly recognized the right of publicity in 1953.[18] Judge Frank distinguished the right of publicity from the right of privacy, describing the right of publicity as "the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross.'"[19] According to Professor Melville Nimmer, the right of publicity was an evolution of sorts away from the right of privacy.[20] When Louis Brandeis and Samuel Warren authored their essay articulating the right to privacy,[21] according to Professor Nimmer, their focus was on protecting "the sensibilities of nineteenth century Brahmin Boston."[22] But, by the mid-twentieth century, many—particularly those in television, film, and radio—were seeking the opposite of privacy; they were seeking to see their likenesses reproduced and to be compensated for it.[23]

---

or benefit the name or likeness of another is subject to liability . . . ." (quoting Restatement (Second) of Torts § 652(C) (Am. L. Inst. 1977))).

[17] *See* Coyle, *supra* note 15, at 1133–34 ("When either justifying the right of publicity's existence or resolving a doctrinal issue, writers have argued that the right of publicity should mirror copyright law, trademark law, or trademark dilution." (footnotes omitted)).

[18] *See* Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 47 (1994) (noting that the 1953 Second Circuit decision of Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc. was the first explicit recognition of the right of publicity).

[19] Haelan Labs. Inc. v. Topps Chewing Gum, 202 F.2d 866, 868 (2d Cir. 1953).

[20] *See* Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 206–07 (1954) ("[T]he doctrine of privacy was evolved as a means of preventing offensive (as distinguished from non-offensive) publicity.").

[21] *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (explaining the individual right to privacy and its intricacies).

[22] Nimmer, *supra* note 20, at 203.

[23] *See id.* at 203–04 ("Well known personalities connected with these industries [did] not seek the 'solitude and privacy' . . . . Their concern [was] rather with publicity, which may be regarded as the reverse side of the coin of privacy.").

Professors Stacy Dogan and Mark Lemley divide the right of publicity into two eras.[24] The first era, dubbed the privacy phase, reflects the original willingness of courts to recognize that individuals have a right to limit the unauthorized commercial use of their names and likenesses.[25] During the years following the landmark Brandeis and Warren article, states, including New York, began to codify privacy statutes that allowed for recovery against so-called commercial appropriation, or the use of any living person's image or name for commercial purposes.[26] Many early cases involved the use of famous individuals being associated with commercial endeavors that could harm their reputations.[27] The first era of cases shared a few distinct characteristics according to Professors Dogan and Lemley: first, publication of photographs alone was not viewed as a violation of a privacy right; second, the use of a celebrity's image alone was often found to not constitute an endorsement of a product and thus was not within the scope of the statutory protection; and third, damages were typically limited to the plaintiff's actual loss, as opposed to the defendant's economic gain.[28]

The second era Professors Dogan and Lemley identify is the modern view, or, as they refer to it, "Fame as Property."[29] This modern era begins around the middle of the twentieth century with the *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*[30] case over the exclusive right to use photographs of baseball players.[31] By then, the right of publicity had evolved from the early privacy-based protections designed to stop the media from prying into person's

---

[24] *See* Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1167 (2006) ("[W]e find it useful to divide the right of publicity's evolution into two general phases: the privacy phase and the modern phase.").

[25] *See id.* ("The privacy phase—which began in the late 1800s—involved the courts' recognition, for the first time, of the right of individuals to limit the use of their names or likenesses by commercial actors.").

[26] *See id.* at 1169 (detailing the New York privacy statute).

[27] *See id.* at 1170 ("[T]he cases involving well-known individuals tended to involve blatant misrepresentations that could harm their reputations in the community.").

[28] *See id.* at 1171 (overviewing the characteristics of this first era, including a fourth factor that these rights typically terminated upon death).

[29] *Id.* at 1172.

[30] 202 F.2d 866, 868 (2d Cir. 1953).

[31] *See* Dogan & Lemley, *supra* note 24, at 1172 ("Celebrities frustrated with the right of privacy found their vindication in 1953, when the Second Circuit decided *Haelan v. Topps Chewing Gum*.").

private affairs to a more complete protection of virtually all aspects of an individual's identity.[32] The unauthorized and appropriated use of a person's likeness for commercial gain creates reputational harm because it draws a false association between an individual and a product or service.[33] In many ways, the right of publicity is used to prevent reputational harms like defamation does.[34] However, the right of publicity also serves another purpose, supplementing where the right to privacy is inadequate.[35] For example, under the right to privacy, a celebrity whose image is used without consent and suffers only "hurt feelings" may not recover under privacy statutes, whereas the right of publicity assumes a commercial value to an identity and allows financial recovery for unauthorized use.[36]

1. A Balancing Act. Professor Mark McKenna ties the modern endorsement of the right of publicity to a detachment from the claim's origins and argues that the claims are a property or unjust enrichment claim.[37] Indeed, just how to classify or analogize the right of publicity has been the subject of debate over whether the claim should be classified alongside torts, intellectual property rights,[38] or as a hybrid.[39]

While there is debate over which area of law the right of publicity belongs, the right of publicity largely has moved from a right that is concerned with remedying an invasion of privacy to an affirmative

---

[32] *See* Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 232 (2005) (explaining that the right of publicity has been broadened to "include almost any attribute associated with an individual, including a distinctive voice, a phrase associated with an individual, and even a character the individual has portrayed" (footnotes omitted)).

[33] *See id.* at 242 ("Identity appropriation . . . can create associations between an individual and the commercial user of her identity that might impact the way the individual is perceived.").

[34] *See id.* (noting that the reputational harm is similar to that of defamation and libel claims).

[35] *See id.* at 242–45 (explaining the right of privacy's inadequacy in protecting celebrities).

[36] *Id.* at 242, 244–45.

[37] *See id.* at 244 (observing that the modern right of publicity claim was "unmoored from its privacy roots" and that courts have asserted that the claim is a property claim or unjust enrichment claim).

[38] *See* K.J. Greene, *Intellectual Property Expansion: The Good, the Bad, and the Right of Publicity*, 11 CHAP. L. REV. 521, 543 (2008) (describing the debate of where the right of publicity should, or should not fall, within the realm of intellectual property).

[39] *See* Andrew M. Jung, *Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites*, 86 CHI.-KENT L. REV. 381, 417 (2011) (noting debate over shoehorning the right of publicity into a privacy or property right).

right to be protected.[40] There is an irony of the right of publicity being traced to Warren and Brandeis's *Right to Privacy* given that the authors were concerned with an overly intrusive media and today the right, if anything, helps to keep the famous in the public eye.[41]

2. An Evolution. The right of publicity indeed has evolved since it derived from the 1890 Right to Privacy.[42] In 1902, the New York appellate courts were tasked with determining whether there was a cause of action where a plaintiff's likeness was used by the Rochester Folding Box Company to sell Franklin Mills Flour.[43] The plaintiff, Mrs. Abigail Roberson, claimed that she had "been attacked, causing her great distress and suffering, both in body and mind; that she was made sick, and suffered a severe nervous shock, was confined to her bed, and compelled to employ a physician, because of these facts."[44] Mrs. Roberson alleged that the continued printing and distribution of her likeness had caused her $15,000 in damages.[45] While the appellate court acknowledged that the theory of a right to privacy was novel, the Rochester Folding Box Company was found to have violated Mrs. Roberson's rights;[46] however, New York's highest court reversed, leaving Mrs. Roberson without a remedy.[47]

---

[40] *See* Johnson, *supra* note 16, at 897 (discussing the evolution of the right of publicity).

[41] *See id.* at 899, 902 (noting that there is some debate amongst commentators about whether appropriation and the right of publicity encompass the same activity, with some commentators arguing that appropriation is related to human dignity whereas the right of publicity requires a commercial misuse of a person's identity); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 572 (1977) ("It is also abundantly clear that *Time, Inc. v. Hill* did not involve a performer, a person with a name having commercial value, or any claim to a 'right of publicity.' This discrete kind of 'appropriation' case was plainly identified in the literature cited by the Court and had been adjudicated in the reported cases." (footnote omitted)).

[42] *See* Jonathan Faber, *A Concise History of the Right of Publicity*, RIGHT OF PUBLICITY, https://rightofpublicity.com/brief-history-of-rop (last updated July 7, 2022) (noting that about half of the states, along with the Restatement, currently recognize the right of publicity).

[43] Roberson v. Rochester Folding Box Co., 64 N.E. 442, 442 (N.Y. 1902).

[44] *Id.*

[45] *Id.*

[46] *See id.* at 443 (explaining that the court below recognized the claim's novelness but "nevertheless . . . reached the conclusion that [the] plaintiff had a good cause of action against defendants").

[47] *See id.* at 448 ("[T]he so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated.").

While various cases solidified the existence of the right of publicity through the first portion of the twentieth century, the Supreme Court did not tackle the issue until 1977.[48] There, Mr. Hugo Zacchini, more famously known as the human cannonball, sued the Scripps-Howard Broadcasting Company following the broadcast of his fifteen-second-long performance on the eleven o'clock news.[49] The broadcast of Mr. Zacchini's performance was "favorable."[50] Nonetheless, Mr. Zacchini sued the broadcaster, alleging that it had unlawfully appropriated Mr. Zacchini's "professional property."[51] The Ohio Supreme Court, while recognizing a right of publicity in Mr. Zacchini's act, ruled that the public interest of broadcasting newsworthy information outweighed interests in an individual's right of publicity unless the broadcast intended to misappropriate the benefit of the footage or caused injury to the claimant.[52] The Supreme Court granted certiorari to consider the First and Fourteenth Amendment questions.[53]

In delivering the opinion of the Court, Justice White made clear that the right of publicity is a right granted under state law.[54] Justice White noted that had there been a mere recollection of the performance without Mr. Zacchini's photo or video, the case would likely not merit Supreme Court review.[55] But the Ohio Supreme Court upheld the broadcaster's constitutional right to display Mr. Zacchini's act in its entirety, not to merely provide a recollection.[56] Justice White articulated: "The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance."[57] The Court thus held that while Ohio law could

---

[48] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977). The Supreme Court did, however, touch on related issues prior to *Zacchini*. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 374 (1967) (explaining that the plaintiff sued under a state statute allowing individuals to recover where a defendant used their name or photograph in trade or advertising without consent).

[49] *Zacchini*, 433 U.S. at 563–64.

[50] *Id.* at 564.

[51] *Id.*

[52] *Id.* at 565.

[53] *Id.* at 565–66.

[54] *See id.* at 566 ("There is no doubt that petitioner's complaint was grounded in state law and that the right of publicity which petitioner was held to possess was a right arising under Ohio law.").

[55] *Id.* at 569.

[56] *Id.* at 570.

[57] *Id.* at 575.

privilege the broadcast, the First and Fourteenth Amendments do not allow for the unfettered broadcast of material that deprives individuals of the rights to their own likeness.[58]

In the wake of the *Zacchini* case, the right of publicity began to develop clear contours. In 1983, the Sixth Circuit Court of Appeals noted that "[t]he right of publicity has developed to protect the commercial interest of celebrities in their identities."[59] The Sixth Circuit went on to extend the right of publicity to the phrase "Here's Johnny," which had long been associated with entertainer Johnny Carson, but was now appropriated by a Michigan-based purveyor of portable toilets.[60] The Ninth Circuit went even further in *Motschenbacher v. R.J. Reynolds Tobacco Co.*, extending the right of publicity to the identifiable representation of a race car driver's car.[61] Nevertheless, not every court is willing to go nearly that far.[62]

The right of publicity has even been extended by some courts to "impersonator" cases.[63] For example, in 1988, the Ninth Circuit held that the Ford Motor Company and its advertising agency were liable to famed singer Bette Midler for using a "sound alike" in the company's 1985 "Yuppie Campaign."[64] Meanwhile, in 1992, the same court found Frito-Lay, Inc. liable for right of publicity infringement where it had hired a professional singer who was known for his impression of the distinctive-voiced Tom Waits[65] to

[58] *See id.* at 578–79 ("[A]lthough the State of Ohio may as a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so.").

[59] Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983).

[60] *Id.* at 836.

[61] *See* 498 F.2d 821, 826–27 (9th Cir. 1974) (holding that the right of publicity protected identifiable features on a race car such as distinctive decorations on the car).

[62] *See, e.g.*, Burck v. Mars, Inc., 571 F. Supp. 2d 446, 448–49 (S.D.N.Y. 2008) (holding that New York's right of publicity statute protects the name and image of a living person but does not protect a character or role played by that person).

[63] *See* Faber, *supra* note 42 (listing and describing impersonator cases).

[64] Midler v. Ford Motor Co., 849 F.2d 460, 461 (9th Cir. 1988).

[65] The Ninth Circuit cites a fan's description of Waits's voice: "[L]ike how you'd sound if you drank a quart of bourbon, smoked a pack of cigarettes and swallowed a pack of razor blades . . . . Late at night. After not sleeping for three days." Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1097 (9th Cir. 1992).

record a radio commercial.[66] Nevertheless, again, this view has not been adopted by all courts.[67]

B. THE MODERN RIGHT OF PUBLICITY

In the modern era, the elements needed to make a prima facie case for violating one's right of publicity have become relatively consistent across most states' laws. In these states, "a prima facie claim for violating one's right of publicity requires the showing of four elements: (1) the use of one's identity; (2) for purposes of a commercial advantage; (3) without consent; and (4) in a manner that causes monetary harm."[68] Nevertheless, when balancing the state right of publicity against the First Amendment right to free speech, federal circuits have applied different approaches to striking the proper balance between these legal principles.[69] For example, the Third and the Ninth Circuits have effectively adopted tests that borrow from copyright law and ask whether the use of a celebrity likeness *transforms* that likeness.[70] Meanwhile, the Second and Sixth Circuits employ what has become known as the Rogers Test, which examines whether the use of a celebrity's likeness is "wholly unrelated to the [defendant's work] or was simply a disguised commercial advertisement for the sale of goods or services."[71] And, the Eighth and Tenth Circuits employ something closer to a true balancing test, which "weighs the

[66] *Id.* at 1098.

[67] *See* Amanda Tate, Note, *Miley Cyrus and the Attack of the Drones: The Right of Publicity and Tabloid Use of Unmanned Aircraft Systems*, 17 TEX. R. ENT. & SPORTS L. 73, 84 (2015) (noting that around thirty states recognize the right of publicity and that those states can be further categorized from narrow to broad recognition).

[68] Marc Edelman, *Closing the "Free Speech" Loophole: The Case for Protecting College Athletes' Publicity Rights in Commercial Video Games*, 65 FLA. L. REV. 553, 560 (2014).

[69] *See id.* at 564–67 (discussing the First Amendment Defense to alleged infringement of one's right of publicity).

[70] *See* Alex Wyman, *Defining the Modern Right of Publicity*, 15 TEX. REV. ENT. & SPORTS L. 167, 169 (2014) ("Recently, the Third and Ninth Circuits adopted a test for determining liability that asks 'whether the work sufficiently transforms the celebrity's identity or likeness.'" (quoting Hart v. Elec. Arts, Inc., 717 F.3d 141, 163 (3d Cir. 2013))); *see also In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1276 (9th Cir. 2013) (adopting a transformative elements test to determine liability for using someone's likeness).

[71] Wyman, *supra* note 70, at 169 (citing Rogers v. Grimaldi, 875 F.2d 994, 1004 (2d Cir. 1989)); *see also* Parks v. LaFace Recs., 329 F.3d 437, 461 (6th Cir. 2003) (applying the Rogers test to the instant case).

celebrity's interests in [their] right of publicity against the public's interest in freedom of expression."[72]

With the Supreme Court failing to grant certiorari in any case since *Zacchini* that requires balancing the right of publicity against the First Amendment, the split among the circuits on this important issue has only grown stronger and more concerning for publicity rights scholars. As such, it has become more challenging to advise both endorsers and creators about the outermost contours of right of publicity protection. This tension between vigorous enforcement of celebrities' publicity rights and the protection of free speech under the First Amendment has thus sometimes led to inconsistent court decisions in this area—an outcome that becomes especially clear when looking at the right of publicity in the context of commercial athletes.

III. SPORTS AND THE RIGHT OF PUBLICITY

Sports have long served as a vehicle well suited for the development of the law surrounding the right of publicity.[73] As a result of athletes' high-profile careers and frequent desirability for endorsement contracts, the professional athletics industry has played an outsized role in developing the right of publicity.[74] Part III of this Article examines the role of the right of publicity in sports. This Part begins by discussing the significance of athlete image rights and then describing the seminal right of publicity cases involving professional athletes before ending by discussing the cases that have had college athletes at their center.

---

[72] Wyman, *supra* note 70, at 169; *see* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 823 (8th Cir. 2007) (adopting the balancing test); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 970–72 (10th Cir. 1996) (same).

[73] *See* Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 MARQ. SPORTS L.J. 23, 32–33 (1999) (providing the names of more than a dozen professional athletes who have litigated their likeness rights).

[74] *See* J. Thomas McCarthy & Paul M. Anderson, *Protection of the Athlete's Identity: The Right of Publicity, Endorsements and Domain Names*, 11 MARQ. SPORTS L. REV. 195, 202–05 (2001) (describing various influential sports-based right of publicity cases).

A. THE ROLE OF IMAGE RIGHTS IN SPORTS

When one looks at a list of the world's most valuable athletes, iconic names like mixed-martial artist Conor McGregor, soccer star Lionel Messi, tennis star Roger Federer, and basketball star LeBron James are often at the top.[75] These athletes invariably have something in common beyond success at their sport: marketability beyond the field.[76] Indeed, many of the athletes on the Forbes list of highest-paid athletes made more money off the field than on the field.[77] At the extreme is tennis superstar Roger Federer, who, despite only earning about $300,000 on the court in 2020, had more than $90 million in earnings through his partnerships with Rolex, Credit Suisse, and Uniqlo, a clothing company.[78] The opportunities for top athletes off the field of play can be far more lucrative than their on-field salaries, which in many American leagues are artificially suppressed via league salary caps.[79]

In American professional team sports, players' associations often allow for the group licensing of athletes' NILs.[80] This type of licensing arrangement allows for industries like sports trading cards and sports-based video games to use authentic names and images.[81] Athletes' images, or their brands, represent a significant revenue generation tool for them away from the field, and in the

---

[75] *See, e.g.*, Brett Knight, *The World's 10 Highest-Paid Athletes: Conor McGregor Leads a Group of Sports Stars Unfazed by the Pandemic,* FORBES (May 12, 2021, 6:30 AM), https://www.forbes.com/sites/brettknight/2021/05/12/the-worlds-10-highest-paid-athletes-conor-mcgregor-leads-a-group-of-sports-stars-unfazed-by-the-pandemic/?sh=7cb31f7426f4 (listing the highest paid athletes of the previous year).

[76] *See id.* (discussing off-field earnings for the highest paid athletes).

[77] *See id.* (comparing on-field and off-field earnings for each of the ten highest paid athletes).

[78] *Id.*

[79] *See* Ramy Elitzur, *NFL and NHL Salary Caps Have Worked Out Well for Players*, THE CONVERSATION (Aug. 26, 2021, 11:08 AM), https://theconversation.com/nfl-and-nhl-salary-caps-have-worked-out-well-for-players-165739 (explaining that salary caps are controversial because they "limit the amount of money a professional sports team can spend on their athletes").

[80] *See, e.g.*, CAROLINA PINA, GARRIGUES, THE ROLE OF IP FOR ATHLETES AND IMAGE RIGHTS https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_reg_ip_sport_sin_14/wipo_reg_ip_sport_sin_14_t_11.pdf (last visited Sept. 17, 2022) (discussing the National Football League Players Association group licensing program); *Licensing*, NHLPA, https://www.nhlpa.com/the-pa/business-affairs/licensing (last visited Sept. 17, 2022) (describing the National Hockey League Players Association group licensing program).

[81] PINA, *supra* note 80.

case of particularly successful athletes, after their careers are over.[82] To protect the value of their brand, athletes must take action to prevent unauthorized use or risk the value of their brand being depleted.[83] Protecting one's image is a critical component for maintaining value, but the rise of morality clauses in endorsement contracts can mean that an athlete must uphold certain standards or risk their commercial relationships being terminated.[84]

As the amount of money in the sports industry has grown over the last several decades, athletes have become increasingly savvy in protecting their brands and recognizing the right to protect marks associated with their images.[85] The close relationship between the right of publicity and traditional intellectual property law means that both areas of law seek to exclude the unauthorized use of the holder's property right; however, both also rely on enforcement.[86] While professional athletes have long had agents and licensing arms of players' associations that protect their interests both individually and collectively,[87] collegiate athletes in the United States have long had to assign their rights of publicity to their schools or the NCAA in exchange for a scholarship.[88] The NCAA's new NIL policy has and will continue to change how collegiate athletes can monetize their NILs.[89] The next section provides an

---

[82] *See* Ian Blackshaw, *Understanding Sports Image Rights*, WORLD INTELL. PROP. ORG., https://www.wipo.int/ip-outreach/en/ipday/2019/understanding_sports_image_rights.html (last visited Sept. 17, 2022) (noting that "the commercialization of the sports image rights of well-known teams and sports persons" generates "mega sums").

[83] *See id.* (discussing remedies available to athletes whose image rights have been infringed upon).

[84] *See id.* (overviewing morality clauses and their implications for athletes).

[85] *See, e.g.*, Josh Gerben, *What Do Athletes Need to Know About Registering a Trademark?*, GERBEN, https://www.gerbenlaw.com/blog/what-do-athletes-need-to-know-about-registering-a-trademark/ (last visited Sept. 17, 2022) (describing various athletes efforts to trademark nicknames and catch-phrases).

[86] *See* Ryan Sullivan, *An Athlete's Right of Publicity—An Active Area in Sports Law*, HEITNER LEGAL (June 12, 2015), https://heitnerlegal.com/2015/06/12/an-athletes-right-of-publicity-an-active-area-in-sport-law/ (explaining the relationship between the right of publicity and intellectual property law).

[87] *See supra* notes 80–81 and accompanying text.

[88] *See* Sullivan, *supra* note 86 ("The NCAA contends that student-athletes assign their rights of publicity to the colleges or the NCAA, in exchange for a scholarship and the right to play for the school.").

[89] *See* Maria Carrasco, *Some College Athletes Cash In While Others Lose Out*, INSIDE HIGHER ED (Oct. 12, 2021), https://www.insidehighered.com/news/2021/10/12/while-some-ncaa-athletes-cash-nil-others-lose-out ("One of the biggest beneficiaries of NIL so far is

overview of the cases involving professional athletes' alleged publicity rights that have shaped the right of publicity as we know it today.[90] Many of the cases post-*Zacchini* entail judicial efforts to balance athlete publicity rights against First Amendment considerations.

B. PROFESSIONAL SPORTS AND THE RIGHT OF PUBLICITY

As in other areas of entertainment, the sports law branch of the right of publicity law has seen modern professional athletes attempting to protect the misappropriation of their NILs. But the athletes have been successful in their legal challenges in only some of these cases.

One of the first sports-based right of publicity cases involved former collegiate All-American quarterback and Philadelphia Eagles player Davey O'Brien.[91] Pabst, a beer distributor, seasonally included calendars with National Football League (NFL) and college football schedules in its boxes of beer.[92] The 1939 calendar included not only the schedules but also under the heading "Pabst Breweries, Blue Ribbon Export Beer," was a photograph of Davey O'Brien posed like he was preparing to throw a football in his Texas Christian University (TCU) uniform.[93] O'Brien sued, claiming that the use of his image in the defendant's advertising campaign violated his right to privacy.[94] Pabst defended on three grounds.[95] First, Pabst alleged that O'Brien was not a private person, and as a public figure, the photo was truthful, showing him engaged in an activity that he regularly participated in, and thus he was not entitled to the same expectations of privacy as a private citizen.[96]

University of Alabama quarterback Bryce Young, who by late July [2021] had already earned close to $1 million in endorsement deals.").

[90] *See* Brian M. Rowland, *An Athlete's Right of Publicity*, 76 FLA. BAR J. 45, 46–49 (Nov. 2002), https://www.floridabar.org/the-florida-bar-journal/an-athletes-right-of-publicity/ (describing briefly various professional sports-related right of publicity cases).

[91] O'Brien v. Pabst Sales Co., 124 F.2d 167, 168 (5th Cir. 1941). Indeed, Davey O'Brien's prowess at quarterback was so renowned that the Davey O'Brien award is now awarded annually to the top collegiate quarterback. *Foundation & History,* DAVEY O'BRIEN AWARD, https://daveyobrienaward.org/davey-obrien-foundation/ (last visited Dec. 19, 2021).

[92] *O'Brien*, 124 F.2d at 168.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

Second, Pabst argued that it had lawfully obtained a license to use the photo from TCU and that TCU was the proper licensing authority.[97] Finally, Pabst argued that O'Brien had not suffered any harm because he had only learned of the calendars after they had already been in circulation for some time.[98] O'Brien, meanwhile, argued that he was harmed because his association with an alcohol distributor undermined his partnership with the Allied Youth of America, an organization that sought to curb alcohol use by young people.[99]

Despite O'Brien's seemingly strong argument from a public policy perspective, the Fifth Circuit ruled against O'Brien—finding that his claims failed to fall within the narrow contours of the law as they were applied at the time.[100] In particular, the Fifth Circuit concluded that O'Brien's claim fell short because he was "not [a private] person and the publicity he got was only that which he had been constantly seeking and receiving," as well as "because the use of the photograph was by permission, and there were no statements or representations made in connection with it, which were or could be either false, erroneous or damaging to the plaintiff."[101]

Nevertheless, this narrow view of the right of publicity articulated by the Fifth Circuit in *O'Brien* has since been largely reversed by most courts. The reversal began with the Second Circuit's important decision in *Haelan Laboratories v. Topps Chewing Gum*.[102] In *Haelan Laboratories*, two rival chewing gum companies were competing for the right to use the images of baseball players to sell their gum.[103] Haelan Laboratories had signed a player to an exclusive contract and alleged that Topps had knowingly induced the player to enter into a contract with them in violation of the player's commitment to Haelan Laboratories.[104] Topps defended by arguing that even if the facts as alleged were true, there was no cause of action because the plaintiff's contract was a mere release to use the player's image, not an exclusive

---

[97] *Id.*

[98] *Id.*

[99] *Id.* at 168–69.

[100] *See id.* at 170 (indicating that, even assuming an actionable right of privacy for a private person existed under Texas law at the time, O'Brien could not assert such a claim).

[101] *Id.* at 169.

[102] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

[103] *Id.* at 867.

[104] *Id.*

arrangement.[105] In ruling that Topps had infringed upon bona fide publicity rights that Haelan Laboratories had secured from individual players, the Second Circuit rejected the defendant's argument that a person has no legal interest in the publication of their image beyond the right to privacy.[106] Instead, the Second Circuit held that "[in addition] to and independent of that right of privacy, a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else," and that right "symbolizes the fact that courts enforce a claim which has pecuniary worth."[107]

C. BALANCING ATHLETE PUBLICITY RIGHTS AGAINST THE FIRST AMENDMENT

The *Haelan Laboratories* decision clarified, for the first time, that there was a right of publicity, distinct from the right to privacy. Under this right, athletes enjoy general protection from the use of their likenesses, without their permission, for commercial gain.[108] Since *Haelan*, a number of different groups of athletes have successfully recovered damages for the unlicensed use of their identities for commercial gain—including successful challenges by several hundred Major League Baseball players who had their identities used in a commercial board game,[109] several professional

---

[105] *Id.*

[106] *See id.* at 868 (rejecting the defendant's contention that "a man has no legal interest in the publication of his picture other than his right of privacy, i.e., a personal and non-assignable right not to have his feelings hurt by such a publication").

[107] *Id.*

[108] *See* J. Gordon Hylton, *Baseball Cards and the Birth of the Right of Publicity: The Curious Case of* Haelan Laboratories v. Topps Chewing Gum, 12 MARQ. SPORTS L. REV. 273, 273–74 (2001) (indicating that individuals, including professional athletes, possess a property right in their own image which protects them from unauthorized use of their image for commercial gain).

[109] *See* Uhlaender v. Henricksen, 316 F. Supp. 1277, 1283 (D. Minn. 1970) (granting injunctive relief and holding that the board game manufacturer "ha[s] violated plaintiffs' rights by the unauthorized appropriation of their names and statistics for commercial use"), *abrogated by* Dryer v. Nat'l Football League, 55 F. Supp. 3d 1181, 1199 (D. Minn. 2014).

golfers who had similarly appeared in a board game,[110] and a class of NCAA Division I college football players who had their likenesses appear as avatars in an electronic videogame.[111]

Nevertheless, as discussed in *Zacchini*, athletes' publicity rights must still be balanced against the First Amendment,[112] and sometimes, in the era subsequent to *Zacchini*, the First Amendment has been found to trump commercial athletes' publicity rights. For example, following the San Francisco 49ers' unprecedented run of success during the 1980s, the San Jose Mercury News issued a special section in its Sunday newspaper on February 4, 1990.[113] The front page of the special souvenir section carried an artist's rendition of Joe Montana, the 49ers star quarterback.[114] After the original printing, the San Jose Mercury News then reprinted the cover page with the Montana image and sold some as posters for five dollars.[115] Montana sued, alleging that the San Jose Mercury News had appropriated his name and likeness for its commercial advantage.[116] The California Court of Appeal, however, analogized the posters to election posters and held that Montana's achievements were "clearly a newsworthy event," and that the posters were a means of presenting information that must be protected by the First Amendment.[117]

Similarly, in *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, an Oklahoma-based manufacturer of parody trading cards that featured Major League Baseball players caricatures along with a disclaimer, obtained a declaratory judgment that its actions were

---

[110] *See* Palmer v. Schonhorn Enters., Inc., 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967) (granting injunctive relief for the unauthorized commercial use of four professional golfers' likenesses and statistical information).

[111] *See* Hart v. Elec. Arts, Inc., 717 F.3d 141, 170 (3d Cir. 2013) (reversing a grant of summary judgment and holding that the unauthorized use of the plaintiffs' likenesses, even where transformative aspects were present, was sufficient to establish a claim for the violation of plaintiffs' rights of publicity).

[112] *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578 (1977) (stating that "entertainment, as well as news, enjoys First Amendment protection" but recognizing that "neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized").

[113] Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639, 640 (Cal. Ct. App. 1995).

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at 641.

protected First Amendment activities.[118] In evaluating the Players Association's rights, the Tenth Circuit found that there were indeed protectable rights involved;[119] however, the underlying parody represented "an important form of entertainment and social commentary that deserve[d] First Amendment protection."[120] Eleven years later, the Eighth Circuit in *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, held that a fantasy sports company's unlicensed use of players' identities in connection with a fantasy sports contest was protected by the First Amendment for a variety of reasons, including fair use, lack of confusion as to source, and because the athletes were "handsomely" compensated through other means.[121]

Each of these cases highlights that the right of publicity's practical reality is about controlling endorsement opportunities related to one's own identity and not about preventing all forms of use. Nevertheless, even though the defendants prevailed in *Montana*, *Cardtoons*, and *C.B.C. Distribution*, across the big picture, licensing the right to use one's name, image, or likeness for money has emerged as, and will likely remain, an important source of revenue for many commercial athletes.[122]

IV. THE AMATEURISM MODEL AND COLLEGE SPORTS INDUSTRIAL COMPLEX

Whereas many professional athletes over the past seventy years have come to enjoy substantial economic benefits from licensing their NILs based on the state-law right of publicity,[123] college athletes have long been excluded from these opportunities—not by

[118] 95 F.3d 959, 962 (10th Cir. 1996).

[119] *See id.* at 968 ("[N]otwithstanding any First Amendment defense, Cardtoons' use of player likenesses on its cards violates the Oklahoma statute and infringes upon the property rights of MLBPA.").

[120] *Id.* at 976.

[121] 505 F.3d 818, 824 (8th Cir. 2007).

[122] *See*, *e.g.*, Brett Knight, Justin Birnbaum & Matt Craig, *Highest-Paid Athletes: The Top 50 Sports Stars Combined to Make Nearly $3 Billion in a Year, Crushing the Record*, FORBES, https://www.forbes.com/athletes/ (last visited Aug. 18, 2022) (presenting data that shows that many of the top athletes earn amounts far exceeding their salaries or winnings from endorsements).

[123] *See id.* (noting that many of the top athletes earn amounts far exceeding their salaries or winnings from endorsements).

state or federal law, but rather by the NCAA's own internal rules that forbade the practice.[124] But that is now changing due to new state laws that ensure college athletes the right to endorse products free from NCAA interference,[125] as well as due to dicta from a recent Supreme Court antitrust decision that calls into doubt NCAA collective restraints in this area.[126] This Part examines the origins of the NCAA, provides a brief history of its economic operations, and outlines the recent reforms in terms of college athletes' economic rights that have emanated not only from sustained political pressure but also from recent legal changes.

A. A BRIEF OF THE HISTORY OF THE NCAA

Those on the outside observing the college sports industry often mistake college sports as being both owned and created by the NCAA; in reality, college sports existed for several decades before the bottom-up trade association even came into existence.[127] The early days of college sports can be traced all the way back to an 1852 regatta between Harvard and Yale Universities that was modeled after the regattas that were already taking place among colleges in England.[128] At the time, in contrast with today's popular conception

---

[124] *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2021–22 NCAA DIVISION I MANUAL 57 (2021) (stating in bylaw 12.5.2.1 that student athletes who receive payment for the use of their name or picture to promote a product or service shall be ineligible for participation in intercollegiate athletics).

[125] *See*, *e.g.*, O.C.G.A. § 20-3-681 ("A student athlete at a postsecondary educational institution may earn compensation for the use of his or her name, image, or likeness. . . . An intercollegiate athletic association shall not prevent a student athlete from receiving compensation, or penalize a student athlete for earning compensation, as a result of the student athlete earning compensation for the use of such student's name, image, or likeness.").

[126] *See* NCAA v. Alston, 141 S. Ct. 2141, 2156 (2021) (noting that NCAA restrictions on student-athletes "can (and in fact do) harm competition" because "student-athletes have nowhere else to sell their labor").

[127] *See* John T. Holden, Marc Edelman, Thomas A. Baker III & Andrew G. Shuman, *Reimagining the Governance of College Sports After* Alston, 74 FLA. L. REV. 427, 430–31 (2022) (discussing the history of the NCAA).

[128] Blair Shiff, *The History Behind America's Oldest Active Collegiate Sporting Event*, ABC NEWS (June 9, 2017, 4:00 AM), https://abcnews.go.com/Sports/history-americas-oldest-active-collegiate-sporting-event/story?id=47852376; *see also When Rowing Fever Was Ignited by Harvard Racing Oxford*, WORLD ROWING (Sep. 24, 2019), https://worldrowing.com/2019/09/24/when-rowing-fever-was-ignited-harvard-racing-oxford/

about college sports, the college athletes competing in the regatta were compensated.[129] As the Supreme Court explained, "[a] railroad executive sponsored the event to promote train travel to the picturesque lake," and he provided the competitors in the regatta with "an all-expenses-paid vacation with lavish prizes—along with unlimited alcohol."[130]

The first collegiate football game, meanwhile, was played in 1869, between what is now Princeton University and Rutgers College.[131] Almost immediately thereafter, college football emerged as a far more desirable and lucrative pursuit than staging regattas.[132] By the late 1880s, some college football games were "attracting 40,000 spectators and generating in excess of $25,000 . . . in gate revenues."[133] Some colleges were even compensating non-students for their enrollment, even temporarily, to help them win on the gridiron.[134]

Over the following years, schools would slowly begin to assemble sports conferences, although these conferences lacked much in the way of centralized governance.[135] The rapid emergence of college football as a sport also began to attract regulatory attention based on its violence.[136] Football in the late nineteenth and early twentieth century was far different than the sport is today: the ball was larger, there was no forward pass, and the game was more violent.[137]

(explaining that the famous boat race between Oxford and Cambridge in England inspired the 1852 boat race between Harvard and Yale).

[129] *See Alston*, 141 S. Ct. at 2148 (noting that back in the 1800s, "[c]olleges offered all manner of compensation to talented athletes").

[130] *Id.*

[131] Holden et al., *supra* note 127, at 430–31.

[132] *See Alston*, 141 S. Ct. at 2148 ("[I]t was football that really caused college sports to take off.").

[133] *Id.*

[134] *See id.* (explaining that "[c]olleges offered all manner of compensation to talented athletes" and operated as "big business[es]").

[135] *See* Holden et al., *supra* note 127, at 431 ("By the late 1800s, groups of colleges with advanced sporting programs had joined together into small, athletic conferences for purposes of better organizing their sporting competitions.").

[136] *See id.* ("The NCAA's emergence as a regulator of intercollegiate sports is historically inseparable from the rise of national attention paid to safety issues in college football.").

[137] *See* Katie Zezima, *How Teddy Roosevelt Helped Save Football*, WASH. POST (May 29, 2014, 8:00 AM), https://www.washingtonpost.com/news/the-fix/wp/2014/05/29/teddy-roosevelt-helped-save-football-with-a-white-house-meeting-in-1905/ ("The ball was roughly the size of a watermelon. Forward passes were not allowed, leading to short lateral tosses, large scrums of players jockeying for the ball and vicious hits.").

Football had been associated with at least forty-five deaths between 1900 to 1905.[138] More as a concerned bystander than a fan of the game, President Theodore Roosevelt summoned the heads of various schools to the White House and held a conference seeking to add safety guidelines to collegiate football and, amongst other things, remove the use of mercenary players who were otherwise unaffiliated with schools.[139]

The NCAA officially formed on March 31, 1906, as a safety-oriented body and was originally named the Intercollegiate Athletic Association of the United States (IAAUS).[140] The original IAAUS had sixty-two members and focused primarily on developing rules to reform intercollegiate football.[141] In 1910, the IAAUS was renamed the National Collegiate Athletic Association; however, the first decade of the NCAA focused primarily on developing rules for intercollegiate sports, with students still serving as the primary organizers of intercollegiate activities.[142] The NCAA hosted its first national championship in 1921 for track and field.[143] During the 1920s, the Carnegie Foundation expressed concern regarding the increase in commercialization in college athletics.[144] The Carnegie Foundation issued a statement: "Commercialism in college athletics must be diminished and college sport must rise to a point where it is esteemed primarily and sincerely for the opportunities it affords to mature youth."[145] The Carnegie Foundation statement would be one of the most prescient college sports themes over the next century.[146]

The Carnegie Foundation's concerns were overshadowed during the 1930s by University of North Carolina President Frank P.

---

[138] *Id.*

[139] Holden et al., *supra* note 127, at 431–32.

[140] *History*, NCAA, https://www.ncaa.org/sports/2021/5/4/history.aspx (last visited Dec. 21, 2021).

[141] Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000).

[142] *See id.* at 12–13 ("[S]tudents, with some faculty oversight, continued to be the major force in running intercollegiate athletics.").

[143] *History*, *supra* note 140.

[144] *See* Holden et al., *supra* note 127, at 432 (describing how the Carnegie Foundation "began actively calling for increased scrutiny of the commercialization of collegiate sports, and college football more specifically").

[145] Smith, *supra* note 141, at 13.

[146] *See id.* at 13 (explaining how the Carnegie Foundation advocated for college presidents to change the policies surrounding commercialization).

Graham, who advocated a plan to decouple athletics from the role of the university.[147] The *Graham Plan,* as it has come to be known, called for an end to academically related aid, ended post-season competition, required athletes to provide the school with an accounting of their income and expenses, and provided the university's faculty with oversight of athletics.[148] The *Graham Plan*, however, undermined a plan from the Southeastern Conference, which supported granting the full cost of attendance to collegiate athletes.[149] This division between schools that supported athletically-tied aid and those that did not could have resulted in two different streams of college athletics.[150]

Following World War II, the NCAA felt a need to crack down on payments to collegiate athletes and implemented the *Sanity Code* in 1948,[151] which temporarily disallowed any compensation to college athletes beyond the actual cost of attendance.[152] As sports economist Andy Schwarz has observed, "the NCAA has only ever truly enforced a nationwide prohibition on payments to athletes for three years—from 1948 to 1951."[153] The *Sanity Code* was meant to turn athletic-aid grants into a strict liability offense; the punishment was expulsion.[154] In 1951, the NCAA identified "seven sinners," Boston College, The Citadel, the University of Maryland, Villanova University, the University of Virginia, Virginia Tech, and

---

[147] Holden et al., *supra* note 127, at 432.

[148] *See The Graham Plan For Intercollegiate Athletics, 1935*, FOR THE RECORD (Oct. 23, 2017), https://blogs.lib.unc.edu/uarms/2017/10/23/the-graham-plan-for-intercollegiate-athletics-1935/ (describing the key components of the *Graham Plan*); *see also* Holden et al., *supra* note 127, at 432–33 ("Specifically, the plan called for a nationwide ban on financial aid based on athletic ability, and placed athletics under the control of university faculty." (footnote omitted)).

[149] *See* Holden et al., *supra* note 127, at 432 ("[The Graham Plan], however, was ill-timed as it was introduced to the Southern Conference around the same time that the Southeastern Conference had voted in favor of grants-in-aid.").

[150] *See id.* (noting how the diametrically opposed plans could result in an "amateur half" and "professional half" of college athletics).

[151] *See id.* at 433 ("The *Sanity Code*, which was adopted by the NCAA in 1948, sought to put an enforcement mechanism behind the NCAA's principles that limited the compensation of college athletes.").

[152] *See id.* ("[T]he *Sanity Code* restricted schools from compensating their athletes based on athletic ability, while still allowing athletes to receive . . . need-based financial aid.").

[153] Andy Schwarz, *The NCAA Has Always Paid Players; Now It's Just Harder to Pretend They Don't*, DEADSPIN (Aug. 29, 2015, 12:25 PM), https://deadspin.com/the-ncaa-has-always-paid-players-now-its-just-harder-t-1727419062.

[154] Holden et al., *supra* note 127, at 433.

the Virginia Military Institute, all schools guilty of providing financial aid to athletes.[155] When the time came to expel these schools, however, the other NCAA members realized that they too might face expulsion one day, which effectively ended the *Sanity Code*.[156] In 1956, the NCAA term grant-in-aid was born, which allowed schools to provide athletes with money to cover their living expenses beyond tuition itself.[157] During the 1970s, Title IX, which federally-mandated equitable treatment for women's sports, required that men's and women's programs receive equitable funding for scholarships.[158] However, in 1975, the NCAA ended the payments for expenses beyond tuition room and board, calling them too expensive, even though they were capped at fifteen dollars per month.[159]

During the 1980s, the NCAA was in the spotlight as revenue had grown[160] and athletes like Brian Bosworth were household names.[161] While revenue was growing, the NCAA was attempting to limit college football's exposure by reducing the number of times

---

[155] Schwarz, *supra* note 153.

[156] *See id.* ("The full NCAA membership, when asked to enforce the Sanity Code, had a moment of 'there but for the grace of God go I' and realized that because they were also providing athletic scholarships, if they knocked out Virginia Tech, the next knock on the door in the night might be to haul them in to be judged for their own insanity. So neither Virginia Tech nor its fellow 'Seven Sinners' were punished and the Sanity Code, while it stayed on the books for a few more years, was left unenforced.").

[157] *Id.*

[158] *See* Deborah Brake, *The Struggle For Sex Equality in Sport and the Theory Behind Title* IX, 34 U. MICH. J.L. REFORM 13, 123–24 (2000) (noting that Title IX's standards of equality requires funding sufficient to buy "the same quality of treatment for men and women in the sports that they play[,]" rather than numerically equal amounts of funding for men and women); *see also* Holden et al., *supra* note 127, at 434 ("[W]hen Title IX became effective law, the NCAA . . . set its sights on ensuring equal educational opportunity for male and female students in intercollegiate athletics.").

[159] Schwarz, *supra* note 153.

[160] *See* Thomas J. Horton, Drew DeGroot & Tyler Custis, *Addressing the Current Crisis in NCAA Intercollegiate Athletics: Where Is Congress?*, 26 MARQ. SPORTS L. REV. 363, 374 (2016) ("[T]elevised sports increased in popularity during the 1980s and huge amounts of money began to pour into the NCAA . . . .").

[161] *See* Ivan Maisel, *Perfect Timing for Bosworth, Snyder,* ESPN (Jan. 9, 2015), https://www.espn.com/college-football/story/_/id/12143168/brian-bosworth-bill-snyder-college-football-hall-fame-induction-perfect-timing ("[Bosworth] became a two-time All-American and as The Boz, he became a national figure known for brash, egocentric stunts that helped usher in a different kind of college football celebrity.").

that schools could be broadcast on television.[162] Believing that the NCAA was engaged in anticompetitive behavior, the University of Oklahoma and the University of Georgia sued the NCAA successfully, opening the door to a free market for college football games.[163] While schools were the big victors in *NCAA v. Board of Regents*,[164] Justice John Paul Stevens, perhaps unintentionally, granted the NCAA a gift in dicta. Justice Stevens stated:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. But consistent with the Sherman Act, the role of the NCAA must be to *preserve* a tradition that might otherwise die; rules that restrict output are hardly consistent with this role.[165]

The NCAA would use this statement dubiously by Justice Stevens for more than three decades to justify ongoing restrictions on the earning capacity of college athletes.[166] With the defeat of restrictions designed to promote in-person attendance, the NCAA leaned into commercialism, growing the men's basketball tournament to sixty-four teams in 1985 and allowing a primetime show to be built around tournament selections.[167] In the last three decades, the NCAA has continued to grow its revenues, but there

---

[162] *See* Holden et al., *supra* note 127, at 435–36 (describing the limitation of televised games as a basis for the suit filed by University of Oklahoma and the University of Georgia).

[163] *See id.* at 436 ("The case, *NCAA v. Board of Regents*, made its way to the Supreme Court in 1984, and the Court held that the collective actions of member colleges in the NCAA were not only subject to antitrust scrutiny, but also that limiting televised football broadcasts violated the law." (footnote omitted)).

[164] *See* NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984) (finding in favor of the litigant schools).

[165] *Id.* (emphasis added).

[166] *See* Thomas A. Baker III & Natasha T. Brison, *From* Board of Regents *to* O'Bannon: *How Antitrust and Media Rights Have Influenced College Football*, 26 MARQ. SPORTS L. REV. 331, 331–32 (2016) ("Most of college football's economic growth can be attributed to the influx of monies flowing from media rights deals made possible by *Board of Regents*. The actual athletes . . . remain unable to [receive any] profit . . . .").

[167] Holden et al., *supra* note 127, at 436.

has also been the creation of a divide between the so-called Power Five conferences and everyone else.[168] Along the way, however, one constant has remained: a commitment to the constructed term "amateurism."[169]

B. THE CREATION OF AMATEURISM

Contrary to popular belief, the idea of amateurism did not begin with the ancient Greeks; instead, it originated in nineteenth-century upper-class England.[170] It was at the famed Henley Regatta where it was first declared that "'[n]o person . . . who is or ever has been by trade or employment for wages a mechanic, artisan, or labourer' shall be eligible to compete in rowing."[171] Predictably, this excluded lower classes, which typically began working at younger ages, from ever competing.[172] This concept would be carried over to college athletics in the United States.[173] Despite lacking any real authority for much of its first fifty years, the NCAA enshrined the idea that college sports must be connected to amateurs.[174] Things would change in 1951, however, when the NCAA hired its first executive director, Walter Byers, a man who had left college before finishing.[175] Byers took it upon himself to take on the dirty world of college sports, handling scandals ranging from fake grades to point-

[168] *See* Jon Solomon, *NCAA Adopts New Division I Model Giving Power 5 Autonomy*, CBS SPORTS (Aug. 7, 2014, 9:41 AM), https://www.cbssports.com/college-football/news/ncaa-adopts-new-division-i-model-giving-power-5-autonomy/ (noting that the Power Five conferences are the Southeastern Conference, Atlantic Coast Conference, Big Ten, Pac-12, and Big XII and describing the emergence of the Power Five autonomy model).

[169] *See* Ronald A. Smith, *History of Amateurism in Men's Intercollegiate Athletics: The Continuance of a 19th-Century Anachronism in America*, 45 QUEST 430, 430–47 (1993) (describing the use and history of the term amateurism).

[170] *See id.* at 431 ("Amateurism did not begin with the ancient Greeks . . . . Not until the 19th century did the upper classes of Victorian England invoke amateurism for their own purposes.").

[171] *Id.*

[172] *See id.* (explaining that the intent of amateurism from the start was to exclude lower classes from sports).

[173] *See id.* (mapping the onset of amateurism in the United States).

[174] *See* Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 15, 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ ("[T]he NCAA . . . enshrined amateur ideals that it was helpless to enforce.").

[175] *See id.* (providing a short biography of Byers before he was hired by the NCAA).

shaving involving some of the most prominent basketball teams in the country.[176]

The NCAA perfected its amateurism commitment with the creation of the term "student-athlete."[177] The NCAA crafted this marketing phrase to avoid liability for worker's compensation lawsuits.[178] Following the death of a Fort Lewis A&M University player, the player's widow filed for death benefits, calling his football injury work-related.[179] The Colorado Supreme Court ruled that the player was not an employee and therefore was not covered under worker's compensation laws.[180] The term student-athlete, however, provided cover for the NCAA for years to come, as it made clear that college athletes were "students first" and athletes second. But, even more effectively, it made clear that the athletes were not professionals who should be classified as employees by a court.[181] It was not just death benefits that schools and the NCAA managed to avoid, as the student-athlete designation also alleviated the legal obligations of schools to pay long-term healthcare costs associated with sports-related injuries.[182]

The term student-athlete has become the target of criticism in the last decade as NCAA revenues continue to grow and direct student compensation has remained tied to the cost of academic attendance.[183] A memorandum from National Labor Relations

---

[176] *See id.* (highlighting college basketball scandals Byers used as opportunities to rebuild the NCAA's credibility).

[177] *See id.* ("Today, much of the NCAA's moral authority is vested into its claim to protect what it calls the 'student-athlete.'").

[178] *See id.* (explaining that the creation of the term student-athlete to the "fight against workmen's compensation insurance claims").

[179] *See id.* (describing the case of Ray Dennison whose death was caused by a football-related head injury).

[180] *See* Branch, *supra* note 174 ("The Colorado Supreme Court ultimately agreed with the school's contention that he was not eligible for benefits, since the college was 'not in the football business.'").

[181] *See id.* ("[Legal success in workers' compensation suits] vindicated the power of the NCAA's 'student athlete' formulation as a shield, and the organization continues to invoke it as both a legalistic defense and a noble ideal.").

[182] *See id.* (describing the case of Kent Waldrep, a Texas Christian University student-athlete who unsuccessfully challenged the school's refusal to continue compensation for a long-term injury).

[183] *See* Liz Clarke, *The NCAA Coined the Term "Student-Athlete" in the 1950s. Its Time Might Be Up.*, WASH. POST (Oct. 28, 2021, 9:00 AM), https://www.washingtonpost.com/sports/2021/10/27/ncaa-student-athlete-1950s/ (describing the rising animus toward the term student athlete).

Board General Counsel Jennifer Abruzzo called the term a "misclassification" and stated that "it has a 'chilling effect,' and its use may, in itself, violate the [National Labor Relations] act."[184] The use of the term student-athlete and the idea that college athletes must maintain amateur status without pay have become increasingly difficult to justify over the years. As the Supreme Court has highlighted, the NCAA's member conferences earn up to billions of dollars, coupled with an NCAA President who makes four million dollars a year and college coaches who earn more than ten million dollars per year.[185]

C. THE CHANGING TIDE

The revenue growth that has taken place in college sports has been primarily concentrated amongst the Power Five conferences.[186] The Power Five conferences are the five most powerful college athletics conferences: the Atlantic Coast Conference, the Big Ten Conference, the Big XII Conference, the Pac-12 Conference, and the Southeastern Conference.[187] Beginning in 2014, the Power Five conferences began to assert their authority, and the NCAA acquiesced by granting the group limited autonomy.[188] In 2014, the nation's most powerful conferences sought authority to use their superior finances to grant additional resources to athletes, something that smaller schools had blocked for years, fearing that they would not be able to stay competitive.[189] The market power of the Power Five schools has translated into increased leverage

[184] *Id.*

[185] NCAA v. Alston, 141 S. Ct. 2141, 2150–51 (2021) ("At the center of this thicket of associations and rules sits a massive business.").

[186] Andy Wittry, *In FY20, Revenue from Media Rights Rose for Most of the Power 5, NCAA Distributions Decreased for (Almost) All,* OUT OF BOUNDS WITH ANDY WITTRY (June 9, 2021), https://andywittry.substack.com/p/in-fy20-revenue-from-media-rights.

[187] David Kenyon, *Ranking Every Power Five Conference in 2021 College Football Season,* BLEACHER REP. (Nov. 23, 2021), https://bleacherreport.com/articles/2950600-ranking-every-power-five-conference-in-2021-college-football-season.

[188] *See* Solomon, *supra* note 168 (explaining how the NCAA granted the Power Five legislating authority in 2014).

[189] *See id.* (detailing the recruiting struggle between smaller schools and the Power Five).

because it is their programs that generate significant television deals for the NCAA men's basketball tournament.[190]

Indeed, the Power Five conferences have become increasingly powerful as the NCAA has ceded more authority to them.[191] No longer do schools need to rely on the NCAA to craft television deals, at least around football, with all major conferences having individual deals with broadcast networks that pay their members tens of millions of dollars.[192] Some have speculated that as the Power Five consolidate power, the NCAA will lose its ability to dictate terms, and long term, there is a risk that the Power Five conferences split from the NCAA.[193] The two systems that nearly emerged during the *Graham Plan* could emerge yet again.[194] In fact, in choosing to wash its hands of the bulk of regulating the new NIL rules, the NCAA has delegated responsibility to individual schools and conferences to come up with their own regulations.[195]

V. THE EMERGENCE OF COLLEGIATE NAME, IMAGE, AND LIKENESS RIGHTS

As the Power Five conferences were seeking greater autonomy and began making more money off the backs of college-athlete labor, current athletes were still being locked out of the ability to monetize

---

[190] *See id.* (describing the Power Five's market dominance over smaller schools); *see also* Holden et al., *supra* note 127, at 436–37 (detailing the NCAA men's basketball television deals).

[191] Ralph D. Russo, *SEC Takeover: Expansion Would Just Mean More Power, Wealth*, DETROIT NEWS (July 25, 2021, 6:07 PM), https://www.detroitnews.com/story/sports/college/2021/07/25/sec-takeover-expansion-would-just-mean-more-power-wealth/8088290002/.

[192] *See id.* (explaining the major conferences' profitable television deals).

[193] *See* Dennis Dodd, *Power Five, NCAA Are Now Officially Adversaries, and a Breakaway May Only Be a Matter of Time*, CBS SPORTS (Aug. 3, 2020, 11:08 AM), https://www.cbssports.com/college-football/news/power-five-ncaa-are-now-officially-adversaries-and-a-breakaway-may-only-be-a-matter-of-time/ (detailing the Power Five's fights and contemplated split with the NCAA).

[194] *See id.* (explaining the divide of football decision-making systems similar to those that could have emerged under the *Graham Plan*); *see also* Holden et al., *supra* note 127, at 432 (explaining that the *Graham Plan* "threatened to divide the college sports world into two halves—the amateur half and the professional half").

[195] *See* Sam Cooper, *A New Era: NCAA Approves Change to Allow Name, Image and Likeness Payments for College Athletes*, YAHOO! SPORTS (June 30, 2021), https://sports.yahoo.com/ (detailing the NCAA's announcement on June 28, 2021, that "individual schools and conferences are permitted to adopt their own NIL policies").

their publicity rights while in college.[196] The policy, which lasted more than a century, cost hundreds, if not thousands, of athletes the opportunity to make money during the peak of their celebrity; at least a handful of surefire professional athletes would see their pro careers cut short or ended before they began because of injuries.[197] However, in 2016, one California State Senator took an interest in the issue following a chance encounter with an antitrust economist at a Rotary Club event in Oakland.[198] This Part discusses the emergence of NIL laws and their policy implementation across the country.

A. STATE LAWS

In 2019, California Senator Nancy Skinner authored the first bill that granted NCAA athletes rights to profit from their own likenesses, preempting NCAA regulations.[199] The NCAA protested the law and sent California Governor Gavin Newsom a letter arguing that the new law violated the dormant commerce clause.[200] While the NCAA's legal theory appeared to have some holes because the law did not preference in-state actors over out-of-state actors, the NCAA argued anyway that prior precedent would find this law unconstitutional.[201] Despite the bluster, the NCAA never filed suit

---

[196] *See* Terry Nguyen, *Most College Athletes Can't Accept Brand Sponsorships or Deals. That Could Soon Change.*, VOX (June 22, 2021, 10:57 AM), https://www.vox.com/the-goods/22242503/ncaa-college-athletes-endorsement-rule (explaining the pre-July 1, 2021, status of collegiate athletes).

[197] *See* Austin Meek, "*I'm F-ing Playing": Michigan's Jake Butt on the Bowl Decision That Changed His Life*, ATHLETIC (Dec. 21, 2021), https://theathletic.com/3023373/2021/12/21/im-f-ing-playing-michigans-jake-butt-on-the-bowl-decision-that-changed-his-life/ (describing the situation of a former University of Michigan tight end, a highly regarded professional prospect who suffered a torn ACL in his team's bowl game that caused him to fall in the NFL draft and likely resulted in a quarter million dollar loss in career earnings).

[198] *See* Chuck Culpepper, *This State Senator Once Caused McDonald's to Change. No Wonder She Took on the NCAA.*, WASH. POST (June 30, 2021, 5:39 PM), https://www.washingtonpost.com/sports/2021/06/30/first-name-image-likeness-law-california-nancy-skinner/ (explaining the event that sparked State Senator Nancy Skinner's interest in NIL).

[199] *See id.* (detailing Skinner's NIL law and its effects).

[200] Alex Blutman, *What if the NCAA Litigated State NIL Legislation?*, HARV. J. SPORTS & ENT. L. (Dec. 28, 2020), https://harvardjsel.com/2020/12/what-if-the-ncaa-litigated-state-nil-legislation/.

[201] *See id.* (explaining the legal arguments for and against the constitutionality of California's NIL law and how the NCAA would rely on *NCAA v. Miller*).

to test its theory.[202] The initial legislation was slated to take effect in 2023.[203] While the NCAA was publicly opposing the California law, it had assembled a working group to discuss possible changes to organization rules, including the possibility of allowing athletes to pursue endorsements.[204]

The Florida legislature accelerated the timeline on NIL rights when the state passed a law similar to that in California but granted athletes their publicity rights on July 1, 2021.[205] After Florida passed its law, a cascade of states began to pass laws and more than twenty-five states in all passed legislation.[206] While the Uniform Law Commission drafted a model state law, it did not come until many states had already passed their own laws.[207] Despite the fact that states sought to pass laws on their own, some common themes emerged.[208] For instance, most state legislation prohibited rules that restricted college athletes from earning compensation for their NILs.[209] Most states also required that athletes disclose any contracts signed to a school official within a designated time.[210] Most state laws also allowed athletes to use the services of an agent

---

[202] *See id.* (noting that legal arguments were never made because NCAA never brought suit).

[203] Dan Murphy, *Everything You Need to Know About the NCAA's NIL Debate*, ESPN (Sept. 1, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate.

[204] *See id.* (describing the timeline of the NCAA's NIL debate).

[205] *See id.* (discussing Florida's NIL law).

[206] *See id.* (detailing state NIL laws and their effective dates).

[207] *See* Katie Robinson, *ULC Approves Seven New Acts at 2021 Annual Meeting*, UNIF. L. COMM'N (July 14, 2021, 5:29 PM), https://www.uniformlaws.org/committees/community-home/digestviewer/viewthread?MessageKey=b468cc65-2316-4da1-bfca-69ca718521ae&CommunityKey=d4b8f588-4c2f-4db1-90e9-48b1184ca39a&tab=digestviewer ("The Uniform College Athlete Name, Image or Likeness Act allows college athletes to earn compensation for the use of their NIL while also providing reasonable protections to educational institutions, athletic associations, and conferences. The Act will provide a clear and uniform framework for states to enact that allows college athletes to earn compensation for the use of their NIL while maintaining a level playing field across state lines.").

[208] *See* DRAKE GRP., STATE-BY-STATE NILS EXECUTIVE SUMMARY (June 23, 2021), https://www.thedrakegroup.org/wp-content/uploads/2020/03/July-1-Update-State-NIL-Legislation-Xsummary-and-Database.pdf (detailing the key components of each state's NIL laws).

[209] *See id.* (describing, for example, Alabama's law that says that "no rules can prohibit [an] athlete from earning NIL compensation").

[210] *See id.* (describing, for example, Connecticut's law that requires a student to disclose to their university a copy of their NIL contract).

or advisor for NIL negotiations.[211] While the state laws granted a significant number of rights to college athletes, most state laws also prohibited schools from directly compensating athletes and granted schools the ability to block deals that might conflict with institutional contracts.[212] Despite these similarities, a few states included requirements that schools provide financial education to athletes,[213] and others sought to ban athletes from endorsing vice industries like tobacco, gambling, alcohol, or adult entertainment companies.[214]

The rise of state laws created significantly more opportunities for college athletes than ever before. With the first state laws coming into effect on July 1, 2021, there was a possibility that roughly half the country would allow athletes to monetize their likenesses and the other half would not.[215] But in perhaps a twist of irony, and despite the threats of litigation, the NCAA relented on the afternoon of June 30, 2021, and released an interim NIL policy.[216] The irony was that the policy released by the NCAA was sufficiently permissive such that it made many state laws seem restrictive by comparison.[217] The NCAA's decision to allow athletes to monetize their NILs was a groundbreaking shift in policy.[218]

---

[211] *See id.* (describing, for example, Arizona's law that contained "[n]o prohibition from retaining" an agent).

[212] *See id.* (describing, for example, Connecticut's law that prohibits a student from entering into an agreement that conflicts with any agreement that the university is a party to).

[213] *See id.* (describing, for example, Alabama's law that requires a university to "conduct a financial literacy and life skills workshop for each student athlete at the beginning of [their] first and third years").

[214] *See id.* (describing, for example, New Jersey's law that prohibits a student from entering an NIL contract if it conflicts with alcohol, tobacco, and gambling university rules).

[215] *See* Murphy, *supra* note 203 (noting the effective date of the state legislation).

[216] *See* Hosick, *supra* note 12 (discussing the release of the interim NCAA NIL policy).

[217] For instance, the NCAA policy does not explicitly exclude athletes from contracting with any type of business, meaning that some state laws like New Jersey's that prohibit certain types of endorsements were more restrictive than what the NCAA permitted. *See* Nicholas A. Plinio & Gregg E. Clifton, *Student-Athlete Name, Image, and Likeness Rights*, 328 N.J. LAW. 14, 14–18 (2021) (detailing the restrictions contained in New Jersey's law).

[218] Alan Blinder, *N.C.A.A. Chief, Pressured by State Laws, Pushes to Let Athletes Cash In*, N.Y. TIMES (Sept. 17, 2021), https://www.nytimes.com/2021/05/08/sports/ncaabasketball/ncaa-endorsements-mark-emmert.html ("The changes together promise to reshape a multibillion-dollar industry and to test the N.C.A.A.'s generations-long assertions that student-athletes should be amateurs who play mainly for scholarships and that college sports appeal to fans partly because the players are not professionals.").

B. THE NCAA'S ANNOUNCEMENT

When the NCAA released its interim policy on NIL, many school administrators did not know what was going to happen the next morning, July 1, when state laws across the country would begin to take effect.[219] The NCAA's interim policy, which it released to the public on June 30, 2021, provided guidance for deregulating the market for college endorsement deals based on four principles: (1) the NCAA was no longer to prohibit college athletes from engaging in NIL activities that are consistent with the law of the state where the school is located; (2) the NCAA would no longer prohibit college athletes who attend a school in a state without an NIL law from engaging in the licensing of their NILs; (3) the NCAA would no longer prohibit college athletes from using professional services providers such as agents, tax advisors, marketing consultants, or attorneys for NIL activities; and (4) college athletes would need to report NIL activities in a manner consistent with state law or school and conference requirements to their school.[220]

Nevertheless, the NCAA's policy change did not completely deregulate college athlete endorsement deals at the national trade association level. Pursuant to a question-and-answer statement released by the NCAA in November 2021, even under a deregulated system, the following four restraints still applied: (1) the NCAA would continue to forbid NIL agreements where the college athlete is paid without performing any actual work; (2) the NCAA would continue to forbid NIL agreements that are contingent upon a college athlete enrolling in a particular college; (3) the NCAA would continue to forbid NIL agreements where the college athlete's compensation is "for athletic compensation or achievement"; and (4) the NCAA would continue to forbid NIL agreements provided by NCAA member institutions in exchange for the use of the athlete's name, image, or likeness.[221]

---

[219] *See* Dan Murphy, *College Conference Commissioners Pushing Minimalist Plan to Regulate NIL*, ESPN (June 20, 2021), https://www.espn.com/college-sports/story/_/id/31675595/college-conference-commissioners-pushing-minimalist-plan-regulate-nil (noting that the Power Five conference commissioners wanted a fairly hands-off approach from the NCAA in navigating the July 1, 2021 changes).

[220] Hosick, *supra* note 12.

[221] NCAA, NAME IMAGE AND LIKENESS POLICY QUESTION AND ANSWER (Nov. 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf.

Moreover, according to the NCAA's written policy, "[w]hen information suggests that a violation related to pay-for-play, improper inducements or other legislation that remains in effect may have occurred, the NCAA enforcement staff will act according to current legislation . . . and enforcement policies and procedures."[222] As of September 2022, the NCAA has already launched investigations into the NIL deals signed by college football players at three different member colleges—Brigham Young University, the University of Miami, and the University of Oregon.[223]

C. SCHOOL AND CONFERENCE POLICIES

With the NCAA adopting a comparatively more hands-off approach to regulating college athlete NIL deals, individual schools and their member conferences are now the primary authority for crafting NIL policies.[224] As such, NIL policies vary.[225] One area that schools have begun to take differing approaches is in regards to granting athletes access to license school marks for use in their individual activities.[226] Various schools have sought to provide

---

[222] NCAA, NAME IMAGE LIKENESS: NEW INTERIM POLICY TAKEAWAYS (July 2021), https://ncaaorg.s3.amazonaws.com/ncaFn.a/NIL/NIL_PolicyKeyTakeaways.pdf.

[223] *See NCAA Investigating NIL Deals of College Football Players at BYU, Miami*, SPORTSNAUT (Dec. 10, 2021), https://sportsnaut.com/ncaa-investigating-nil-deals-of-football-players-at-byu-miami (discussing the NCAA investigation of NIL deals signed by players at Brigham Young University and the University of Miami); Daniel Libit, *Oregon Draws NCAA Scrutiny for Third-Party NIL Problem*, YAHOO! (Jan. 15, 2022), https://www.yahoo.com/now/oregon-draws-ncaa-scrutiny-third-170148040.html (discussing the NCAA investigation of the University of Oregon).

[224] *See* Michael McCann, *A Scouting Report on the Fast-Moving and Chaotic Change of NIL,* SPORTICO (July 15, 2021, 12:01 AM) [hereinafter McCann, *A Scouting Report*], https://www.sportico.com/law/analysis/2021/nil-scouting-1234634321/ (discussing the NCAA's lack of action as the cause of confusion and fear among universities attempting to navigate their new NIL policies).

[225] *See Tracker: NIL Policies by Institution*, BUS. OF COLL. SPORTS (Sept. 17, 2021), https://businessofcollegesports.com/tracker-nil-policies-by-institution/ (providing links to dozens of school name, image, and likeness policies).

[226] *See* James D. Leonard & Abe Jentry Shanehsaz, *Name, Image and Likeness Scouting Report, Week 5: Conference and Member School NIL Policies Proliferate, but Enforcement Remains "Blurry,"* FAEGRE DRINKER (Oct. 15, 2021), https://www.faegredrinker.com/en/insights/publications/2021/10/name-image-and-likeness-scouting-report-week-5-conference-and-member-school-nil-policies-proliferate (explaining,

college athletes with special tools or education that they can use to monetize their images.[227] Many schools view NIL brand activation as a possible recruiting tool, meaning that those schools that are restrictive with how many resources and the access they give athletes may need to change their policies or risk being the odd school out when chasing recruits.[228] Most major school athletic departments have partnered with companies like Inflncr and Opendorse to assist athletes and provide a centralized mechanism for reporting deals.[229] While there was a great deal of fear surrounding the July 1, 2021, policy change, including the apocalyptic concerns of college sports ending as we know it that the NCAA held up for decades as a reason to restrict college athletes' earnings, these fears never materialized.[230]

The NCAA's last-minute adoption of a permissive policy towards college athlete NIL rights resulted in college athletes being able to make money off their own images.[231] While there was a great deal of attention heaped on several large deals for superstar players, in the first month of athletes being able to earn money, the average

---

for example, that the University of Michigan's NIL policy does not allow athletes to use the university's name, trademarks, or service marks).

[227] *See* Lila Bromberg, *In the NIL Arms Race, Some Schools Are Going the Extra Mile to Help Their Athletes*, SPORTS ILLUSTRATED (July 1, 2021), https://www.si.com/college/2021/07/01/name-image-likeness-programs-schools-ncaa ("[F]or a small number of schools, [the advent of NIL is] being used as an opportunity to do something . . . impactful. Some have launched partnerships with academic colleges on their campuses, others have started NIL-focused classes that count toward credit and a few have created new positions on their staff.").

[228] *See* John Holden, *Colleges Must Choose Whether to Let Athletes Wear School Gear for Paid Promotions*, CONVERSATION (Sept. 23, 2021, 8:30 AM), https://theconversation.com/colleges-must-choose-whether-to-let-athletes-wear-school-gear-for-paid-promotions-167287?utm_source=twitter&utm_medium=twitterbutton (noting that many schools, including Clemson University, have restricted athletes from using any university marks in their name, image, and likeness activities).

[229] Jeff Tracy, *Partnerships Form to Help NCAA Athletes Profit Off Their Likeness,* AXIOS (June 9, 2021), https://www.axios.com/ncaa-athletes-profit-likeness-name-image-partnerships-eb5be0a9-1a1e-46f7-968b-fb0b98271a2f.html.

[230] *See* Dan Wolken, *Opinion: With New NIL Rules on Horizon in Some States, NCAA Will Experience Messy, Chaotic Transition*, USA TODAY (June 18, 2021, 2:59 PM), https://www.usatoday.com/story/sports/columnist/dan-wolken/2021/06/18/ncaa-experience-messy-chaotic-period-dealing-new-nil-rules/7746376002/ (labeling the July 1, 2021, NIL laws as a siege on the NCAA that would lead to chaos in the realm of college athlete endorsements).

[231] Spenser Davis, *July Data Shows Value of Average NIL Deal*, SATURDAY DOWN S. (Aug. 12, 2021), https://www.saturdaydownsouth.com/sec-football/july-data-shows-value-of-average-nil-deal/.

transaction according to Opendorse was $471, and the median transaction was only $35.[232] Nearly eighty percent of the NIL deals in the first month were given to football players.[233] Some of the most publicized and innovative beneficiaries of NIL policies, however, have been female basketball players and gymnasts with a large presence on Instagram, TikTok, and other social media platforms.[234]

If the early numbers are predictive, there is money to be made, but the amount of money will likely not be life-changing for all college athletes.[235] In Part VI, we discuss the legal and strategic risks that the NCAA and college conferences face in regulating NIL rights.

VI. LEGAL AND STRATEGIC RISKS FOR THE NCAA AND CONFERENCES

From the perspective of some college sports insiders, the NCAA's announcement that it would deregulate certain aspects of college-athlete licensing deals marked substantial reform. And, even from an objective perspective, the deregulation of certain college athlete endorsement deals marks perhaps the largest step forward for the economic rights of college athletes since the NCAA first allowed athletes to receive athletic scholarships covering their cost of tuition in 1948.[236] Nevertheless, the NCAA's NIL reforms, which are partial in nature, do not fully immunize the NCAA or its individual member colleges/conferences from potential liability for the NIL restraints that remain in place, nor do they immunize the NCAA or their members for failure to allow past generations of college athletes to profit from their NILs. As the NCAA and conferences pivot to a

---

[232] *Id.*

[233] *See id.* (showing that football's NIL market share in July, 2021, was seventy-nine percent).

[234] *See, e.g.*, Sean Gregory, *"I'd Love to Throw a Chair at Somebody." College Athlete TikTok Stars Are Signing on with WWE,* TIME (Dec. 20, 2021, 12:42 PM), https://time.com/6129228/wwe-cavinder-twins-nil-college-sports/ (describing an NIL deal between TikTok stars, the Cavinder twins (leading scorers on the Fresno State University women's basketball team), and WWE).

[235] *See* Davis, *supra* note 231 (noting low averages in NIL compensation for college athletes).

[236] *See* NCAA v. Alston, 141 S. Ct. 2141, 2149 (2021) (explaining that the NCAA *Sanity Code* of 1948 "for the first time . . . authorized colleges and universities to pay athletes' tuition"); *see also supra* notes 152–156 and accompanying text.

college landscape with NIL, they face continuing and disruptive threats to their longstanding conventions. These threats are from heightened antitrust scrutiny, labor rights, and repercussions from the previous denial of NIL rights; whether the NCAA and conferences will exhibit more skilled and realistic responses remains to be seen.

A. ANTITRUST CHALLENGES TO NIL RULES

One legal area where the NCAA and its member conferences' NIL rules may still reasonably be susceptible to legal challenge is under antitrust law.[237] In particular, Section 1 of the Sherman Act, which is sometimes described as "the Magna Carta of free enterprise,"[238] prohibits any "contract, combination . . . or conspiracy in restraint of trade."[239] Applying this statute, the collective commercial actions of members of bottom-up trade associations such as the NCAA and individual athletic conferences are regularly subject to antitrust scrutiny.[240] As joint ventures, these sports trade associations' rules

---

[237] *See, e.g.*, Marc Edelman, *The District Court Decision in* O'Bannon v. National Collegiate Athletic Association*: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2354–55 (2014) [hereinafter Edelman, *A Small Step Forward*] ("Although the court in *O'Bannon* did not order deregulation of the third-party endorsement markets, a subsequent lawsuit under this theory might achieve a more favorable result if the plaintiffs are able to show that some businesses would seek to hire college-athlete endorsers if they were not precluded from doing so by the NCAA bylaws."); Marc Edelman, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM 861 (2002) [hereinafter Edelman, *Reevaluating Amateurism Standards*] (arguing that the NCAA's rules that prevent college athlete endorsement deals should be viewed as a violation of Section 1 of the Sherman Act)*; see also* Memorandum from Jennifer A. Abruzzo, Gen. Couns., Nat'l Lab. Rel. Bd., to Reg'l Dirs., Officers-in-Charge & Resident Officers, Nat'l Lab. Rel. Bd. 5 (Sept. 29, 2021) [hereinafter Abruzzo Memo], https://apps.nlrb.gov/link/document.aspx/09031d458356ec26 (noting that Justice Brett Kavanaugh, in his concurring opinion in *Alston,* "strongly suggested that the NCAA's remaining compensation rules also violate antitrust laws").

[238] Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 415 (2004) (quoting United States v. Topco, 405 U.S. 596, 610 (1972)).

[239] *See* Sherman Act, 15 U.S.C. § 1 (1890)*; see also Alston*, 141 S. Ct. at 2151 (2021) ("[I]n view of the common law and the law in this country when the Sherman Act was passed, the phrase 'restraint of trade' is best read to mean 'undue restraint'" (quoting Ohio v. Am. Express Co., 138 S. Ct. 2274, 2283 (2018))).

[240] *See* Am. Needle v. NFL, 560 U.S. 183, 197 (2010) (explaining that antitrust scrutiny occurs because these trade associations' collective actions deprive the marketplace of "independent centers of decisionmaking," meaning that they limit competition among the individual members of the association).

are probably not per se illegal, but they still must withstand Rule of Reason scrutiny, which entails "'a fact-specific assessment of market power and market structure' to assess a challenged restraint's 'actual effect on competition.'"[241]

1. Antitrust Challenges Against the NCAA Based on Current NIL Rules. In the context of the NCAA's NIL rules—even as recently modified—a Rule of Reason analysis likely would prove unfavorable to the NCAA.[242] While the NCAA's current NIL rules may be less restrictive than the NCAA's previous rules that prohibited college athlete endorsement deals entirely, the current NCAA rules still maintain four restraints on how athletes may use their NIL rights that limit free-market policy setting at either the school or conference level.[243] Given that the NCAA maintains near-complete dominance of markets pertaining to the offering of elite, college athletic opportunities,[244] the legality of these four restraints would thus turn on a factual review under the Rule of Reason to determine

---

[241] *Alston*, 141 S. Ct. at 2151 (quoting Am. Express Co., 138 S. Ct. at 2284 (2018)). Nevertheless, if a given sports trade association was not considered to constitute a legitimate joint venture, then a court would assess the members of the trade association's collective behavior more harshly under the per se test, which presumes illegality merely because the underlying conduct occurred. *See id.* at 2156 ("At the other end, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful *per se* or rejected after only a quick look.").

[242] *See* Marc Edelman, *The NCAA, Fair Pay to Play, Antitrust Scrutiny, and the Need for Institutional Reform*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 177, 190 (2020) [hereinafter Edelman, *Fair Pay to Play*] (explaining that the NCAA's restraints on endorsement markets and NIL licensing would be subject to review under the Rule of Reason rather than the stricter *per se* test because "the NCAA structurally is a *bona fide* joint venture, where colleges who are members of the NCAA must cooperate, at least to a limited extent, to put on their product at all, even though they also compete, or should compete, in a lot of ways for players, sponsorships and even students"); *see also* Edelman, *A Small Step Forward*, *supra* note 237, at 2355 ("[A] direct challenge to the NCAA rules forbidding college athletes from endorsing products is likely to succeed on its antitrust merits because the NCAA could not easily argue that there are any procompetitive benefits to restraining third-party endorsement markets.").

[243] NCAA, NAME, IMAGE AND LIKENESS POLICY QUESTION AND ANSWER, *supra* note 221, ¶ 11.

[244] *See Alston*, 141 S. Ct. at 2151–52 (explaining that the district court had found that "the NCAA enjoys 'near complete dominance of, and exercises monopsony power in' . . . the market for 'athletic services in men's and women's Division I basketball and FBS football,'" and that "[i]n short, the NCAA and its member schools have the 'power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance." (quoting *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litigation, 375 F. Supp. 3d 1058, 1097, 1070 (N.D. Cal 2019))).

their "actual effect on competition."[245] In light of the Supreme Court's recent decision in *National Collegiate Athletic Association v. Alston* that overturned the NCAA's restrictions on school's in-kind payments of educational benefits to college athletes,[246] it is hard to imagine that a court would, to the contrary, find that the NCAA's continued restraints on college athletes licensing their NILs somehow produced a more than offsetting procompetitive, economic benefit.

As such, perhaps the best way for the NCAA to avoid an antitrust legal challenge to its limits on athlete compensation, including its current NIL policy, would be to allow college athletes to unionize and then to engage in good-faith collective bargaining with the formed players union over NIL policy.[247] If college athletes indeed formed a collective bargaining unit that was recognized under the National Labor Relations Act (NLRA), any good-faith negotiation over NIL policy between the NCAA and this bargaining unit would likely become exempt from antitrust scrutiny based on antitrust law's non-statutory labor exemption.[248] Nevertheless, NCAA

---

[245] *Id.* at 2151.

[246] *Id.* at 2165–66.

[247] *See id.* at 2168 (Kavanaugh, J., concurring) (explaining that one potential way for the NCAA to maintain certain restraints on college athlete compensation without running afoul of antitrust law would be that "colleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues"); Edelman, *A Small Step Forward*, *supra* note 237, at 2356 (explaining that "if college football and men's basketball players unionize as part of a multiemployer bargaining unit, the NCAA would incur an immediate obligation to bargain with these athletes over the mandatory terms and conditions of employment-hours, wages, and general working conditions[,]" and thus "[t]his, in turn, would grant the NCAA the benefit of antitrust law's non-statutory labor exemption-thus allowing for collective bargaining over athlete pay without the risk of any further antitrust liability").

[248] *See* Brown v. Pro Football, Inc., 518 U.S. 231, 236–37 (1996) (recognizing that a non-statutory labor exemption from antitrust law applies where unionized employees bargain in good faith with their employees over hours, wages and working conditions). The Supreme Court has implied the non-statutory labor exemption "from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining; which require good-faith bargaining over wages, hours, and working conditions; and which delegate related rulemaking and interpretive authority to the National Labor Relations Board." *Id.* at 236 (internal citations omitted).

leaders to date continue to do more to stymie player unionization efforts than support this cause.[249]

2. Antitrust Challenges Against Athletic Conferences Based on Current NIL Rules. By contrast, the legal status under antitrust law of NIL rules that are implemented on the individual conference level is a bit more unsettled.[250] The primary difference between NCAA NIL restraints and those coming down from the conference level relates to the less settled question as to whether individual NCAA member conferences exercise "market power" in a relevant market in the same manner as does the NCAA.[251]

While it is clear, at least according to the Supreme Court, that "there are no viable substitutes" to the NCAA's Division I for providing "elite college football and basketball,"[252] it is at least theoretically possible that certain college athletic conferences may constitute substitutes for one another.[253] In determining whether individual NCAA conferences compete against one another, or whether each conference is a standalone market, the most important factors for a court to consider are whether college athletes pursue recruitment opportunities from schools across multiple

---

[249] *See* Dan Wolken, *Opinion: Allowing College Athletes to Unionize Could Be the Answer to the NCAA's Problems*, USA TODAY (May 27, 2021, 5:37 PM), https://www.usatoday.com/story/sports/columnist/dan-wolken/2021/05/27/allowing-college-athletes-unionize-could-help-solve-ncaa-problems/7476234002/ ("[The NCAA is] paralyzed by its own bureaucracy [and] spends most of its time playing whack-a-mole on the various crises that arrive on its doorstep.").

[250] *See infra* notes 251–267 and accompanying text.

[251] *See* Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law*, 64 CASE W. RES. L. REV. 61, 74, 97 (2013) [hereinafter Edelman, *A Short Treatise*] (defining the term "market power" and explaining its importance in an antitrust analysis involving college sports labor markets); *cf.* Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (explaining that the determination of market power is based upon "the reasonable interchangeability of use or the cross-elasticity of demand between the product and substitutes for it"); Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 961 (6th Cir. 2004) (adopting "reasonable interchangeability" as the standard for determining what constitutes a relevant market for purposes of ascertaining market power).

[252] *Alston*, 141 S. Ct. at 2152.

[253] *See* Edelman, *A Short Treatise*, *supra* note 251, at 97 ("[R]ules governing student-athlete pay at the conference level, as a matter of antitrust law, would likely be far less restrictive to student-athletes, colleges, and consumers because individual conferences [might] lack sufficient 'market power' within any relevant market to illegally restrain trade."); *see also* Tanaka v. Univ. S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001) (endorsing the view that the "relevant geographic market" for women's college soccer labor is "national in scope" due to players' recruitment opportunities at various colleges across the United States).

conferences, as well as whether players who exercise their transfer rights tend the transfer on an interconference basis rather than simply transferring on an intraconference basis.

3. Antitrust Challenges Against Athletic Conferences Based on Past NIL Rules. Meanwhile, the NCAA and its member conferences also face sustained risk of antitrust liability for their past restraints on NIL—including a case that is currently ongoing, *House v. NCAA*.[254] In this case, Oregon basketball star Sedona Prince and her fellow plaintiffs maintain that the NCAA and its members conspired through amateurism rules to violate Section 1 of the Sherman Act by denying them the opportunity to profit off their NIL during their playing days.[255] The plaintiffs, who seek class certification for different groups of current and former Division I college athletes who have competed since 2016, want money they could have earned had the NCAA allowed NIL earlier.[256] Of particular concern to the defendants, the proposed remedy goes beyond conventional applications of NIL to include publicity rights—namely, appearances in TV game broadcasts and accompanying group licensing.[257] In addition to monetary damages, the plaintiffs demand injunctive relief that would prevent the NCAA and its members "from enforcing their alleged agreement to restrict the amount of NIL compensation that members of this proposed class can receive."[258]

The *House v. NCAA* court stresses that the NCAA's longstanding prohibition against NIL was betrayed by the granting of NIL waivers, wherein college athletes were permitted to earn from NIL without endangering their eligibility.[259] The NCAA furnished more

---

[254] 545 F. Supp. 3d 804 (N.D. Cal. 2021); *see* Michael McCann, *NCAA to Face More Collusion in Wake of Alston NIL Defeats*, SPORTICO (June 28, 2021, 2:15 PM) [hereinafter McCann, *NCAA to Face More Collusion*], https://www.sportico.com/law/analysis/2021/house-v-ncaa-legal-primer-1234632887/ ("The two cases challenge the denial of pay for college players' appearing in TV game broadcasts and could lead to current and recent college athletes receiving money they would have earned had NIL been allowed."). What is described herein as *House v. NCAA* is technically the consolidation of two separate lawsuits. *See* House v. NCAA, 4:20-cv-03919, 2021 WL 3578572 (N.D. Cal. June 24, 2021); Oliver v. NCAA, 4:20-cv-04527, 2021 WL 3578572 (N.D. Cal. June 24, 2021).

[255] McCann, *NCAA to Face More Collusion*, *supra* note 254.

[256] *Id.*

[257] *Id.*

[258] *House*, 545 F. Supp. 3d at 810.

[259] *See id.* at 814 (detailing the plaintiffs' allegations against the NCAA that the defendants had granted hundreds of waivers in contravention of the challenged rules).

than 200 such waivers from 2015 to 2021.[260] For instance, in 2018, the NCAA allowed Notre Dame basketball player Arike Ogunbowale to compete on ABC's *Dancing with the Stars*, a TV show where contestants can earn as much as $325,000.[261] Arguable inconsistencies in NCAA policy towards NIL are not a new phenomenon, with some athletes being allowed to profit from certain uses of their identity without NCAA sanction.[262] These waivers, the plaintiffs charge, undermine the NCAA's avowed worries that permitting NIL could diminish demand among consumers in college sports.[263] As those waivers were granted, key metrics—including TV ratings and revenue—rose, not fell.[264]

In June 2021, U.S. District Judge Claudia Wilken, who had presided over prominent NCAA antitrust trials, denied the defendants' motions to dismiss *House*.[265] She identified a "reasonable inference that competition among schools and conferences would increase" if players could negotiate compensation for TV appearances and other commercial uses of their identity.[266] "This increased compensation," she added, "would incentivize schools and conferences to share their broadcasting and other commercial revenue with student-athletes even if the student-athletes lacked publicity rights in broadcasts."[267] Judge Wilken's reasoning indicates that she sees college athletes being able to share

---

[260] *Id.* at 810.

[261] McCann, *NCAA to Face More Collusion*, *supra* note 254.

[262] *See* ED O'BANNON & MICHAEL MCCANN, COURT JUSTICE: THE INSIDE STORY OF MY BATTLE AGAINST THE NCAA 81 (2018) (describing situations where the NCAA made exceptions to its policy of prohibiting student-athletes from profiting off of their NIL); *see also* GABE FELDMAN, THE NCAA AND "NON-GAME RELATED" STUDENT-ATHLETE NAME, IMAGE AND LIKENESS RESTRICTIONS (May 2016), https://www.knightcommission.org/wp-content/uploads/2008/10/feldman_nil_white_paper_may_2016.pdf (explaining the NCAA's justifications for prohibiting student-athlete compensation and proposing a framework for non-game related NIL payments).

[263] *House*, 545 F. Supp. 3d at 809–10.

[264] *See* Ben Mathis-Lilley, *Highest Ratings in Five Years Suggest College Football Will Survive Era of Players Doing Instagram Ads for Car Dealerships*, SLATE (Sept. 9, 2021, 12:57 PM), https://slate.com/culture/2021/09/massive-college-football-tv-ratings-suggest-paying-players-fine.html (finding that the ratings prove that NIL deals are not "actually capable of keeping Americans from watching a whole lot of football").

[265] *House*, 545 F. Supp. 3d at 818.

[266] *Id.* at 816.

[267] *Id.*

telecast group licensing revenue as potentially required by antitrust law.

The *House* case is currently set for trial in 2024 and appears enhanced by *Alston* and the NCAA allowing NIL earnings.[268] If the NCAA determined NIL to be compatible with amateurism in 2021, why was NIL incompatible with amateurism from 2016 to 2020—when thousands of college athletes could have earned NIL but did not due to amateurism rules? The plaintiffs can credibly maintain that a less restrictive, more competitive model was feasible during the proposed class years because the NCAA's own actions indicate as much.

B. COLLECTIVE BARGAINING AND PACKAGING RIGHTS

Another legal issue that remains to be determined in the NIL era is how the NCAA could legally handle college athletes' collective licensing deals—namely, whether these deals entail all of the players on a given sports team (such as a South Florida mixed martial arts training facility offering of $500 per month to every member of the University of Miami football team)[269] or all of the players in a given sports conference (such as a theoretical deal with Division I college football players to have their likenesses used in a college football videogame).[270]

In the U.S. premier professional sports leagues, the players within each league are members of a union that is regulated under

---

[268] *See* John Sigety, *Bringing Down the House: The NCAA and the Power 5 Conferences Response in NIL Litigation*, CONDUCT DETRIMENTAL (Oct. 1, 2021), https://www.conductdetrimental.com/post/bringing-down-the-house-the-ncaa-and-the-power-5-conferences-response-in-nil-litigation (noting that so far, in its answer, the NCAA denied that *Alston* applied and avoided taking a position on the NIL debate).

[269] Dan Murphy, *Dan Lambert Plans $500-a-month Endorsement Deal for Every Miami Hurricanes Football Player on Scholarship*, ESPN (July 6, 2021), https://www.espn.com/college-football/story/_/id/31771563/dan-lambert-plans-500-month-endorsement-deal-every-miami-hurricanes-football-player-scholarship.

[270] *See* Ross Dellenger, *Group Licensing Is the Key to the Return of NCAA Video Games—So What's the Holdup?* SPORTS ILLUSTRATED (May 5, 2020), https://www.si.com/college/2020/05/05/ncaa-football-video-game-return-group-licensing (discussing what it would take for college football players to profit from their name, image, and likeness in a NCAA video game).

the NLRA.[271] Separate from its labor duties under the NLRA, each labor union has a group licensing arm, which most players opt into for endorsement deals featuring more than six players.[272] The fact that all college athletes at present are not unionized does not per se prevent these athletes from creating a group licensing arm.[273] As a matter of practicality, however, it elevates the transaction costs[274] associated with securing the opt-in of players. Moreover, with many different individuals seeking to take the lead on organizing college athletes for purposes of group licensing, the more likely result, at least in the short-term, will be a number of different fragmented groups.[275]

From an economic efficiency perspective, both college athletes and potential brand endorsers would benefit from the creation of a college-athlete group licensing arm for four reasons. First, a group licensing arm could help to pair players with brands through a simple clearinghouse. Second, it would help ensure the consistent and legally appropriate assignment of property rights from players to brands for endorsement purposes. Third, a licensing arm would be able to track the way brands treated their player-endorsers in past endorsement opportunities as a way to inform future players-endorsers about both positive and negative working relationships. Finally, a group licensing arm would provide licensing assistance to less well-known college athletes who may not be as well-positioned

---

[271] *See Impact of the NLRB on Professional Sports*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/impact-of-the-nlrb-on-professional-sports (last visited Jan. 29, 2022) (discussing the NLRB's relation to professional sports).

[272] *See, e.g.*, *Add NFL Players to Your Product Line-up*, NFPLA, https://nflpa.com/partners/licensing (last visited Jan. 19, 2022) (explaining that "[a]n official NFPLA license delivers rights for every active NFL player" through its group licensing program).

[273] *See* Sam Farmer, *NFL Players Decertify Union*, L.A. TIMES (Mar. 11, 2011, 12:00 AM), https://www.latimes.com/sports/la-xpm-2011-mar-11-la-sp-nfl-labor-talks-fail-story.html (explaining that even after the NFL players attempted to decertify their union for collective bargaining purposes in March 2011, they continued to operate as a "voluntary trade association with no authority to negotiate for the players").

[274] *See* JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICAHEL SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY 48 (8th ed. 2014) (defining "transaction costs" as "costs of arranging an offer").

[275] *See* Dan Murphy, *New Players' Association Aims to Represent College Football Players Amid Changing NCAA Landscape*, ESPN (July 27, 2021), https://www.espn.com/college-football/story/_/id/31896889/new-players-association-aims-represent-college-football-players-amid-changing-ncaa-landscape (discussing the multiple groups that are attempting to organize college athletes for purposes of group licensing).

to seek their own legal counsel or representation or to sign endorsement deals in an individual capacity.

Arguably, the NCAA and its member colleges and conferences would also benefit from a college-athlete group licensing arm because its creation would facilitate third parties such as Electronic Arts to create a marketable videogame in which they pay the NCAA for the rights to use school and conference intellectual property, and pay the athletes for the rights to use their NIL.[276] Nevertheless, college sports' leadership is concerned about athletes organizing for purposes of group licensing because they would perceive the establishment of a group licensing arm as one step in the direction of college athlete unionization, which they oppose.[277] And, even though the General Counsel for the National Labor Relations Board (NLRB) set forth the prosecutorial position in an NLRB advisory memorandum that certain college athletes that compete in NCAA sports "are employees under the [National Labor Relations] Act,"[278] the NCAA continues to purport, despite this warning, that their athletes are mere "student-athletes."[279]

At present, there is nothing in the NCAA's NIL rules that disallow individual college athletes from banding together for purposes of group licensing deals with entities other than their colleges or conferences;[280] however, there remain logistical and organizational impediments. Moreover, any efforts by the NCAA to

---

[276] *See id.* ("A trade association for college athletes would potentially give the players more leverage in negotiating for increased benefits in the future and could also provide a vehicle for group licensing deals that would help players collect money from items like jersey sales, trading cards or video games—all options that are now available to college athletes due to recent rule changes.").

[277] *See* Taylor P. Thompson, *Maximizing NIL Rights for College Athletes*, 107 IOWA L. REV. 1347, 1384 (2022) (explaining that collective bargaining and player unions are "result[s] the NCAA and its members hope to avoid").

[278] Abruzzo Memo, *supra* note 237, at 1.

[279] *See* Daniel Libit, *NCAA Says Athletes Pushed Use of "Student-Athlete" in Constitution*, YAHOO! (Nov. 10, 2021), https://www.yahoo.com/now/ncaa-says-athletes-pushed-student-130022164.html (discussing the NCAA's continued use of the term student-athlete even after a forewarning from the NLRB's general counsel about misclassifying athletes through the use of that term); *see also* Abruzzo Memo, *supra* note 237, at 4 (opining that "because [college athletes at certain NCAA member schools] are employees under the Act, misclassifying them as 'student-athletes,' and leading them to believe that they are not entitled to the [National Labor Relations] Act's protection, has a chilling effect on Section 7 activity" and thus, in itself, may amount to a violation of the NLRA).

[280] NCAA, NAME IMAGE AND LIKENESS POLICY QUESTION AND ANSWER, *supra* note 221, ¶ 11 (listing what is prohibited under the policy and not including group licensing deals).

prevent college athletes from engaging in group licensing deals would likely run afoul of federal antitrust laws for much the same reasons discussed in the previous section.[281]

C. STOPPING ILLEGITIMATE ARRANGEMENTS

In addition, the NCAA and individual member conferences face the legal question, based upon the foregoing, about what, if anything, they can do to stop NIL deals that they perceive as illegitimate. Here, the question of illegitimacy likely turns upon the meaning of the word. Presumably, both the NCAA and any individual member conference could investigate, sanction, and disallow any NIL deal that is in violation of state law in a state with jurisdiction over that particular deal. For example, Tennessee's NIL law disallows athletes from using their NIL in conjunction with "activities that promote gambling, tobacco, alcohol, and adult entertainment."[282] Thus, presumably, the NCAA could investigate whether an athlete based in Tennessee is engaged in NIL licensing that is prohibited by the state. But the NCAA could not investigate, sanction, or disallow a NIL deal based on a commercial restraint that the association has implemented because doing so would violate antitrust law.[283] And, as such, the NCAA probably could not legally prevent an athlete from a state that does not have the Tennessee prohibition from licensing these same products.

Further, unless preempted by state law, an NCAA member conference that reasonably lacks market power under antitrust law could investigate, sanction, and disallow a NIL deal that disallows its own rules; meanwhile, an NCAA member conference with market power would face a substantial antitrust risk for doing so.[284] And the NCAA is probably powerless under antitrust law to investigate, sanction, or disallow a NIL deal that violates only the association's rules and not state law based upon the federal antitrust risk that would emanate from doing so. Of course, however, broader powers could be provided by college athletes to the

---

[281] *See supra* Section VI.A.

[282] TENN. CODE ANN. § 49-7-2802(g)(3) (2022).

[283] *See supra* notes 244–245 and accompanying text.

[284] *See supra* Section VI.A.*2*.

NCAA and any individual member conference through the collective bargaining process should the college athletes unionize.[285]

For the NCAA and its member conferences, NIL poses both opportunities and risks. Opportunities would arise if those overseeing associations pursued commonsensical agreements with athletes. Those agreements could ensure that athletes enjoy the same rights as their classmates. Athletes could thus gain compensation aligned with their actual contributions. Risks, meanwhile, would manifest with continued resistance to pragmatic change. The NCAA and major conferences spent decades defending its system of rules from right of publicity claims and antitrust claims. That consuming and expensive effort ultimately failed. It remains to be seen whether they will take lessons from that effort into future legal battles.

VII. LEGAL AND STRATEGIC RISKS FOR SCHOOLS

Schools now find themselves in a thorny and fluid spot with NIL. After long complying with NCAA rules that forbade athletes from NIL opportunities, the gates to endorsements, sponsorships, and other opportunities were opened on July 1, 2021.[286] This dramatic shift occurred rapidly, without opportunities for school compliance officers to gain guidance from the NCAA.[287] In the following months, compliance officers attempted to adapt to the new and unsettled terrain of NIL.[288] The legal complexities they and other university officials face are multifaceted and unsettled.

---

[285] *See supra* notes 247–249 and accompanying text.

[286] *See supra* note 12 and accompanying text.

[287] *See* Kristi Dosh, *With NCAA Stepping Back from NIL Regulations, Colleges Begin Preparing to Adopt Their Own Policies*, FORBES (June 24, 2021, 8:40 PM), https://www.forbes.com/sites/kristidosh/2021/06/24/schools-begin-preparing-to-adopt-their-own-nil-policies/?sh=cb1ffb73ce63 ("Faced with the need to adopt their own rules, many schools began scrambling this week to figure out what should be in any rules they may need to adopt on their own.").

[288] *See* Myron Medcalf, Alyssa Roenigk & Tom VanHaaren, *Perspectives from Around College Sports on NIL's One-Year Anniversary*, ESPN (June 29, 2022), https://www.espn.com/mens-college-basketball/story/_/id/34158535/perspectives-college-sports-nil-one-year-anniversary ("[S]chool compliance officers, whose job it is to monitor and comply with NCAA, school and conference rules, as well as state laws, are facing an evolving challenge with few resources to find answers.").

A. PRIVACY RISKS

As within other areas of higher education, protecting college athlete's privacy rights—both as athletes and as students—is a significant challenge for colleges. The relationship between a student's NIL contract and their university goes beyond NCAA considerations. A public university that possesses a copy of an NIL contract, or related other information, could be asked to disclose those materials in a public records request.[289] The university could reject the request pursuant to the Family Education Rights and Privacy Act (FERPA).[290] FERPA obligates universities to gain written permission from a student or guardian before it releases materials connected to a student's education record.[291] Schools enjoy substantial discretion to designate a record as "educational"—and thus confidential.[292] This leeway has sparked criticisms of overuse by schools to conceal materials.[293]

Media companies have sued at least two public universities after they refused to honor requests pertaining to athletes' NIL deals. In November 2021, the *Athens Banner-Herald* filed a complaint against the University of Georgia Athletic Association after the University of Georgia (UGA) rejected a public records request for information about athletes' NIL deals.[294] The *Banner-Herald* insists

---

[289] *See, e.g.*, *Frequently Asked Questions—Public Records*, BERKELEY OFF. OF THE CHANCELLOR, https://chancellor.berkeley.edu/faq/public-records (last visited Sept. 21, 2022) (listing Berkeley's public record policy where anyone can submit a public record request).

[290] Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g.

[291] *See* Under What Conditions Is Prior Consent Required to Disclose Information?, 34 C.F.R. § 99.30(a) (2022) ("The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records.").

[292] *See* Mary Margaret Penrose, *In the Name of Watergate: Returning FERPA to Its Original Design*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 75, 97 (2011) ("Schools understand the wide latitude FERPA provides and have commonly used it to their advantage.").

[293] *See, e.g.*, *id.* at 103–05 (opining that schools routinely use FERPA to advance institutional objectives rather than to protect student privacy); Kitty L. Cone & Richard J. Peltz-Steele, *FERPA Close-up: When Video Captures Violence and Injury*, 70 OKLA. L. REV. 839, 846 (2018) (arguing that FERPA "has become a go-to device for educational institutions to shield information," even in instances when the student has been the victim of a crime).

[294] *See* Fletcher Page, *Banner-Herald Files Complaint Against UGA Athletic Association Alleging Open Records Violation*, ATHENS BANNER-HERALD (Nov. 16, 2021, 10:44 AM), https://www.onlineathens.com/story/news/local/2021/11/16/athens-banner-herald-files-complaint-against-uga-athletic-association/8636497002/ ("The Banner-Herald has requested

that the NIL documents are neither academic records nor maintained by the university's registrar.[295] It also notes that the athletic department's own policy requires its athletes to share information about their NIL deals with the school.[296] A similar dispute has arisen between WAFB-TV Baton Rouge and Louisiana State University (LSU), which was sued by the TV station's parent company after refusing to turn over NIL materials.[297]

UGA and LSU are hardly the first schools to reject journalists' public records requests for athlete information. When ESPN sought documents related to Pryor under Ohio's public records law,[298] Ohio State refused, citing FERPA.[299] ESPN sued Ohio State, arguing that the school had improperly designated the requested records as "education records."[300] The Ohio Supreme Court disagreed, reasoning that because Ohio State's athletic department had retained copies of emails sent by department personnel, and because those staff had collected the Pryor-related documents as electronic files, the records were sufficiently "maintained" by the school.[301]

Should a school supply an athlete's record without their consent, the athlete would not be able to sue under FERPA. As the Supreme Court clarified in *Gonzaga University v. John Doe*, FERPA's nondisclosure provisions "create no rights enforceable under [42 U.S.C.] § 1983."[302] Instead, the U.S. Department of Education

---

the UGA Athletic Association to provide copies of UGA athletes' NIL disclosure documents in its possession, pursuant to the Georgia Open Records Act.").

[295] *See id.* (noting that the university declined the request citing FERPA).

[296] *See id.* ("The Athletic Association requires UGA athletes with NIL contracts to report details to the association, documents that have been requested by the Banner-Herald.").

[297] *See* Daniel Libit, *Georgia, LSU NIL Deals Spark Fights over Media and Privacy Rights*, SPORTICO (Nov. 22, 2021, 10:00 AM), https://www.sportico.com/leagues/college-sports/2021/nil-georgia-lsu-face-1234647071/ ("In its complaint, Gray Media, the parent company of WAFB-TV Baton Rouge, argued that because Louisiana's NIL law does not specifically include a public records exception, whatever relevant documents the university possessed should be subject to disclosure.").

[298] *See supra* notes 2–9 and accompanying text (describing NCAA's reaction to Pryor selling his football championship ring).

[299] *See* Konrad R. Krebs, Casenote, ESPN v. Ohio State*: The Ohio Supreme Court Uses FERPA to Play Defense for Offensive Athletic Programs*, 20 JEFFREY S. MOORAD SPORTS L.J. 573, 574 (2013) (relating ESPN's records request and Ohio State's response).

[300] State *ex rel.* ESPN, Inc. v. Ohio State Univ., 970 N.E.2d 939, 946 (Ohio 2012).

[301] *Id.* at 947.

[302] Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002).

enforces FERPA where violations can lead to loss of federal funding.[303] An athlete may have other causes of action against schools under privacy laws, including tortious invasion of privacy.[304] It is unclear to what extent a college athlete is involved in their school's decision to release NIL records, and the NCAA has provided no guidance on that front.[305]

B. INTELLECTUAL PROPERTY

Protecting a school's bona fide intellectual property interests is another important consideration. Indeed, whereas control of one's NIL constitutes an individual's intellectual property right, known as the right of publicity, the use of school logos, marks, uniforms, or color schemes constitutes intellectual property rights that lie with the school. One way to protect these rights is through state NIL statutes. Texas's NIL statute, for example, expressly forbids athletes from signing a contract that provides "an endorsement while using intellectual property or other property owned by the institution."[306] A school could also enforce its intellectual property through university policies that require faculty, staff, and students to obtain permission before using the school's logos, marks, and more.[307] More combatively, a school could pursue infringement litigation against one of its athletes and the company with whom

[303] *See* Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 AM. U. L. REV. 1, 11 (2001) ("In extreme cases, where a pattern of violations exists, the Office of the Secretary of the Department of Education may initiate proceedings to withdraw federal funds from the school.").

[304] *See* Lynn M. Daggett, *The Myth of Student Medical Privacy*, 14 HARV. L. & POL'Y REV. 467, 493 (2020) (providing an example when a student challenged their school's disclosure of their psychological reports as a tortious invasion of privacy).

[305] *See* McCann, *A Scouting Report*, *supra* note 224 (describing the NCAA's "hastily cobbled together" NIL policy).

[306] S.B. No. 1385, 87th Leg. (Tex. 2021) (enacted), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB01385F.pdf.

[307] For example, the University of Houston has a detailed policy on use of university intellectual property in marketing. *See General Brand Use Guidelines for University of Houston Students, Faculty, and Staff*, UNIV. OF HOUSTON, https://uh.edu/brand/brand-protection/uh-users/index (last visited Sept. 21, 2022). The policy instructs members of the university on how they must first secure permission. *Id.*

they do NIL business.[308] A sponsorship agreement between a school and a company, meanwhile, can also empower the sponsor to take action against any infringing party, including an athlete, a school, and a business that signs athletes to NIL deals.[309]

There are very few examples of universities suing their own students, most likely a reflection of the awkwardness such a move would present.[310] Instead of adopting an adversarial approach to athletes' use of school properties, many schools have signed contracts that enable their athletes to use school trademarks, logos, and other intellectual property in NIL contracts. For example, college multimedia rights leader Learfield has reached agreements with brands to sign NIL contracts with athletes wherein school marks and logos can be used.[311] Similarly, The Brandr Group, a sports marketing and licensing agency, has reached agreements with dozens of Division I schools to facilitate group licensing between the athletes and the schools.[312] Through these business

---

[308] *See generally* Heather S. Ray, *Making a Mark: Taking a Glance at Trademarks and Graphic Infringement*, 16 WAKE FOREST J. BUS. & INTELL. PROP. L. 68, 71 (2015) (noting that, for example, logos typically feature graphics and are subject to protection).

[309] To illustrate, a sponsorship agreement between Nike and Arizona State University contains language that limits the use of logos by athletes: "UNIVERSITY acknowledges that a pattern or practice of 'spatting' or other unauthorized taping, so as to cover any portion of the NIKE logo on the NIKE athletic footwear worn by members of the Teams during practices, games, exhibitions, clinics, sports camps and other occasions during which Team members wear athletic footwear, is inconsistent with the purpose of this Agreement and the acknowledgment of NIKE's sponsorship to be derived from it by NIKE and is a material breach of this Agreement." CONTRACT FROM NIKE, USA INC. TO THE ARIZONA BOARD OF REGENTS 4(d) (July 1, 2008), http://media.oregonlive.com/pac10/other/Arizona-State-Nike-Sponsorship.pdf.

[310] Yet universities have been willing to sue students over unpaid tuition. *See, e.g.*, *Trs. of Colum. Univ. v. Jacobsen*, 148 A.2d 63, 64 (N.J. Super. Ct. App. Div. 1959 ("Columbia brought suit in the district court against defendant and his parents on two notes made by him and signed by them as co-makers, representing the balance of tuition he owed the University."), *aff'd*, 156 A.2d 251 (N.J. 1959).

[311] *See* Eben Novy-Williams & Emily Caron, *Learfield Pivots to Pair Brands with School Logos and Athletes*, SPORTICO (Nov. 16, 2021, 5:55 AM), https://www.sportico.com/business/sponsorship/2021/learfield-nil-platform-1234646592/ (explaining that the new deal allows brands to use school marks and logos in deals with athletes and that "Learfield works with thousands of brands and represents multimedia rights for more than 150 schools and conferences" and that "[n]ine of them, including Duke, Florida, Kansas and Wisconsin, have already signed on").

[312] *See* Daniel Libit & Eben Novy-Williams, *Brandr's NIL Licensing Moves Spur NCAA Turf Tussle with Learfield*, SPORTICO (Dec. 16, 2021, 10:00 AM), https://www.sportico.com/leagues/college-sports/2021/nil-licensing-brandr-learfield-

ventures, schools, athletes, and companies that contract with them can all profit.

These arrangements are consistent with the permissive approach taken by the NCAA to NIL in the aftermath of adopting an interim NIL policy.[313] Last July, NCAA President Mark Emmert acknowledged that the legal "environment" had shifted in the aftermath of states adopting NIL statutes.[314] Emmert reflected that, "[i]t just forces us to think more about what constraints should be put in place on college athletes and it should be the bare minimum."[315] This is also a reflection of how a relatively unrestrained marketplace for college sports has operated for schools, coaches, staff—but not athletes—at the college level for decades.[316] The athletes are now, to some degree, able to share in that marketplace. This is likely why the marketplace moved so quickly to address potential inefficiencies, including the use of school intellectual property to enhance advertisements and sponsorships for athletes: the marketplace was already there.

C. DUE PROCESS

While the NCAA itself is not a state actor and therefore is not required to afford due process protections to those within its sphere of jurisdiction,[317] the same is not true for many of the organization's member institutions. Indeed, sixty-seven percent of the NCAA's Division I member institutions are public colleges or universities.[318]

1234650604/ (noting how in five months, Brandr has "racked up exclusive agreements with at least 30 Division I schools—including other Power Five programs like Ohio State, Florida, Georgia, Texas and LSU").

[313] *See supra* note 217 and accompanying text.

[314] Michael McCann, *Emmert Pivots on NCAA Role as Breyer SCOTUS Retirement Watch Looms*, SPORTICO (July 19, 2021, 12:52 PM), https://www.sportico.com/law/analysis/2021/justice-breyer-retirement-1234634646/.

[315] *Id.*

[316] *See* Patrick Hruby, *The Free Market Case Against the NCAA Chokehold on College Sports*, WASH. TIMES (Mar. 30, 2012), http://www.washingtontimes.com/news/2012/mar/30/the-free-market-case-against-the-ncaa-chokehold-on/?page=all (describing how college sports are "big businesses" for everyone involved but the athlete).

[317] *See* NCAA v. Tarkanian, 488 U.S. 179, 199 (1988) (holding that the NCAA was not a state actor).

[318] NCAA, INSTITUTIONAL CHARACTERISTICS OF NCAA MEMBER SCHOOLS: EXECUTIVE SUMMARY,

Public institutions must afford due process protections while conducting investigations or engaging in any process that might result in the deprivation of a life, liberty, or property interest.[319] In the educational setting, the Supreme Court held in *Goss v. Lopez*[320] that in cases where students are going to be deprived of the educational process for more than a trivial period, they are entitled to due process protections.[321] While recognizing that schools may have some leeway because of the unique nature of the educational institution within society, the Supreme Court held that schools must still provide, at minimum, notice and the opportunity to be heard to students accused of wrongdoing.[322]

Even though private institutions are not bound to afford due process in the same manner as public institutions, private institutions remain obliged to follow the procedures set forth by the institution itself.[323] In choosing to enforce NIL rules, public schools, in particular, must keep in mind the due process rights that athletes have and ensure that when making decisions, athletes are afforded, at minimum, notice of any alleged wrongdoing and the opportunity to have a hearing.[324] However, private institutions must also be mindful when making decisions affecting an athlete's livelihood that their decisions are based on formal policy and are not being applied in an arbitrary or capricious manner.[325] The risk of depriving an athlete of their due process rights by failing to provide basic safeguards could result in the decision being overturned by a court.

---

https://ncaaorg.s3.amazonaws.com/research/demographics/2017RES_institutionalcharacteristicsSummary.pdf (last visited Jan. 24, 2022).

[319] *See* U.S. CONST. amend. XIV (stating that no one may "be deprived of life, liberty, or property, without due process of law").

[320] 419 U.S. 565 (1975).

[321] *Id.* at 576.

[322] *See id.* at 581 ("Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.").

[323] *See An Overview: The Private University and Due Process*, 1970 DUKE L.J. 795, 795 (1970) (contrasting due process protections at private versus public universities).

[324] *See* McCann, *A Scouting Report*, *supra* note 224 (explaining how universities must remain mindful of due process considerations in enforcing NIL rules).

[325] *See id.* (citing student handbooks and honor codes as sources of procedural guidelines).

D. FREE SPEECH RISKS

Relatedly, NCAA institutions, particularly public schools, must be cognizant of athletes' free speech rights. The First Amendment risks surrounding NIL are two-fold: first, there are questions as to whether schools can compel athletes to disclose their NIL activities;[326] and second, whether restrictions on certain types of agreements might infringe on athletes' rights.[327] The First Amendment protects a wide variety of expressive activities, including the right not to speak.[328] In *National Institute of Family and Life Advocates v. Becerra*,[329] the Supreme Court struck down requirements that California clinics provide certain notices to pregnant women.[330] The Supreme Court has allowed some disclosure requirements in commercial speech situations; however, the required disclosures were limited to basic information about terms and services.[331] But the Supreme Court does limit the scope of compelled disclosures should they become overly burdensome.[332] As a result, schools should be mindful of not requiring more information from athletes than is necessary to identify the NIL deals they have secured.

In evaluating what types of restrictions schools can apply to athlete NIL agreements, a court is likely to view the question under

---

[326] *See id.* ("There are privacy and, for public universities, free speech considerations in attempting to compel athletes to reveal their NIL dealings; should a school go 'too far,' it could be sued by the athlete.").

[327] *See* Sam C. Ehrlich & Neal C. Ternes, *Putting the First Amendment in Play: Name, Image, and Likeness Policies and Athlete Freedom of Speech*, 45 COLUM. J.L. & ARTS 47, 50 (2021) (concluding that the NIL restrictions could compromise athletes' First Amendment rights).

[328] *See, e.g.*, W. Vir. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that students could not be required to salute the flag or say the pledge of allegiance).

[329] 138 S. Ct. 2361 (2018).

[330] *See id.* at 2368, 2378 (holding that requiring unlicensed clinics to provide notice that "that California has not licensed the clinics to provide medical services" is unduly burdensome under First Amendment precedent).

[331] *See* Zauderer v. Off. Disciplinary Couns. Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985) (holding that an "advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers" and that requiring disclose of mere terms of service is proper).

[332] *See id.* ("We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.").

the commercial speech lens.[333] Under the *Central Hudson* test, the Supreme Court applies a four-part analysis to commercial speech cases.[334] First, the speech must concern legal activity and not be misleading; second, the government must have a substantial interest in regulating the speech; third, the restriction must advance that substantial government interest; and fourth, the restriction is no more burdensome than is necessary to accomplish the government's interest.[335] While the NCAA's interim policy appears permissive, various state laws have restricted the types of commercial relationships that athletes may enter.[336] Three types of restrictions have been observed in varying degrees across state NIL laws: "(1) prohibitions on conflicting sponsorship deals; (2) prohibitions on vice industry endorsements; and (3) prohibitions on deals that conflict with institutional values."[337]

The fact that these various state laws single out athletes and target the content of their speech may raise First Amendment problems when challenged.[338] Even in cases where a state law is not in effect, school policies that restrict certain types of commercial arrangements may constitute impermissible speech restrictions.[339] While schools should be cognizant of ex-post adjustments to policies that infringe on athlete free speech rights, they may be able to avoid future issues if students contract away their rights to engage in certain types of commercial opportunities.[340]

---

[333] *See* Ehrlich & Ternes, *supra* note 327, at 63 ("Generally speaking, concern over athlete NIL rights has focused on [commercial speech] . . . .").

[334] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[335] *Id.*

[336] *See generally* DRAKE GRP., STATE-BY-STATE NILS EXECUTIVE SUMMARY, *supra* note 208 (noting that, for example, Alabama's NIL law upholds team contracts that prevent athletes from using their NIL "for a commercial purpose when the athlete is not engaged in official team activities").

[337] Ehrlich & Ternes, *supra* note 327, at 65.

[338] *See id.* at 70–71 (comparing student athlete speech restrictions with student musician speech privileges).

[339] *See id.* at 72 (questioning why universities would be able to restrict student athlete speech more than professional teams can restrict player speech).

[340] *See Banning Student-Athletes from Social Media: A Potential First Amendment Violation,* BUS. OF COLL. SPORTS (Sept. 4, 2012), https://businessofcollegesports.com/legal/banning-student-athletes-from-social-media-a-potential-first-amendment-violation/ (explaining the role of contracts in restricting athlete speech online).

E. UNAUTHORIZED PRACTICE OF LAW

States have adopted laws that make it illegal to practice law without a license.[341] In some states, such activity is considered a crime.[342] These laws protect people from the potential hazards of relying on legal advice from persons who are either not attorneys or who are unlicensed to practice law in the state.[343] Attorneys play a crucial role in the sports industry, with roles ranging from representing leagues, teams, unions, and players in various legal matters to serving as mediators and player agents.[344] None of the major pro leagues players' associations require that an agent be an attorney.[345] Yet attorney agents possess knowledge that might advantage them in drafting and negotiating contracts, and they carry malpractice insurance, too.[346]

With NIL, there exists the challenge of college athletes wisely seeking professional advice on the rights and obligations in a potential contract while being unable to afford those services. Although costs vary depending on an attorney's fee and the complexity of a contract, it normally costs about $300 to $1,000 for an attorney to review a contract, and much more if the attorney

---

[341] *See* David S. Caudill, *Revisiting the Ethics of Representing Professional Athletes: Agents, "Attorney-Agents," Full-Service Agencies, and the Dream Team Model*, 3 VA. SPORTS & ENT. L.J. 31, 38–39 (2003) (listing examples of activities by non-lawyers that courts have held to be "the practice of law").

[342] *See* Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 165 (2000) ("Given that the power to regulate the practice of law rests with the judiciary, it is perhaps odd that many states have statutes making the unauthorized practice of law a crime.").

[343] *See* La Tanya James & Siyeon Lee, *Adapting the Unauthorized Practice of Law Provisions to Modern Legal Practice*, 14 GEO. J. LEGAL ETHICS 1135, 1141 (2001) (highlighting the importance of working with licensed attorneys).

[344] *See* Michael McCann & Scott Soshnick, *Longtime NBA Lawyer Mishkin Moving to Arbitration After Skadden Arps*, SPORTICO (Oct. 18, 2021, 5:55 AM), https://www.sportico.com/law/news/2021/nba-legal-counsel-mishkin-skadden-arps-1234644177/ (explaining the many roles of attorney-agents).

[345] *See* Caudill, *supra* note 341, at 37 ("Short of the minimal registration requirements for sports agents in some states, and the certification requirements for agents in professional team sports[,] there is no particular model for representing athletes that is required by law." (footnotes omitted)).

[346] *See id.* (listing the benefits of having attorney-agents).

redrafts the contract.[347] Many NIL deals have been for relatively modest amounts. For the first five months of NIL, the median monthly NIL compensation for Division I athletes was a mere six dollars.[348] This figure is less dispiriting when considering only those athletes who signed NIL deals. Their monthly median was $250, a much more impressive figure, though still low enough to make paying an attorney a pricy proposition.[349]

This combination of low NIL returns and (relatively) high attorneys' fees could lead athletes to forgo legal representation. Alternatively, they might ask for advice from well-intentioned but uninformed friends and family. Similarly, college athletes could ask athletic department staff for feedback on NIL opportunities. These inquiries are potentially problematic if the advice is inexpert and constitutes the practice of law. For a school, this is particularly worrisome if a staff member is dispensing the advice. To mitigate this concern, law schools have launched NIL clinics where supervised law students advise college athletes on NIL opportunities without charge to those athletes—hopefully, more law schools will follow suit.[350]

F. TITLE IX

Finally, some college sports officials have publicly expressed concern that allowing college athletes to license their NILs to third

---

[347] *How Much Does It Cost for a Lawyer to Review a Contract?*, BIZCOUNSEL (July 23, 2020), https://bizcounsel.com/articles/How-Much-Does%20It-Cost-for-a-lawyer-to-review-a-contract.

[348] *See* Pat Eaton-Robb, *Foreign College Athletes Left Out of Rush for NIL Windfall*, ASSOCIATED PRESS (Dec. 24, 2021), https://apnews.com/article/entertainment-sports-business-celebrity-endorsements-education-4abf78b5012911f02ebee4ee6d776d7d (citing data from Opendorse).

[349] *Id.*

[350] *See, e.g.*, Trevor Mason, *Campbell Law School Offers Pro Bono Clinic for NCAA Athletes*, PRELAW (Aug. 24, 2021, 2:02 PM), https://nationaljurist.com/national-jurist-magazine-campbell-law-school-offers-pro-bono-clinic-ncaa-athletes/ (explaining how Campbell Law School launched "its sixth pro bono clinic, the Shipman & Wright Sports Law Clinic, to provide legal assistance to local student athletes who will be dealing with third-party arrangements to have their NIL used"); *Law School to Launch Sports and NIL Clinic*, MINNESOTA L. (Apr. 5, 2022), https://law.umn.edu/news/2022-04-05-law-school-launch-sports-and-nil-clinic ("A new clinic Minnesota Law will launch next fall will offer name, image, and likeness (NIL) legal assistance to students with NIL needs, including college athletes and social media influencers of all types.").

parties might lead to their school violating Title IX of the Education Amendments of 1972,[351] which states 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 Federal financial assistance."[352] Since 1979, Title IX has been interpreted as requiring colleges "to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes." [353] In this vein, most concerns that NIL reform would cause colleges to violate Title IX misconstrue the statute and are dubious because "Title IX only governs the conduct of educational institutions, and not unrelated third parties."[354]

---

[351] *See* Nick Bromberg, *SEC Commissioner "Concerned" Women's Sports Could Lose Funding if Prominent Male Athletes Generate Significant Endorsements*, YAHOO! SPORTS (July 1, 2020), https://www.yahoo.com/now/sec-commissioner-concerned-womens-sports-could-lose-funding-if-prominent-male-athletes-generate-significant-endorsements-171623674.html (quoting SEC Commissioner Greg Sankey, who himself is not a lawyer, telling Congress that he purportedly was "concerned that the amount of NIL activity around football and men's basketball will pull away funding from women's sports" in a manner that would purportedly violate Title IX); *see also* Sarah Valenzuela, *California Passes Fair Pay to Play Act, but the NCAA Won't Go Down Without a Fight*, N.Y. DAILY NEWS (Sept. 30, 2019, 2:42 PM), https://www.nydailynews.com/sports/college/ny-ncaa-california-governor-gavin-newsom-college-athletes-20190930-p6dni2zreffujnegfrsjwxa4m4-story.html (discussing NCAA member college presidents accusing the supporters of California's bill to reform NIL of somehow destroying Title IX).

[352] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a); *see also* Alicia Jessop & Joe Sabin, *The Sky is Not Falling: Why Name, Image, and Likeness Legislation Does Not Violate Title IX and Could Narrow the Publicity Gap Between Men's Sport and Women's Sport Athletes*, 31 J. LEGAL ASPECTS SPORTS 253, 261 (2021) ("[I]n 1975, the Department of Health, Education and Welfare codified a federal regulation, which applied Title IX to athletics."); *see also* Marc Edelman, *Assessing the Department of Education's Proposed 2018 Revisions to its Regulations Under Title IX of the Education Amendments Act*, 9 WAKE FOREST J.L. & POL'Y 155, 156 (2018) [hereinafter Edelman, *Assessing the Department of Education's Proposed 2018 Revisions*] (recognizing that "[a]lthough commentators frequently cite to Title IX in the context of college sports," Title IX, as a statute, predated its application in the sports context, and beginning in 1977 with the decision in Alexander v. Yale University, courts have also begun to apply Title IX in preventing a culture of sexual harassment at colleges).

[353] Jessop & Sabin, *supra* note 352, at 261 (quoting Title IX's policy interpretation).

[354] Edelman, *Fair Pay to Play, supra* note 242, at 198; *see also* Jessop & Sabin, *supra* note 352, at 270–71 (concluding that "[i]t is difficult to imagine a scenario where NIL compensation provided to college athletes triggers a Title IX claim" given that "third-party corporate sponsors are not required to uphold Title IX, since they are not federally funded educational settings"); Edelman, *Reevaluating Amateurism Standards*, *supra* note 237, at 888

Nevertheless, there are theoretical ways in which a college could affirmatively infuse itself into the NIL licensing process in a way that violates Title IX by "provid[ing] one gender of athletes with an NIL-related benefit that it did not provide the other gender, or provid[ing] the NIL benefit to one gender over the other gender at a non-equitable level."[355] Some theoretical behaviors, tangentially related to NIL, that could lead an NCAA member college to suffer a Title IX violation might include any of the following:

(1) passing school-wide rules that grant male and female athletes different rights pertaining to the endorsement of products or services;

(2) granting athletes of one sex but not the other permission to use school intellectual property in their NIL likeness deals;

(3) engaging in co-branded NIL deals with the athletes of one sex but not the other; [356]

(4) providing unequal levels of education, training, or career support for purposes of NIL licensing to athletes based on their sex;[357]

(5) passing school-level rules limiting NIL licensing that may be facially neutral but would have a disparate impact on one particular sex (for example, school rules disallowing athletes from endorsing categories of products that skew heavily female); or

(6) hiring individuals to work with athletes on NIL conduct that engage in behaviors that would constitute sexual harassment.[358]

Based upon the foregoing, the easiest way for an NCAA member college to avoid Title IX risk related to NIL is by not involving itself at all in the NIL relationship between their college athletes and third-party endorsers or, in the alternative, ensuring equal

("[D]eregulation [of college athlete endorsement deals] is not a circumvention of equal rights law, but rather a proper understanding of its spirit [because deregulation] will not only provide opportunity for star men's college basketball players to earn money, but it will also pave the way for women's minor league sports, and endorsements, and promotion opportunities involving female student-athletes.").

[355] Jessop & Sabin, *supra* note 352, at 271.

[356] *See id.* (describing loosely this sort of behavior under the moniker of "acting as agents for" or "helping procure endorsements for" intercollegiate athletes).

[357] *See id.* at 270–71 (describing the factors to be considered when assessing Title IX violations, including equality of resources and training).

[358] *See* Edelman, *Assessing the Department of Education's Proposed 2018 Revisions*, *supra* note 352, at 156–57 (explaining that beginning in 1977 with the decision in Alexander v. Yale University, courts have also begun to apply Title IX to prevent colleges from allowing cultures that enable sexual harassment).

opportunity to male and female athletes to participate in NIL deals in which the college serves as a party to the relationship. In other words, as long as the NCAA member school takes a hands-off, agnostic approach to NIL, that member school's risk of Title IX liability as related to NIL is, in essence—quite *apropos*—nil.

The NCAA's attempts to first block, then postpone—indefinitely—NIL not only failed but left member schools scrambling for guidance at the time they needed it most: the beginning of the NIL era. The resulting fallout has been predictable. Schools are attempting to answer complicated legal questions that lack established answers, leading to a traditionally risk-averse population (i.e., university compliance officers and general counsels) forced to make educated guesses. Courts will likely soon grade their performances.

VIII. LEGAL AND STRATEGIC RISKS FOR ATHLETES

When viewed from 10,000 feet above, NIL offers college athletes opportunities to enjoy their publicity rights without the risk of losing eligibility or endangering athletic scholarships. At a more granular level, however, NIL provides a clearly bounded set of options. Athletes pursuing NIL opportunities are potentially constrained by intellectual property rights belonging to schools, sponsors, and others. They, just like all earners, are also subject to federal, state, and municipal tax laws. Meanwhile, athletes from foreign countries are currently regarded as ineligible for NIL due to potential complications with student visas.

A. FAILING TO FOLLOW SCHOOL POLICIES

NIL is not a free market. Schools are obligated to follow state NIL statutes that may contain restrictions on permissible deals for their athletes. For instance, the University of Alabama's NIL policy bars, among other things, their athletes from signing deals with tobacco companies ("including alternative nicotine products"), alcoholic beverage brands, sellers or distributors of marijuana and other controlled substances, adult entertainment businesses, and casinos and other gambling entities.[359] The policy notes that these

[359] *The Advantage: Name, Image, Likeness*, UNIV. OF ALA. ATHLETICS, https://rolltide.com/sports/2021/6/28/name-image-likeness.aspx (last visited Sept. 22, 2022).

restrictions comport with the state's NIL statute, which prohibits these types of NIL arrangements.[360]

Schools have also imposed "guardrails"—to borrow a preferred NCAA word[361]—on prospective NIL deals that appear inconsistent with a university's honor code or mission statement. Brigham Young University (BYU), for example, connects limitations expressed in its NIL policy to the university's honor code.[362] As a result, BYU college athletes can't sign endorsement deals with a wide range of companies, including those in the coffee industry.[363] In addition, "dress and grooming standards" found in the BYU honor code must be followed in any NIL opportunity.[364] Alabama's NIL policy similarly underscores that the school can reject an NIL opportunity if the school deems it to "negatively impact[] or reflect[] adversely" on the university.[365] Athletes must also follow team rules, including in regard to attending practices.[366] An athlete who misses a practice for an NIL opportunity would likely run afoul of a team rule and potentially face team discipline, including dismissal and the accompanying loss of a scholarship.[367]

---

[360] Act of Apr. 19, 2021, 2021 Ala. Laws 227 (codified at ALA. CODE § 8-26-32) (repealed 2022).

[361] *See, e.g.*, *Board of Governors Moves Toward Allowing Student-Athlete Compensation for Endorsements and Promotions*, NCAA (Apr. 29, 2020, 8:30 AM), https://www.ncaa.org/news/2020/4/29/board-of-governors-moves-toward-allowing-student-athlete-compensation-for-endorsements-and-promotions.aspx ("The [NCAA] [B]oard [of Governors] is requiring guardrails around any future name, image and likeness activities. These would include no name, image and likeness activities that would be considered pay for play; no school or conference involvement; no use of name, image and likeness for recruiting by schools or boosters; and the regulation of agents and advisors.").

[362] *See* Brandon Judd, *How Will BYU's Honor Code Affect Athletes Seeking NIL Compensation?*, DESERET NEWS (July 1, 2021, 12:59 PM), https://www.deseret.com/2021/7/1/22559298/byus-policy-guidelines-for-name-image-and-likeness-include-adherence-to-honor-code-standards-ncaa ("BYU student-athletes are not allowed to enter into NIL agreements with any business that does not conform with the school's Honor Code.").

[363] *See id.* (stating that some examples of businesses that do not conform with BYU's honor code are "companies involving alcohol, tobacco, gambling, adult entertainment, coffee, etc").

[364] *Id.*

[365] *See The Advantage: Name, Image, Likeness*, *supra* note 359.

[366] *See* DRAKE GRP., STATE-BY-STATE NILS EXECUTIVE SUMMARY, *supra* note 208 (noting that, for example, Oregon's NIL law prohibits students from entering NIL contracts that conflicts with team rules).

[367] *See* Susan K. Menge, *2005 Annual Survey: Recent Developments in Sports Law*, 16 MARQ. SPORTS L. REV. 381, 400–01 (2006) (discussing an athlete who was dismissed and lost their scholarship for missing practices).

Athletes are bound by school policies that forbid NIL compensation when an accompanying contract would conflict with a term of a contract held by the school. The University of Texas's (UT) policy, like those of other schools, notes that athletes are prohibited from "enter[ing] into a contract for use of their NIL if any provision in the contract conflicts with a provision of a team contract (e.g. team rules, athletics scholarship agreement, etc.), an institutional contract (e.g. sponsorship agreement involving the use of UT's trademarks), athletics department policy (e.g., SA Code of Conduct, etc.), or UT honor code."[368] Likewise, colleges in Mississippi can, pursuant to the state NIL statute, enjoy "sole control over what athletes wear during a sponsored event."[369]

Athletes are further constrained by temporal restrictions in state laws that schools must follow. In Florida, college athletes can only sign deals that will expire no later than when their collegiate athletic careers end.[370] In addition, schools have attempted to disclaim any potential liability to athletes and those with whom they conduct NIL business. "The University," the University of Massachusetts Lowell NIL policy warns, "shall have no liability to any student-athlete, noninstitutional entity, professional service provider, vendor, contractor, or agent as a result of a student-athlete's participation in NIL activities."[371]

For athletes that violate their school's NIL policy, the school could deem them ineligible to play.[372] In that scenario, the school could cancel the athletes' student financial aid and any scholarship.[373] The school, as a member of the NCAA, has a contractual obligation to adhere to NCAA rules, including those

---

[368] UNIV. OF TEX. ATHLETICS, TEXAS NAME, IMAGE, LIKENESS (NIL) BILL SUMMARY (June 2, 2021), https://texassports.com/documents/2021/7/1//State_law_summary_1_.pdf?id=15848.

[369] *State of Mississippi NIL Laws: What College Athletes and Businesses Need to Know*, ICON SOURCE, https://www.iconsource.com/mississippi-nil-laws.html (last visited Feb. 7, 2022).

[370] Michael McCann & Eben Novy-Williams, *Florida NIL Rules Draw Lawsuit from High School, College Players*, SPORTICO (Jan. 13, 2022, 12:01 AM), https://www.sportico.com/law/analysis/2022/florida-nil-rules-1234658232/.

[371] *Student-Athlete Name, Image and Likeness (NIL) Policy*, UMASS LOWELL ATHLETICS (May 26, 2022), https://goriverhawks.com/sports/2021/7/1/NIL_Policy.

[372] *See id.* ("Violations of this policy may result in . . . permanent eligibility to participate in college athletics.").

[373] *Id.*

pertaining to NIL.[374] As of this writing, the NCAA is investigating several schools and their business partners for compliance with the NCAA's NIL policy.[375] There is concern certain NIL deals might be more akin to "pay for play" than NIL.[376]

B. BAD CONTRACTS

Contract law probably would not be a field of study without contractual disputes. That principle holds true for NIL. Some college athletes will sign deals that they later regret, while others will regret not signing offers. To the extent that college athletes are landing NIL deals, it appears that many are attracting modest deals, including payment for teaching clinics.[377] Others are landing free merchandise, complimentary services, and commissions in exchange for the use of their NIL.[378] Invariably, some athletes will accept deals that they later conclude underpay them, perhaps because these athletes played better—and attracted more acclaim—than anticipated.

Companies with whom college athletes sign NIL contracts are in the same predicament. Two arguably lamentable NIL deals for companies arose during the 2021 college football season. University of Oklahoma quarterback Spencer Rattler and University of Miami quarterback D'Eriq King were both highly regarded and marketable

---

[374] *See* Geoffrey Christopher Rapp, *Institutional Control and Corporate Governance*, 2015 BYU L. REV. 985, 988–89 (noting that the NCAA is a "voluntary association" and that for the benefits it offers schools, the schools agree to "abide by the NCAA's rules").

[375] *See NCAA Calls for Schools to Help Investigate NIL Violations*, SPORTS ILLUSTRATED (Aug. 19, 2022), https://www.si.com/college/2022/08/19/ncaa-nil-investigations-calls-for-help-member-schools-impermissible-benefits (discussing how the NCAA's enforcement staff are currently pursuing violations of the NIL compensation policy).

[376] Daniel Libit & Eben Novy-Williams, *NCAA Probes BYU, Miami NIL Deals for Potential Pay-for-Play Violation*, SPORTICO (Dec. 10, 2021, 4:36 PM), https://www.sportico.com/leagues/college-sports/2021/ncaa-byu-miami-nil-probe-1234650215/.

[377] *See* Alan Blinder, *The Smaller, Everyday Deals for College Athletes Under New Rules*, N.Y. TIMES (Dec. 9, 2021), https://www.nytimes.com/2021/12/09/sports/ncaafootball/college-athletes-nil-deals.html (discussing how a lacrosse student-athlete hosts teaching clinics for young lacrosse players, making around $475 initially (her rates have since doubled) for two hours).

[378] *See Tracker: NIL Marketplaces for Student Athletes*, BUS. OF COLL. SPORTS (Apr. 19, 2022), https://businessofcollegesports.com/tracker-nil-marketplaces-for-student-athletes/ (listing known NIL opportunities available for athletes).

players. Both secured endorsement deals.[379] Yet both also encountered disappointing seasons, with Rattler underperforming and losing his starting job[380] while King struggled before suffering a season-ending injury.[381] This fact pattern, of course, is not unusual or indicia of illegality. Companies have long signed endorsement deals with athletes, entertainers, and other public figures. Some of those deals prove wise, others less so. Variance in outcomes of business deals has been apparent for as long as humans have conducted business.

Whether a "bad contract" gives rise to a breach depends on circumstances. For instance, companies usually negotiate morals clauses in endorsement deals to protect themselves in the event the endorser commits illegal acts or engages in controversial behavior.[382] When he was indicted for the murders of Nicole Brown Simpson and Ronald Goldman in 1994, O.J. Simpson endorsed Hertz and other brands.[383] Since that time, morals clauses have become more prominent in deals.[384] There are also reverse morals clauses, which allow the endorsing athlete or entertainer to void a deal if the sponsored company engages in unlawful or unethical

---

[379] *See* Ralph D. Russo, *Good Deal: Benching Doesn't Sully Rattler's Marketability*, YAHOO! (Oct. 17, 2021), https://www.yahoo.com/now/good-deal-benching-doesnt-sully-140740650.html (discussing Rattler and King taking the opportunity to benefit from endorsements).

[380] *See* John E. Hoover, *Spencer Rattler's QB Trainer: "No Brainer" That Rattler Leaves Oklahoma After 2021*, SPORTS ILLUSTRATED (Nov. 5, 2021, 6:36 AM) https://www.si.com/college/oklahoma/football/spencer-rattlers-coach-no-brainer-he-leaves-oklahoma (noting how Rattler lost the starting quarterback job mid-season during the UT game).

[381] *See* David Cobb, *D'Eriq King Injury: Miami Star QB Out for Season, Embattled Coach Manny Diaz Pins Hopes on Redshirt Freshman*, CBS SPORTS (Oct. 11, 2021, 11:23 AM) https://www.cbssports.com/college-football/news/deriq-king-injury-miami-star-qb-out-for-season-embattled-coach-manny-diaz-pins-hopes-on-redshirt-freshman/ (explaining how King was struggling before undergoing season ending shoulder surgery)

[382] *See* Caroline Epstein, Note, *Morals Clauses: Past, Present and Future*, 5 N.Y.U. J. INTELL. PROP. & ENT. L. 72, 75 (2015) (discussing the protection that morals clauses provide).

[383] *See id.* at 94 ("OJ Simpson . . . illustrated the importance of morals clauses when he was indicted for a double murder while serving as the spokesman for Hertz, among other brands.").

[384] *Id.*; *see also* Marc Edelman, *Rashard Mendenhall Settles Lawsuit with Hanesbrands over Morals Clause*, FORBES (Jan. 17, 2013, 12:02 PM), http://www.forbes.com/sites/marcedelman/2013/01/17/rashard-mendenhall-settles-lawsuit-with-hanesbrands-over-morals-clause/#16a1021c6c87 (last visited Jan. 15, 2022) (exemplifying the involvement of a morals clause in an endorsement contract).

conduct.[385] At some point, we should expect to see a dispute between a college athlete and a company over a controversy that leads the company to attempt to exit the deal.

A skilled agent can help a college athlete avoid the pitfalls of a regrettable deal. NIL statutes and the NCAA's interim policy permit agents.[386] There remains uncertainty, however, over how agents for college athletes can be licensed and regulated. The NCAA is not a labor organization, like the National Football League Players' Association or the National Basketball Players' Association, and thus can't rely on the NLRA to adopt a licensing procedure.[387] It is also not an arm of the government that licenses professional agents, such as a state agency that oversees real estate brokers.[388]

C. RISKING ELIGIBILITY

Athletes also run the risk of losing their college sports eligibility if they were to violate a school, conference, or NCAA rule related to NIL. At present, some of these rules may be confounding to college athletes because (1) rules may differ from state to state; (2) rules may differ from conference to conference; (3) most incoming college athletes do not have representation to advise them on NIL rules; and (4) at present there is no singular body advising college athletes like the one embodied in professional sports through union licensing arms.[389] While it would be prudent for an incoming college athlete to seek legal counsel for advice on NIL rules, college athletes do not

---

[385] *See* Porcher L. Taylor, III, Fernando M. Pinguelo & Timothy D. Cedrone, *The Reverse-Morals Clause: The Unique Way to Save Talent's Reputation and Money in a New Era of Corporate Crimes and Scandals*, 28 CARDOZO ARTS & ENT. L.J. 65, 66–67 (2010) (defining reverse moral clauses as "reciprocal contractual warrant[ies] to a traditional morals clause intended to protect the reputation of talent from the negative, unethical, immoral, and/or criminal behavior of the endorsee-company or purchaser of talent's endorsement").

[386] *See* NCAA, NAME IMAGE AND LIKENESS POLICY QUESTION AND ANSWER, *supra* note 221, ¶ 7 (explaining how professional service providers, including agents, are allowed to be used in connection with NIL activities).

[387] *See* Michael A. McCann, *Jump Ball: The Unsettled Law of Representing College Basketball Stars and Monetizing Their Name, Images and Likenesses*, 61 SANTA CLARA L. REV. 177, 210–11 (2020) (discussing how the NCAA is not a labor organization but is instead a not-for-profit entity and noting the consequences of such a designation)

[388] *Id.* at 211.

[389] *See* DRAKE GRP., STATE-BY-STATE NILS EXECUTIVE SUMMARY, *supra* note 208 (detailing the key components of each state's NIL laws).

have regular access to counsel.[390] Moreover, without the ability to pay upfront fees for legal advice, many athletes run the risk of either choosing counsel with limited real-world experience in the NIL space or counsel that charges high percentage fees on endorsement deals.[391] One potential, partial solution might be that a few law schools, including those affiliated with UCLA, Campbell University, and the University of Minnesota, are creating clinics where current law students could help advise collegiate athletes on their NIL rights.[392] But given the ongoing disparate interests in NIL licensing that exist between many colleges and their athletes, it is imperative that law school clinics that provide legal representation to college athletes on NIL deals are sufficiently firewalled from their college's athletic department and their legal counsel. Failure to do so could mean that even the most well-intended programs take an overly risk-averse approach to college athlete NIL rights to the detriment of college athletes, even if they are the intended beneficiary.

---

[390] *See* John Keilman, *Lawyer Specializing in Name and Image Rights Advises Caution as College Athletes Pursue Endorsements: "A Lot of People Are Trying to Take Advantage of the Chaos for Their Own Benefit*," CHI. TR. (July 2, 2021, 3:23 PM), https://www.chicagotribune.com/news/breaking/ct-college-athletes-name-image-likeness-illinois-lawyer-20210702-jw4ysfeejza6fmpedwx6msbshe-story.html (noting that if student-athletes get counsel, they seek them outside their schools).

[391] *See id.* (explaining the risks that student-athletes now run not understanding the long-term implications of endorsements unless they get good advice)*; see also A Sports Agent's Role In The World of NIL: Part II*, ATHLETICDIRECTORU, https://athleticdirectoru.com/sanil/a-sports-agents-role-in-the-world-of-nil-part-ii/ (last visited Aug. 1, 2022) ("It should be evident that the NCAA—or whatever entity that ends up regulating NIL—will face tremendous challenges in ensuring that student-athletes are not taken advantage of when choosing to be represented by . . . firms and their agents.").

[392] *See* Ben Bolch, *UCLA Stars Trying to Tap Hollywood, Social Media and Their Talent for NIL Payday,* L.A. TIMES (June 28, 2021, 5:00 AM), https://www.latimes.com/sports/ucla/story/2021-06-28/ucla-nil-dorian-thompson-robinson-margzetta-frazier (describing UCLA's programs to help athletes monetize their NIL rights); Christine Charnosky, *Minnesota Law's New Clinic Aims to Help College Athletes and Social Media Influencers Negotiate Deals*, WWW.LAW.COM (Apr. 5, 2022, 2:24 PM), https://www.law.com/2022/04/05/new-minnesota-law-clinic-aims-to-help-college-athletes-and-social-media-influencers-negotiate-deals/ (describing the University of Minnesota Law School's new clinic offering NIL assistance); *supra* note 350 and accompanying text (describing Campbell's new NIL related clinic).

D. USING SCHOOL MARKS

As discussed above, state NIL statutes, university policies, and complex contractual arrangements all pose legal barriers for college athletes in their use of school logos, marks, and other intellectual property.[393] These cases, however, are complicated by the fact that not all unlicensed use of third-party marks would violate antitrust law, and difficult questions pertaining to nominative fair use and the appropriateness of disclaimers are often fact-intensive and subject to mixed interpretations.[394] Although case law on schools and sponsors suing athletes is sparse, a more plausible penalty for a player who engages in unauthorized use is that the school suspends them from play or deems them ineligible, thereby endangering their scholarship.[395] Yet an increasing number of Division I schools are signing group licensing contracts that permit their athletes to use school intellectual property under certain guidelines—an approach that provides a potential win-win for all parties involved.[396] This arrangement will likely avert potential for thorny legal disputes between schools and their athletes.

E. IMMIGRATION LAW

When Congress failed to pass an NIL bill by July 1, 2021, it meant that state NIL statutes would proceed without federal interference. It also meant that college athletes fully able to enjoy their rights of publicity without the threat of eligibility sanctions would be limited to those who are U.S. citizens or permanent residents (Green Card holders).[397] Approximately twelve percent of college athletes are from a foreign country, and most have entered and remained in the U.S. on F-1 student visas.[398] To qualify for an F-1 visa under the Immigration and Nationality Act, the applicant must be a "bona fide student" who intends to study a "full course" of

---

[393] *See supra* Part VII.

[394] *See supra* Section II.C.

[395] *See supra* Section VIII.A.

[396] *See supra* Section VI.B.

[397] *See* Eaton-Robb, *supra* note 348 ("If the school finds out that one of their international student-athletes has been doing side jobs, making money off their name, image or likeness, the school is legally obligated to terminate their visa . . . .").

[398] *Id.*

an academic program at an approved school.[399] When a student on an F-1 visa deviates from their status as a full-time student or otherwise violates the terms of the visa, the visa can be found invalid.[400] Violations can trigger dire consequences for a college student, including visa cancelation and deportation, as well as future ineligibility to enter the U.S.[401]

F-1 visas greatly restrict students' opportunities to earn compensation from working.[402] Employment opportunities under F-1 visas are limited to certain types of academic work or practical training, none of which appear to contemplate endorsement deals and related NIL opportunities.[403] There are potential loopholes that might work for certain athletes, but the need to rely on loopholes—an inherently uncertain and often unadvisable approach—is hardly ideal.[404] One of us has testified before the U.S. Senate that a federal NIL statute could address the drawbacks of the current state-by-state NIL approach.[405] A federal NIL statute could expressly permit student visa holders to take advantage of NIL rights. An alternative

---

[399] 8 U.S.C. § 1101(a)(15)(F)(I); *see also* Christopher S. Collins & T. Richmond McPherson, III, *How Tri-Valley University Fell Off the Diploma Mill: Student Immigration and Façade Education*, 38 J. Coll. & U. L. 525, 537 (2012) (detailing the F-1 visa process).

[400] *See* Collins & McPherson, *supra* note 399, at 538 ("Ultimately, failure to follow the guidelines could jeopardize the student's immigration status.").

[401] *See* Eaton-Robb, *supra* note 348 (finding that some international students have been told not to accept NIL deals because of the potential drastic immigration consequences).

[402] *See id.* (explaining how F-1 visas "prohibit students from working off campus except in rare authorized exceptions").

[403] *See* Nancy S. Cowen, *The Employer's Dilemma Under IRCA: Is It Possible to Comply with I-9 Requirements Without Discriminating?*, 6 GEO. IMMIGR. L.J. 285, 293 (1992) (noting the role of practical training); *see also* Eaton-Robb, *supra* note 348 (explaining that college athletes have been advised by schools that they should not accept NIL opportunities).

[404] *See* Paul Doyle, *UConn's Dorka Juhász Has Plenty of Sponsorship Offers, but She Isn't Allowed to Take Them*, CT INSIDER (Nov. 25, 2021, 9:45 PM), https://www.ctinsider.com/uconn/article/UConn-s-Dorka-Juh-sz-has-plenty-of-sponsorship-16649567.php (interviewing an immigration attorney who suggests there may be backdoor avenues for faculty advisors to help athletes with NIL opportunities while remaining technically adherent to the visa).

[405] *See NCAA Athlete NIL Rights: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, (statement of Michael McCann, Professor of Law, University of New Hampshire Franklin Pierce School of Law), 117th Cong. 1 (2021) https://www.commerce.senate.gov/services/files/37D152EC-E8F7-49E2-93B0-32FFA9AAA73D ("A federal standard could resolve state differences and likely ward off certain types of litigation. It could also ensure that there is equal treatment for athletes regardless of whether he or she lives in a state that adopted a statute. Every athlete would potentially have the right to gain.").

strategy would be to amend federal immigration law to carve out NIL protections. Efforts to change immigration law, however, often encounter political resistance due, in part, to the sometimes-contentious intersection of human rights considerations and national security interests.[406]

F. TAXES

NIL earnings are subject to federal income taxes and, in most states, state income taxes.[407] Given the episodic work of endorsement activity and seasonal coaching stints, college athletes who earn from NIL are likely independent contractors, not employees, for the businesses with whom they perform work.[408] To be clear, this expected classification is subject to potential legal changes. For instance, if college athletes are recognized as employees of their school, and if they and their school are partners through a group licensing deal, it is possible that their employment could encompass some forms of NIL.[409] Alternatively, some states have limited opportunities for employers and workers to form independent contractor relationships, and urged that the workers be recognized as employees.[410]

---

[406] *See* Ernesto Hernández-López, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAND. J. TRANSNAT'L L. 1345, 1419 (2007) (noting that there is "serious political resistance to immigration reform").

[407] *See* Michael McCann & Robert Raiola, *College Athletes and Their Sponsors Face Tax Reality of NIL*, SPORTICO (July 9, 2021, 12:00 PM), https://www.sportico.com/law/analysis/2021/nil-taxes-1234633902/ ("All of the athletes now earning compensation—whether through promotional deals or personal business endeavors, whether endorsing products or selling non-fungible tokens—will have to remember one thing: They'll need to file income taxes and, in some cases, turn over portions of their earnings to Uncle Sam and state treasuries."). Further, nine of the fifty states have no state income tax. Doug Friednash, *Polis' Anti-Income Tax Position Isn't as Outlandish as It Sounds*, DENVER POST (Sept. 8, 2021, 11:46 AM), https://www.denverpost.com/2021/09/08/jared-polis-zero-income-tax-reform-colorado/.

[408] *See* McCann & Raiola, *supra* note 407 ("As a starting point, companies that sign college athletes to NIL deals will likely classify those athletes as independent contractors—an arrangement commonly seen in athlete endorsement deals.").

[409] *See* Warren K. Zola, *College Athletics: The Growing Tension Between Amateurism and Commercialization*, *in* THE OXFORD HANDBOOK OF AM. SPORTS L. 367, 378–89 (Michael A. McCann ed., 2018) (discussing developments surrounding the possible classification of college athletes as employees).

[410] *See* Recent Legislation, *Labor and Employment Law—Worker Status—California Adopts the ABC Test to Distinguish Between Employees and Independent Contractors*, 133

Independent contractors are ordinarily paid without the payer withholding income taxes, Social Security, or Medicare as an employer does for regular employees.[411] A college athlete as an independent contractor will thus be paid in gross and, when filing taxes, will pay a larger tax bill because the pay lacks withholdings.[412] The athletes may be able to deduct certain expenses, including agent fees and travel costs incurred for NIL-related work.[413] Athletes must also be mindful that taxable activities include money generated by appearance fees, autograph signings, and car leases, as well as the value of goods (such as apparel or equipment) exchanged in for promoting a business.[414]

These hazards and limitations of NIL should not obstruct the more central narrative: A restrained NIL market for athletes is better than no NIL market. That said, athletes and their agents should be mindful that NIL carries a similar set of legal conventions as most types of economic activities. Schools, which are in the business of providing education to college athletes, would be wise to educate athletes on potential threats and vulnerabilities in the NIL world.

IX. OTHER CONSIDERATIONS

While numerous potential legal and strategic considerations could be affected by the change in the NCAA's NIL policy, we identify two prominent groups that could be exposed to risk if they do not carefully navigate the new landscape: (1) agents and advisors, and (2) boosters and fans.

A. AGENTS AND ADVISORS

One of the common themes among states that granted NIL rights by statute and the NCAA's interim policy is the ability of athletes

---

HARV. L. REV. 2435, 2435, 2438 (2020) (discussing consequences of the enactment of California Assembly Bill No. 5).

411 *See* McCann & Raiola, *supra* note 407 (explaining taxation for independent contractors).

412 *Id.*

413 *Id.*

414 *See* Aaron Goldberg & Zach Miller, *Do I Have to Pay Taxes on My NIL Deals?*, AWM (July 19, 2021), https://awmcap.com/blog/nil-taxes (discussing tax obligations resulting from NIL income).

to obtain the advice of agents or advisors before entering deals.[415] The NCAA has long denied athletes access to agents or advisors, with only narrow exceptions.[416] While advisors are now being allowed, some states are requiring that agents register with the state and comply with the Sports Agent Responsibility and Trust Act.[417] Other states have taken to requiring that athlete advisors can also be locally licensed attorneys.[418] While there have been questions raised about whether there will be enough money for many agents to make a living in the NIL representation space, Opendorse, a marketing firm for NIL deals, reported that 1,200 agents are already signed up for the product.[419] The risks for athletes posed by unscrupulous or inexperienced agents are likely primarily centered on financial risks, including bad financial advice and bad career advice that foreclose future opportunities.[420] Agents who are not lawyers that seek to operate in states where a law license is required risk a state bar association targeting them for unauthorized practice of law.[421] Agents may also face liability under federal law.[422]

---

[415] *See* DRAKE GRP., STATE-BY-STATE NILS EXECUTIVE SUMMARY, *supra* note 208 (noting that Hawaii, for example, has no prohibition from retaining an agent).

[416] With limited exceptions, the NCAA has long denied college athletes the ability to consult with an agent and maintain collegiate eligibility. *See* Marc Edelman, Thomas A. Baker III, John T. Holden & Andrew Shuman, *Exploring College Sports in the Time of Covid-19: A Legal, Medical, and Ethical Analysis*, 2021 MICH. ST. L. REV. 469, 503–04 (2021) (discussing historical barriers for college athletes to sign with agents).

[417] *See, e.g.*, 2019 Cal. Legis. Serv. Ch. 383 (S.B. 206) (West) (requiring college athletes in California to comply with the Sports Agent Responsibility and Trust Act).

[418] *See, e.g.*, 2020 Nebraska Laws L.B. 962 (establishing the Nebraska Fair Pay to Play Act).

[419] Liz Mullen & Michael Smith, *Agents Question NIL*, SPORTS BUS. J. (June 28, 2021), https://www.sportsbusinessjournal.com/Journal/Issues/2021/06/28/Upfront/Name-Image-and-Likeness.aspx.

[420] For an illustration of high-profile examples where agent-athlete relationships have gone awry, see Amber Lee, *25 Athletes Who Got Totally Ripped Off*, BLEACHER REP. (Apr. 5, 2013), https://bleacherreport.com/articles/1593378-25-athletes-who-got-totally-ripped-off.

[421] *See* DRAKE GRP., STATE-BY-STATE NILS EXECUTIVE SUMMARY, *supra* note 208 (noting that many states require advisors to be lawyers licensed by the state).

[422] The Sports Agent Responsibility and Trust Act regulates interactions between agents and athletes; violation of the act is treated as an unfair and deceptive trade practice subject to penalties under the Federal Trade Commission Act. 15 U.S.C. §§ 7801–7807.

B. BOOSTERS

Boosters, or the bag men as they are sometimes referred to when their activities cross a permissible line, are more than supporters,[423] and they have long been a thorn in the side of the NCAA's commitment to ensuring college athletes receive no more compensation than what the NCAA deems permissible.[424] Indeed, even in the world of athletes having the ability to monetize their NILs, giving money as an inducement to attend a college is a violation of the law in many places with a state NIL statute.[425] The NCAA has allegedly begun investigating several schools over potential NIL violations, which allegedly involve pay-for-play arrangements that violate the NCAA's guidance.[426] Although the NCAA could take action against schools it views as violating the new guidance, there appears to be little that could be done against boosters in many jurisdictions who break the guidelines, and there are even reasonable questions as to whether the NCAA's restraint on booster activity complies with federal antitrust law. Many state laws prohibit specific conduct, though few include any sort of statutory punishment for violations.[427] Additionally, without police powers, the NCAA is unable to command a non-member to cooperate; even in the case of member organizations, non-cooperation may be the optimal choice.[428]

---

[423] *See* Steven Godfrey, *Meet the Bag Man: 10 Rules for Paying College Football Players*, BANNER SOC'Y (Apr. 10, 2014, 10:13 AM), https://www.bannersociety.com/2014/4/10/20703758/bag-man-paying-college-football-players (describing how bag men operate to lure athletes to particular schools).

[424] *See* Carl Stine, *Miami Football Scandal and the Biggest College Booster Fails of All Time*, BLEACHER REP. (Aug. 25, 2011), https://bleacherreport.com/articles/819814-miami-hurricanes-football-scandal-is-this-the-biggest-booster-fail-of-all-time (detailing various scandals involving boosters and college athletes).

[425] *See* DRAKE GRP., STATE-BY-STATE NILS EXECUTIVE SUMMARY, *supra* note 208 (noting that New Mexico, for example, says that NIL deals cannot be used as inducements to recruit prospective athletes).

[426] *See* Erin Walsh, *Report: Miami, BYU Investigated by NCAA Enforcement over Potential NIL Violations*, BLEACHER REP. (Dec. 10, 2021), https://bleacherreport.com/articles/10020519-report-miami-byu-investigated-by-ncaa-enforcement-over-potential-nil-violations (explaining how the deals might be a pay-for-play arrangement, which is prohibited under NIL guidelines).

[427] *See generally* DRAKE GRP., STATE-BY-STATE NILS EXECUTIVE SUMMARY, *supra* note 208 (detailing the key components of each state's NIL laws).

[428] *See* Connor O'Gara, *The NCAA's Message to Everyone with This Upheld Mizzou Bowl Ban: Don't Ever Cooperate*, SATURDAY DOWN S. (2019),

X. CONCLUSION

The ability for college athletes to monetize their NIL rights for the first time in nearly 120 years is a momentous step forward in placing them in an economic position similar to any other member of the college community—being free to exercise their right to make money off their own likeness. Nevertheless, the change in NIL policy comes too late for a generation of hundreds, or perhaps thousands of athletes who have missed an opportunity to monetize their own image during their prime earning years—some of whom were punished by their colleges, conferences, and the NCAA simply for seeking to share in the fruits of their own labor.[429] In addition, the current generation of college athletes still do not enjoy true free market opportunities to profit from their athletic talents and instead must contend with a range of NCAA, college, and sometimes even state laws that may sometimes appear complicated or contradictory to one another. At the same time, college athletes are forced to embark on the journey of licensing their NILs without the aid of a licensing arm of an NLRB-recognized players union, as the athletes in the U.S.'s premier professional sports leagues currently enjoy. This leaves certain college athletes susceptible to exploitation

---

https://www.saturdaydownsouth.com/mizzou-football/ncaa-message-everyone-mizzou-bowl-ban-dont-cooperate-ever-2019/ (noting that the University of Missouri, who cooperated with an investigation, received a stiffer penalty than Mississippi State University for an allegedly similar offense because Mississippi State University refused to cooperate with the NCAA). In another instance, Oklahoma State athletic director Chad Weiberg said:

> [I]'m very concerned that today's decision will send a very chilling message to the NCAA membership that cooperating in an investigation with our own governing body is not in your best interest. What message does it send to the membership that you can receive a postseason ban regardless of the fact the findings found no lack of institutional control, no head coach responsibility, no failure to monitor, no academic fraud or misconduct, no participation of ineligible players as a result of violations and no recruiting violation, a decision we believe has never happened before in the history of the NCAA.

Marshall Scott, *Everything Athletic Director Chad Weiberg Said at the NCAA Press Conference*, PISTOLS FIRING (Nov. 3, 2021), https://pistolsfiringblog.com/everything-osu-athletic-director-chad-weiberg-said-at-the-ncaa-press-conference/.

[429] *See, e.g.*, Michelle R. Martinelli, *Viral Former UCLA Gymnast Katelyn Ohashi Slams NCAA, Felt "Handcuffed" by Profit Rules*, USA TODAY (Oct. 9, 2019, 9:25 AM), https://ftw.usatoday.com/2019/10/katelyn-ohashi-ucla-viral-gymnast-slams-ncaa-fair-pay-to-play (describing the case of viral UCLA gymnast Kaitlyn Ohashi who received a perfect ten in a video seen by millions, but was unable to earn any money from her performance because name, image, and likeness laws had not yet come into effect).

from self-proclaimed NIL advisors, whose interests may not be entirely aligned with the college athletes. Of course, colleges, athletic conferences, and the NCAA itself could mitigate these risks by ceasing to oppose more traditional forms of labor organization among college athletes.

In the coming years, one could reasonably expect the practice of college athletes licensing their NILs to become as embedded in the college sports industry as it has become in Olympic sports. It is also reasonable to presume that athletes who are successful in this space and advisors who have proven themselves as providing ethical counsel for players will charter the norms in college athlete endorsement deals for the next generation. Nevertheless, during this intermediate period, there may be some bumps in the road to implementing these important economic changes.

From the perspective of individual schools and athletic conferences, the wisest course of dealing at this point would be to place the fewest restrictions on athlete endorsement deals as feasible and to focus primarily on ensuring the protection of their own intellectual property rights and compliance with all federal and state laws. For schools that wish to partner with college athletes in pursuing joint endorsement relationships, ensuring that the athletes have their own independent counsel and providing athletes with equal joint opportunities irrespective of their gender would be prudent. Finally, individual colleges, athletic conferences, and the NCAA all should be cognizant of their potential legal liability under antitrust law if they pursue joint activity to limit college athletes' economic rights pertaining to NIL, and heed seriously the words from Justice Kavanaugh that "[t]he NCAA is not above the law."[430]

[430] NCAA v. Alston, 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring).