

Summer 2024

False Start on NIL: Public and Private Law Should Treat College Athletes Like Any Other Student

Jodi Balsam

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Antitrust and Trade Regulation Commons](#), [Entertainment, Arts, and Sports Law Commons](#), [Privacy Law Commons](#), and the [Public Law and Legal Theory Commons](#)

FALSE START ON NIL: PUBLIC AND PRIVATE LAW SHOULD TREAT COLLEGE ATHLETES LIKE ANY OTHER STUDENT

by: Jodi S. Balsam*

ABSTRACT

For most of its regulatory existence, the National Collegiate Athletic Association (“NCAA”) has preached the importance of integrating intercollegiate athletics into the campus culture and educational mission, insisting that athletes be an integral part of the student body. A core element of this creed was the amateurism principle—college athletes must not be paid or professionalized. To preserve and enforce the amateurism principle, the NCAA and its divisions promulgated a vast and complex regulatory scheme that paradoxically resulted in segregating, rather than integrating, athletes into campus life. While nonathlete students enjoy increasing autonomy to pursue expressive and economic activity, athletes are subject to paternalistic rules that restrain their lives on and off campus and deny them a share in the wealth generated by their athletic talents. In a watershed moment in the summer of 2021, this began to change.

*In June 2021, the Supreme Court in *National Collegiate Athletic Association v. Alston* affirmed that the NCAA had violated antitrust laws by capping the benefits that member institutions could offer to athletes when competing to recruit them to college teams. July 2021 brought the effective date of the first of many state laws preventing the NCAA from penalizing college athletes who monetize their name, image and likeness (“NIL”). In response, the NCAA amended its amateurism bylaws to permit all college athletes, regardless of where they attend school, to engage in NIL commercial activity consistent with state law and NCAA guidelines.*

What followed was a cycle of NCAA rulemaking to preserve the amateurism principle alternating with state legislative rejoinders to preserve in-state athletic programs’ recruiting advantage. The resulting morass of private and public NIL rules customized to the college athlete led to calls to federalize those regimes. Proposals for federal legislation would establish national standards and a centralized regulatory authority for college athlete NIL exploitation. No such bills have gained traction in Congress.

This Article argues that both public and private law regimes singling out college athletes for customized regulation have it wrong. Instead, states, schools, and athletes would benefit from discarding specialized rules and reverting to laws of general application—in other words, let’s treat college athletes like any other student on campus. At least with respect to NIL, do away with the bifurcation of higher education into athletic and nonathletic fiefdoms and rent-seeking

DOI: <https://doi.org/10.37419/LR.V11.I4.1>

* Professor of Clinical Law, Director of Externship Programs, Brooklyn Law School. I received excellent research assistance from Mathew Santoyo. For helpful feedback, I am grateful to the participants in the Texas A&M University *Law Review* Symposium, including Professors Matt Mitten, Meg Penrose, and Maureen Weston, and Kevin McDonald, Esq. I also thank the participants in the AALS 2024 Annual Meeting Section on Law and Sports Works in Progress, including Professors Ariel Dulitzky, Ilhyung Lee, and David P. Weber. Special thanks to my casebook co-authors Professors Stephen Ross and William Berry for ongoing dialogue and support.

special treatment of the university's relationship with athletes. Adopt a principle of nondiscrimination that deals with all college students the same way when they seek to benefit from and monetize their identities and publicity rights.

TABLE OF CONTENTS

I. INTRODUCTION	786
II. THE NCAA AMATEURISM PRINCIPLE AND THE BIFURCATION OF THE AMERICAN CAMPUS	790
A. <i>Amateurism Segregates, Not Integrates, the College Athlete</i>	790
B. <i>Erosion of the Amateurism Principle in the Twenty-First Century</i>	798
1. Publicity Rights Challenges to Amateurism	798
2. Antitrust Challenges to Amateurism	801
3. Labor and Employment Law Challenges to Amateurism	804
III. NIL REGULATION EXACERBATES DISPARATE TREATMENT OF ATHLETES	809
A. <i>Current NIL Regulatory Environment</i>	809
1. State NIL Laws	809
2. NCAA Response to State NIL Laws	813
B. <i>Trends in NIL Activity</i>	817
C. <i>Federal Legislative Response Unlikely</i>	819
IV. THE FREE-MARKET SOLUTION	822
V. CONCLUSION	827

I. INTRODUCTION

Contrast the situations of these two hypothetical students: First, meet Sarita Sharma, an accomplished saxophonist who, as a high school student, was recruited into the Music Scholars Program at her state's flagship Division I university. The program offers a four-year full-tuition scholarship, including student fees, room and board, as well as additional financial support. Recipients are required to major in music but may enroll in other coursework or a second major.¹ Past Music Scholars have gone on to rewarding careers in performance, coaching, and teaching music.

While enrolled at the university, Sarita has earned money playing with orchestras and ensembles outside the university, including those that would seek to hire her upon graduation. She has been compensated for

1. Sarita's hypothetical status and experience as a scholarship musician are based on the Kenan Music Scholars Program at the University of North Carolina. *Kenan Music Scholars Program*, UNIV. OF N.C. AT CHAPEL HILL, <https://kenanmusicscholars.unc.edu/> [https://perma.cc/FC68-MDNR].

working at summer music camps and playing at private events, including those hosted by university alumni and boosters. Sarita has also developed such a robust following on her social media that she makes money as a brand ambassador for music industry products and services, including, after turning 21, a brandy sold in a saxophone-shaped bottle. None of this outside or off-campus activity impairs her scholarship or is restricted in any way by university policy or state law.²

Second, meet Sarita's dorm-mate, Bethany Baker, who plays varsity basketball for this Division I university and cannot engage with any athletics-related opportunity outside of her school team commitments unless she complies with a host of National Collegiate Athletic Association ("NCAA"), university, and state regulations.³ Playing with a Women's National Basketball Association ("WNBA") team during its season (May to September) would make Bethany ineligible to compete in any subsequent intercollegiate contest.⁴ Monetizing her name, image and likeness ("NIL") through social media or direct endorsement agreements is subject to layers of specialized public and private law.⁵ The university could bar her from accepting compensation from alumni and boosters if deemed an improper inducement to stay enrolled at the university.⁶ It could block her from endorsing Nike, because of the school's existing contract with a different apparel manufacturer, or endorsing an alcoholic beverage, because of image concerns.⁷ It could require her to report all NIL activity to the university and document that her NIL compensation is commensurate with fair market value.⁸

Sarita's and Bethany's discrepant experiences illustrate the "bifurcation" of higher education under the auspices of the NCAA.⁹

2. *Id.*; see Lee Green, *Impact of California's 'Fair Pay to Play Act' on High School Athletes*, NFHS (Nov. 13, 2019), <https://www.nfhs.org/articles/impact-of-california-s-fair-pay-to-play-act-on-high-school-athletes/> [<https://perma.cc/32LV-GG7G>] (discussing how student-musicians on scholarship can profit from their NIL, but student-athletes cannot).

3. See, e.g., NCAA, DIVISION I 2023–24 MANUAL 37, <https://www.ncaapublications.com/productdownloads/D124.pdf> [<https://perma.cc/9GUX-PR3X>]; UNIV. OF KY. ATHLETICS DEP'T, STUDENT-ATHLETE HANDBOOK 2022–23, at 35, https://storage.googleapis.com/ukathletics-com/2022/11/e80b46a4-22-23-sa-handbook_publish-112222.pdf [<https://perma.cc/JN2S-LNL T>]; Andrea Adelson, *Florida Updates NIL Legislation to Remove Legal Restrictions*, ESPN (Feb. 16, 2023, 12:11 PM), https://www.espn.com/college-football/story/_/id/35673223/florida-updates-nil-legislation-remove-legal-restrictions [<https://perma.cc/HA6E-ZZLR>].

4. NCAA, *supra* note 3, § 12.2.3.2.2 ("An individual may participate with a professional on a team, provided the professional is not being paid by a professional team or league to play as a member of that team (e.g., summer basketball leagues with teams composed of both professional and amateur athletes).").

5. See, e.g., 36 N.C. Reg. 152–54 (Aug. 2, 2021).

6. *Id.* at 153.

7. *Id.*

8. *Id.* at 154.

9. See W. Burlette Carter, *Responding to the Perversion of In Loco Parentis: Using a Nonprofit Organization to Support Student-Athletes*, 35 IND. L. REV. 851, 882–83 (2002), <https://doi.org/10.18060/3544>.

Despite the NCAA's ostensible mission to integrate athletics and education, its nearly 120 years of governance have led to distinct "athletic and nonathletic fiefdoms" on campus.¹⁰ To preserve an ever-fluctuating concept of "amateurism," universities, over time, increasingly segregated intercollegiate athletics from other spheres of campus life and subjected athletes to separate rules.¹¹ As colleges expanded their control over athletes' lives, attention to their welfare paradoxically receded.¹² Institutional financial interests took precedence as student rights and interests were subordinated to the need to protect the substantial revenues generated by athletic departments.¹³

Over the past three decades, the commercialization of college sports has led to repeated calls to restore the rights of athletes to speak, work, and engage in autonomous commercial activity.¹⁴ Athletes and their advocates have challenged the NCAA's amateurism rules through litigation and legislation.¹⁵ A watershed moment for these efforts unfolded in the summer of 2021. In June, the Supreme Court in *National Collegiate Athletic Ass'n v. Alston* affirmed that the NCAA had violated antitrust laws by capping the benefits that member institutions could offer to athletes when competing to recruit them to college teams.¹⁶ July 2021 brought the effective date of the first of many state laws restraining the NCAA from penalizing athletes who monetize their NIL.¹⁷ With its

10. *Id.* at 855, 883.

11. See *infra* Part II. Except where necessary for clarity or included in quoted text, this Article avoids the term "student-athlete," which has been criticized as a "linguistic sleight of hand," assuming the conclusion that athletes on campus are students first and could not be employees. Molly Harry, *A Reckoning for the Term "Student-Athlete,"* DIVERSE ISSUES IN HIGHER EDUC. (Aug. 26, 2020), <https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete> [<https://perma.cc/B74L-U823>]. Just as music majors are not called "student-saxophonists," but simply musicians or saxophonists, students who play college sports will simply be called athletes in this Article.

12. Carter, *supra* note 9, at 894.

13. W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. J. SPORTS & L. 1, 16 (2000). The NCAA reported \$1.14 billion in revenue in 2022. Eben Novy-Williams, *NCAA Revenue Dips to \$1.14 Billion as Self-Insurance Costs Kick In*, SPORTICO (Jan. 26, 2023, 12:14 PM), <https://www.sportico.com/leagues/college-sports/2023/ncaa-revenue-2022-1234707661/> [<https://perma.cc/5WAF-FV7H>]. That same year, the top 25 revenue-earning college athletic programs took in an additional \$3.9 billion. *USA Today Releases Top 25 Revenue Earning College Athletic Programs for 2022*, ON3 (June 14, 2023), <https://www.on3.com/news/usa-today-releases-top-25-total-revenue-college-athletics-programs/> [<https://perma.cc/7ZQQ-THQM>].

14. Nicole Kraft, *Why the Public Strongly Supports Paying College Athletes*, FORBES (Aug. 21, 2023, 11:00 AM), <https://www.forbes.com/sites/nicolekraft/2023/08/21/why-the-public-strongly-supports-paying-college-athletes/?sh=77cc65691b08> [<https://perma.cc/ZHD2-8RV L>].

15. See, e.g., *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 101–02 (2021); *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1055 (9th Cir. 2015); *Nw. Univ.*, 362 N.L.R.B. 1350, 1351 (2015).

16. *Alston*, 594 U.S. at 82, 107.

17. See generally *NIL Legislation Tracker*, SAUL EWING, <https://www.saul.com/nil-legislation-tracker> [<https://perma.cc/A5DV-EXYV>] (listing recently passed state NIL laws, as well as pending state legislation).

back against the wall, the NCAA that summer amended its amateurism bylaws to permit all athletes, regardless of where they attend school, to engage in NIL commercial activity consistent with state law.¹⁸

What followed was a free-for-all as athletes and supporters of college athletic programs scrambled to create and access commercial opportunities that would reward the athlete while providing a recruiting edge to the institution. Predictions are that by the 2023–24 academic year, athletes will earn over \$1 billion from NIL activity.¹⁹ This growth has been fed by a phenomenon known as the “NIL collective,” pooling donations from a particular school’s boosters to supercharge NIL opportunities for athletes who choose to enroll there.²⁰ As NIL activity exposed gaps and flaws in the enabling state NIL laws, it led to multi-state legislative fine-tuning.²¹

The inconsistency and complexity of state NIL laws exacerbated the NCAA’s challenge in enforcing what remained of its amateurism principle, primarily its rules that ban using NIL deals as recruiting inducements.²² A series of NCAA “interim” rules addressing improper recruiting inducements became successive dead letters.²³ State regulation of athlete NIL also exacerbated the disparities in the treatment of athletes and nonathletes on campus.²⁴

The NCAA has attempted to fight fire with fire by seeking special interest federal legislation that treats athlete publicity rights more favorably to its interests.²⁵ Proposals would empower the NCAA and its

18. 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> [https://perma.cc/GHP9-XKZJ].

19. OPENDORSE, *NIL AT TWO: TWO YEARS OF NAME, IMAGE AND LIKENESS IN COLLEGE SPORTS* 5 (2023), <https://biz.opendorse.com/nil-2-report/> [https://perma.cc/X6H5-RHB4].

20. *Name, Image, and Likeness (NIL) Collectives*, TAXPAYER ADVOC. SERV. (Oct. 24, 2023), <https://www.taxpayeradvocate.irs.gov/get-help/general/nil/nil-collectives/> [https://perma.cc/CF7L-FLZY].

21. See Andrew Hope, *A Look at Recent Changes to the NIL Landscape for Student Athletes*, LEGAL INTELLIGENCER (Aug. 24, 2023, 12:36 PM), <https://www.law.com/thelegalintelligencer/2023/08/24/a-look-at-recent-changes-to-the-nil-landscape-for-student-athletes/> [https://perma.cc/5YH5-W33F].

22. *NCAA Moves Towards Implementing New NIL Rules*, ESPN (Oct. 3, 2023, 9:14 PM), https://www.espn.com/college-sports/story/_/id/38560392/ncaa-moves-implementing-new-nil-rules [https://perma.cc/ZB6E-EYDX].

23. Hosick, *supra* note 18; Dennis Dodd, *Inducement Concerns Fuel Fears for Coaches, Administrators Amid \$8 Million Name, Image and Likeness Deal*, CBS SPORTS (Mar. 21, 2022, 11:50 AM), <https://www.cbssports.com/college-football/news/inducement-concerns-fuel-fears-for-coaches-administrators-amid-8-million-name-image-and-likeness-deal/> [https://perma.cc/Z4VA-JS8X].

24. See Spencer Jacobs, *Cash, Chaos, and Collectives: How the NCAA’s Punt on Student-Athlete Name, Image, and Likeness Governance Created a Wild West and How Federal Legislation Can Bring Order*, 58 GONZ. L. REV. 297, 310 (2023).

25. Eric Prisbell, *Examining the NCAA’s Aggressive Push for Federal NIL Laws*, ON3 (Sept. 25, 2023), <https://www.on3.com/nil/news/ncaa-aggressively-pushes-for-federal-nil-bill-corey-booker-lindsey-graham-tommy-tuberville-joe-manchin/> [https://perma.cc/Z7B2-6YFK].

institutions to prohibit certain types of NIL deals, require transparency of third-party NIL activities, and limit athletes transferring between institutions.²⁶ No such bills have gained traction in Congress.²⁷

This Article argues that both public and private law regimes singling out athletes for customized regulation have it wrong. Instead, institutions and athletes would benefit from discarding specialized rules and reverting to laws of general application—in other words, treating athletes like any other student on campus. Do away with the bifurcation of higher education into athletic and nonathletic fiefdoms. Adopt a principle of nondiscrimination that deals with all college students the same way when they seek to benefit from and monetize their identities and publicity rights.

Part II of this Article provides a brief history of the NCAA's amateurism principle, its effect in bifurcating the American campus, and its erosion during this century as college athletics became increasingly commercialized and the athletes successfully advocated and litigated for a share in the resulting wealth. Part III surveys the current NIL regulatory environment, including both state laws and the NCAA's response, which combine in a patchwork quilt of inconsistent and confusing guidance and exacerbate the bifurcation of higher education. It further describes current trends in NIL activity, including the NIL collective and the pursuit of a federal legislative solution to provide uniformity and clarity to college athletics. Part IV advances a free-market solution that removes both the NCAA and state actors from regulating athletes beyond those regulations that apply to all college students. Part V concludes with how the free-market solution to NIL should be a first step toward dismantling the NCAA regulatory apparatus and bringing greater parity and equity to the athlete's campus life.

II. THE NCAA AMATEURISM PRINCIPLE AND THE BIFURCATION OF THE AMERICAN CAMPUS

A. *Amateurism Segregates, Not Integrates, the College Athlete*

The difference between the treatment of the college saxophone player and the college athlete posited in this Article's introduction dates back to the NCAA's founding, which wrested control of intercollegiate programs from the undergraduate students who ran them at the time.²⁸ Initially responding to concerns about football's brutality, the NCAA's

26. *Id.*

27. *Id.*

28. Carter, *supra* note 9, at 861, 874–75. The NCAA was initially called the Intercollegiate Athletic Association of the United States (“IAAUS”) before it changed its name in 1910. For ease of reference, henceforth in the text, the IAAUS will be referred to as the NCAA. *NCAA and the Movement to Reform College Football: Topics in Chronicling America*, LIBR. OF CONG., <https://guides.loc.gov/chronicling-america-ncaa-college-football-reform> [<https://perma.cc/JRG8-2RGV>].

founders expanded their remit to require athletes, alone among college students, to pursue their signature activity solely as amateurs.²⁹

Over the years, justifications for the amateurism principle have evolved. The first NCAA constitution sought to maintain athletic activities “on an ethical plane in keeping with the dignity and high purpose of education.”³⁰ Accordingly, the earliest NCAA bylaws established guidelines that prohibited recruiting inducements, financial aid, and fielding athletes who were not bona fide students or who had ever received any compensation for athletic services.³¹ The 1916 NCAA bylaws defined the “amateur” as “one who participates in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits directly derived therefrom.”³² But compliance with these ideals was erratic, leading to a 1929 report by the Carnegie Foundation for the Advancement of Education that decried commercialism in college athletics.³³ The Carnegie Report urged schools to refocus competitive sports programs to prioritize fostering bodily health, building character, and fulfilling intellectual promise.³⁴

That call to action was finally heeded in 1948, when the NCAA enacted a “Sanity Code” intended to prohibit all concealed and indirect benefits for athletes; any money for athletes was to be limited to transparent scholarships awarded solely on financial need.³⁵ At the risk of expulsion, member institutions were not to award financial aid to athletes beyond that available to the general student body.³⁶ While this move ostensibly sought to maintain the status of athletes as commensurate with their classmates, it drew criticism from member institutions concerned that banning athletics-based scholarships would force some athletes to work off-campus to meet their basic needs, and consequently devote less time to their sport.³⁷ Despite this regulatory effort to monitor and constrain pay-for-play, athletes continued to receive banned payments from boosters, alumni, and athletic departments seeking to gain a competitive advantage.³⁸

29. W. Burlette Carter, *The Age of Innocence: The First 25 Years of The National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 221–22 (2006).

30. INTERCOLLEGIATE ATHLETIC ASS’N OF THE U.S., CONSTITUTION AND BY-LAWS OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES art. II (1906).

31. *Id.* arts. VI, VII; Carter, *supra* note 29, at 222.

32. ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE 34–35 (1998) (citations omitted).

33. Henry S. Pritchett, *Preface to* HOWARD J. SAVAGE ET AL., THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, AMERICAN COLLEGE ATHLETICS, at viii–x (1929).

34. *Id.* at 302–04.

35. *Colleges Adopt the ‘Sanity Code’ to Govern Sports*, N.Y. TIMES, Jan. 11, 1948 (§ 5) at 1, <https://www.ncaa.org/sports/2021/5/4/history.aspx> [<https://perma.cc/4PM2-7BRU>]; Carter, *supra* note 9, at 901–02.

36. Carter, *supra* note 9, at 902.

37. *Id.* at 903.

38. ANDREW ZIMBALIST, UNPAID PROFESSIONALS 23–24 (1999).

Deeming the Sanity Code unworkable, the NCAA replaced it in 1951 with a new regime that permitted athletic scholarships but required the institution to closely regulate them.³⁹ The same year brought the NCAA's first national television contract, with NBC paying \$1.4 million to broadcast a weekly game.⁴⁰ This financial backing fortified the NCAA's governance role and the establishment of an enforcement division dedicated to investigating and prosecuting infractions.⁴¹ By 1956, regulation of athletic scholarships expanded to establish caps on athlete financial aid and limited reimbursement of "commonly accepted educational expenses" such as room and board, books, and laundry money.⁴² Some view this round of amateurism regulation to mark "the beginning of the NCAA behaving as an effective cartel" that empowered its member schools to set and enforce "rules that limit the price they have to pay for their inputs (mainly the 'student-athletes')," while prohibiting those students from sharing in any of the revenues their efforts generated.⁴³

These developments also set the pattern for the regulatory differentiation of all athletes—in revenue and nonrevenue sports—from other students on campus.⁴⁴ Specialized rules for athlete compensation continued to evolve and accrete layers of intricacy, including regulating the sources of athlete financial aid, the number of scholarships per sport that could be provided, and the types of off-campus work a scholarship athlete could take for pay.⁴⁵ Athletes were increasingly segregated from the larger life of the university, with their own dining facilities and living

39. See David F. Gaona, *The National Collegiate Athletic Association: Fundamental Fairness and the Enforcement Program*, 23 ARIZ. L. REV. 1065, 1071 (1981); Carter, *supra* note 9, at 903–04.

40. David J. Halberstam, *Born 80 Years Ago, College Football on TV Was Limited by the NCAA's Grip Until Stopped by the Supreme Court*, SPORTS BROAD. J. (Sept. 29, 2019), <https://www.sportsbroadcastjournal.com/born-80-years-ago-college-football-on-tv-was-limited-by-the-ncaas-grip-until-the-supreme-court-said-let-go/> [<https://perma.cc/3LG3-RT29>].

41. See generally Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 993 (1987) (discussing the enactment and ramifications of the "death penalty" provision and related NCAA legislation).

42. *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1063 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *aff'd sub nom.* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69 (2021).

43. ZIMBALIST, *supra* note 38, at 10.

44. Revenue sports are those that generate the richest broadcast deals, such as football, men's basketball, baseball, men's ice hockey, and increasingly, women's basketball. See NCSA COLLEGE RECRUITING, *Athletic Scholarships: Head Count Versus Equivalency*, <https://www.ncsasports.org/blog/athletic-scholarships-head-count-versus-equivalency> [<https://perma.c.c/XFR6-J8FE>]. Non-revenue sports are, on most campuses, everything else. *Id.*; see Paul H. Haagen, *Sports in the Courts: The NCAA and the Future of Intercollegiate Revenue Sports*, 103 JUDICATURE 54, 57, <https://judicature.duke.edu/articles/sports-in-the-courts-the-ncaaand-the-future-of-intercollegiate-revenue-sports> [<https://perma.cc/BNT9-WB55>] ("No athlete is now praised for taking an 'amateur' approach to their craft. What is valued is a 'professional' approach to training and to play.").

45. Carter, *supra* note 9, at 903–04.

quarters, and answerable to professional coaches who themselves were not integrated into the larger faculty.⁴⁶

Meanwhile, among the general student body, the 1960s brought student-led campus protests and resistance to institutional authority that “forced a new conception of the relationship between the student and the university.”⁴⁷ Universities and courts began to retreat from the doctrine of *in loco parentis*, which provided the social and legal basis for controlling the social conduct, including off-campus conduct, of all college students.⁴⁸ Demographic changes on campuses quickened that retreat, as the average age of college students rose in response to workplace expectations of a college degree and military draft rules that exempted college students.⁴⁹ Yet another Carnegie Foundation report, issued in 1971 amid campus crackdowns on student protests, urged educational institutions to recognize student rights of free expression and due process.⁵⁰

Then, following the 1971 adoption of the Twenty-Sixth Amendment to the Constitution, most states lowered the age of majority from 21 to 18 years.⁵¹ At that point, little stood in the way of college students reasserting their adult autonomy—including how to organize their social, expressive, and economic lives—subject only to the contractual

46. Karen W. Arenson, *Study of Elite Colleges Finds Athletes Are Isolated from Classmates*, N.Y. TIMES (Sept. 15, 2003), <https://www.nytimes.com/2003/09/15/us/study-of-elite-colleges-finds-athletes-are-isolated-from-classmates.html#> [https://perma.cc/36ZA-JAVK] (“There is a significant, serious, widening divide between the academic and the athletic sides of campus life.”); see WILLIAM G. BOWEN & SARAH A. LEVIN, *RECLAIMING THE GAME* 196–97 (2003); Carter, *supra* note 9, at 883 (discussing college coaches not being integrated into the faculty and college athletes dining and living separately from nonathlete students); WALTER BYERS & CHARLES HAMMER, *UNSPORTSMANLIKE CONDUCT* 101 (1995) (describing the “dormitory armaments race”).

47. Carter, *supra* note 9, at 879; see *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158–59 (5th Cir. 1961) (extending procedural due process protections to public university students).

48. Carter, *supra* note 9, at 853, 882. Professor Carter describes the *in loco parentis* doctrine as having three key legs: (1) a control leg that permitted the institution to broadly restrict student behavior, such as requiring students to eat at college facilities; (2) a welfare leg that justified such controls as necessary to protect the student’s welfare; and (3) a deference leg that legally vested this authority in education institutions and “represented a governmental view that educators were uniquely situated (unlike employers, for example) to shape the character of those with whom they dealt on a daily basis and that institutions could be presumed to perform this task of socialization to the community’s full satisfaction.” *Id.* at 859.

49. Spring J. Walton, *In Loco Parentis for the 1990’s: New Liabilities*, 19 OHIO N.U.L. REV. 247, 252 (1992).

50. See CARNEGIE COMM’N ON HIGHER EDUC., *DISSENT AND DISRUPTION* 38 (1971) (advocating that some of the “basic rights” for university members are “freedom of speech” and “freedom of peaceable assembly and association”).

51. U.S. CONST. amend. XXVI. The Twenty-Sixth Amendment provides in part: “The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.” See *id.*; Walton, *supra* note 49.

relationship with the university.⁵² Today, that contract with the typical large university offers “primarily an economic transaction and a means to professional success.”⁵³ Nonathlete students are permitted, even encouraged, to pursue professional success while enrolled.⁵⁴ Most college students who receive merit-based aid are not constrained in monetizing their talents and skills as long as the aid is for nonathletic merit.⁵⁵

Yet, until recently, the NCAA was intensifying its oversight of college athletes to buttress an amateurism principle thought essential to its commercial future.⁵⁶ This paradox became manifest in the 1970s and 1980s, as many a Division I athletic department reinvented itself along the lines of professional sports, functioning as “a huge commercial entertainment enterprise with operating methods and objectives frequently opposed to the educational missions of the host universities.”⁵⁷

52. See, e.g., *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 554 (3d Cir. 1984) (“Unlike a university, where it is generally understood that a student is, with reason, responsible for the conduct of his or her own affairs, the behavior of a high school student is subject to the constant regulation and affirmative supervision of adult school authorities.”), *vacated*, 475 U.S. 534 (1986); *Univ. of Denver v. Whitlock*, 744 P.2d 54, 59–60 (Colo. 1987) (“[I]n modern times there has evolved a gradual reapportionment of responsibilities from the universities to the students, and a corresponding departure from the *in loco parentis* relationship. Today colleges and universities are regarded as educational institutions rather than custodial ones.”).

53. Brian Jackson, *The Lingering Legacy of “In Loco Parentis”: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1162 (1991).

54. See, e.g., Jeffrey J. Selinger, *Why More Teenagers and College Students Need to Work While in School*, WASH. POST (Nov. 25, 2015, 9:16 AM), <https://www.washingtonpost.com/news/grade-point/wp/2015/11/25/why-more-teenagers-and-college-students-need-to-work-while-in-school/> [https://perma.cc/2GU5-ZVMQ].

55. See, e.g., *Kenan Music Scholars Program*, *supra* note 1 (Kenan Music Scholars Program at the University of North Carolina offers a full four-year scholarship and a wide range of benefits to a select group of students, many of whom come to the school with prior professional, compensated performance experience); *Hire Juilliard Performers*, JULLIARD, <https://www.juilliard.edu/stage-beyond/hire-juilliard-performers> [https://perma.cc/4VN2B-WCY] (the Juilliard School website advertises the availability of its scholarship students for hire for events and performances); Joannie Fischer, *Read All About It*, STAN. MAG. (Mar./Apr. 2003) <https://stanfordmag.org/contents/read-all-about-it-9152#> [https://perma.cc/5MCZ-QT53] (Stanford University’s student newspaper, *The Stanford Daily*, pays its editor-in-chief and other editors and writers a per-volume salary.).

56. See Ted Tatos, *Abuse and Mistreatment of Athletes at U.S. Universities: Legal Implications for Institutional Duty-to-Protect*, 21 TEX. REV. ENT. & SPORTS L. 1, 40–41 (2020), <https://dx.doi.org/10.2139/ssrn.3497110>.

57. MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION 33 (2000). Similarly, the marketing of a college education to nonathlete students diverged from offering a rigorous education to a fan experience. See *id.* at 56–57. Division I offers the highest level of college athletic competition and is one of the three divisions created by the NCAA in 1973 “to align like-minded campuses in the areas of philosophy, competition and opportunity.” *Our Three Divisions*, NCAA, <https://www.ncaa.org/sports/2016/1/7/about-resources-media-center-ncaa-101-our-three-divisions.aspx> [https://perma.cc/LQ9D-2GVR]. Within Division I, the most prominent and highest earning conferences are known as the Power 5: the Pac-12 Conference, the Big Ten Conference, the Big 12 Conference, Southeastern Conference, and Atlantic Coast Conference. See Steve Berkowitz, *NCAA’s Power Five Conferences Are Cash Cows. Here’s How Much Schools Made in Fiscal 2022.*, USA TODAY (May 19,

New rounds of NCAA regulation nonetheless arrived each decade to shore up amateurism.⁵⁸ These rules were oriented around two sometimes overlapping categories: (1) no compensation, known as “pay-for-play,” whether compensated directly for participation on a college sports team or indirectly for outside activities; and (2) no professionalization, with a clear line of demarcation between amateur and professional athletics.⁵⁹

Regarding compensation, the rules strictly limited benefits an athlete could receive to “grant-in-aid,” comprising tuition, room and board, books, and other fees.⁶⁰ Receipt of even basic hospitality from a coach or booster or reimbursement of unapproved expenses could constitute an infraction.⁶¹ Initial eligibility could be compromised by the receipt of pre-college athletics prize money.⁶² Legitimate off-campus employment, especially athletics-related, was subject to compensation and duration limits.⁶³ Athletes were forbidden to capitalize on their identity and reputation, whether through endorsing other products, branding their own merchandise, or signing autographs for a fee.⁶⁴ To avoid professionalization, the NCAA restricted playing for a professional team while in college (even if unpaid), transferring freely between member institutions to pursue better playing opportunities, entering a professional league’s draft, making an anticipatory commitment to play professional athletics, or receiving benefits or professional services from a sports agent.⁶⁵

The upshot of all these regulatory minutiae was to further distance the athlete’s experience from nonathlete campus peers. As found by the *Alston* district court after a bench trial, limiting athlete compensation actually “promotes separation,” and not integration, by incentivizing schools to spend resources on “facilities that benefit student-athletes exclusively” and by “constrain[ing] student-athletes’ financial ability

2023, 4:23 PM), <https://www.usatoday.com/story/sports/college/2023/05/19/power-5-conferences-earnings-billions-2022/70235450007/> [<https://perma.cc/8X6A-DFLM>].

58. Robert J. Romano, *The Concept of Amateurism: How the Term Became Part of the College Sport Vernacular*, 1 U.N.H. SPORTS L. REV. 29, 39 (2022), <https://scholars.unh.edu/cgi/viewcontent.cgi?article=1004&context=unhslr> [<https://perma.cc/3FM3-3ERN>].

59. *See id.*

60. NCAA, *supra* note 3, at 186; *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1063 (N.D. Cal. 2019), *aff’d*, 958 F.3d 1239 (9th Cir. 2020), *aff’d sub nom.* Nat’l Collegiate Athletic Ass’n v. *Alston*, 594 U.S. 69 (2021).

61. NCAA, *supra* note 3, at 181–82; Jeremy Bauer-Wolf, *Coach’s Lies Bring Harsh NCAA Punishment*, INSIDE HIGHER ED (July 2, 2019), <https://www.insidehighered.com/news/2019/07/03/ncaa-slams-former-uconn-coach-lies-during-investigation-minor-rules-violations> [<https://perma.cc/NNU7-PFS8>].

62. NCAA, 2000–01 NCAA DIVISION II MANUAL 57–59 (VANESSA L. ABELL ED., 2000).

63. Carter, *supra* note 9, at 904, 906–07.

64. *Bloom v. Nat’l Collegiate Athletic Ass’n*, 93 P.3d 621, 627 (Colo. App. 2004) (athlete not allowed to pursue acting opportunities).

65. NCAA, *supra* note 3, at 37, 44–45, 48; *Oliver v. Nat’l Collegiate Athletic Ass’n*, 920 N.E.2d 203 (Ohio Ct. Com. Pl. 2009).

to engage in social activities with other students.”⁶⁶ Similarly, curbing professionalization differentiates, rather than integrates, athletes on campus. Among the student body, athletes alone may not consult with a career coach or lawyer with respect to their signature skill set and professional aspirations.⁶⁷ This restriction, designed to avoid an adversarial relationship between the school and the athlete, extended *in loco parentis* only for athletes.⁶⁸

As huge television revenues poured into college coffers, institutional interest in financial and reputational gain through athletics led to the subordination of the very educational values offered to justify the amateurism principle.⁶⁹ Athletes report that the time demands of participating in college athletics prevent them from electing their preferred majors and taking classes they want to take.⁷⁰ By 1995, Walter Byers, who served as the first Executive Director of the NCAA, published a stinging indictment of his former employer’s bureaucracy and Division I athletics more broadly, describing the system as a “neoplantation” that prioritized dollars and unfairly denied athletes “the freedoms that are available to other students at the university in such matters as work opportunities, the right to transfer between schools, and the right to use their name and reputation for financial gain.”⁷¹

For an example of how athletes have been denied the economic and expressive freedoms accorded other students, consider a venture called “The Spew” founded by University of Michigan nonathlete students. From 2017 to 2019, these students hosted a Facebook TV show featuring the university’s athletes as guests.⁷² Attracting advertisers and sponsors from the local community, the nonathlete students pocketed

66. *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1085–86 (N.D. Cal. 2019), *aff’d*, 958 F.3d 1239 (9th Cir. 2020), *aff’d sub nom.* Nat’l Collegiate Athletic Ass’n v. Alston, 594 U.S. 69 (2021).

67. NCAA, *supra* note 3, at 45 (stipulating that athletes who agree to be represented by an agent are deemed ineligible from playing intercollegiate sports).

68. Jeffrey Standen, *The Next Labor Market in College Sports*, 92 OR. L. REV. 1093, 1111 (2014).

69. In 1989, the NCAA television deal for its basketball national championship topped \$1 billion dollars for the first time, contracting for CBS coverage from 1991 to 1997. *Timeline – 1980s*, NCAA, <https://www.ncaa.org/sports/2021/6/14/timeline-1980s.aspx> [<https://perma.cc/V7DW-ZBV7>]. That number grew to \$6 billion in the 1999 deal that covered the ensuing 11 years. *Timeline – 1990s*, NCAA, <https://www.ncaa.org/sports/2021/6/14/timeline1990s.aspx> [<https://perma.cc/X8P9-9ZK5>].

70. *Johnson v. Nat’l Collegiate Athletic Ass’n*, 556 F. Supp. 3d 491, 497 (E.D. Pa. 2021); see, e.g., Andrew Graham & Sam Ogozalek, *Some SU Athletes Said They Were Forced Into Majors ‘They Did Not Want,’ Following National Trend*, DAILY ORANGE (Feb. 14, 2018, 4:30 PM), <https://dailyorange.com/2018/02/su-athletes-said-forced-majors-not-wantfollowing-national-trend/> [<https://perma.cc/4W4B-UEM4>] (reporting on clustering of athletes into less rigorous majors to facilitate their tight schedules and capacity to study).

71. BYERS & HAMMER, *supra* note 46, at 2–3, 343.

72. Emily Bice, *Students and Sports on “The Spew,”* MICH. DAILY (Sept. 27, 2017), <https://www.michigandaily.com/arts/spew-diy-bside/> [<https://perma.cc/6V9M-UA4V>].

revenues that reached \$5,000 in their best year.⁷³ The athletes received nothing, and their participation and commentary were closely vetted and monitored by the athletics department to avoid suggesting the athletes personally endorsed the local laundry service or restaurant that supported the program.⁷⁴

In another example, two students at Hampton University, a Division I school, launched YouTube channels while enrolled from 2016 to 2019, attracting millions of subscribers as they promoted lifestyle and cosmetic products.⁷⁵ Through product reviews, paid sponsorships, and other brand partnerships, they each earned about \$1,000 a month.⁷⁶ Their videos drew on the students' campus experiences as they pursued degrees in advertising and marketing, unchallenged by any college bureaucrats.⁷⁷ Not so for Donald De La Haye, kicker for the University of Central Florida ("UCF") football team during that same time period. When his popular YouTube channel documenting his football skills and campus life started generating revenue in 2018, the university dismissed him from the team and withdrew his scholarship.⁷⁸ The NCAA offered to reinstate him as long as his videos did not reference his status as a student-athlete or depict his football skill or ability.⁷⁹ Unwilling to accept this restraint on his expressive and commercial activities, he brought a federal lawsuit alleging the school violated his First Amendment rights.⁸⁰ The case settled after the court denied the defendant's motion to dismiss, rejecting the argument that De La Haye waived his First Amendment rights as a condition of receiving a scholarship.⁸¹ De La Haye resumed his education at UCF, although not his spot on the football team.⁸²

As discussed in Section II.B below, over the last 20 years, the NCAA bureaucracy has given up yardage to internal pressures and external litigation challenges seeking to expand athlete freedoms. Nonetheless,

73. *Id.*

74. Interview with Justin Kaplan, former Co-Dir. of Bus. Dev. & P'ships, The Spew (Oct. 16, 2023).

75. Lexie Carmon, *Still In College but Already on a YouTube Career Track*, CNBC (July 28, 2017, 4:50 PM), <https://www.cnbc.com/2017/07/28/college-students-turning-youtubechannels-into-real-money.html> [<https://perma.cc/P9BS-ZDGW>].

76. *Id.*

77. *Id.*

78. Alex Kirshner, *He Lost a Scholarship Because of YouTube Ads, so He's Taking NCAA Rules to Court*, SBNATION (July 4, 2018, 11:27 AM), <https://www.sbnation.com/collegefootball/2018/7/13/17565672/donald-de-la-haye-youtube-ncaa-deestroying> [<https://perma.cc/Y8QA-XK3H>].

79. *Id.*; see NCAA, 2018–19 NCAA DIVISION I MANUAL 73, <https://www.ncaapublications.com/p-4547-2018-2019-ncaa-division-i-manual-august-version-available-august-2018.aspx> [<https://perma.cc/TT98-23QR>].

80. Verified Complaint for Declaratory and Injunctive Relief at ¶¶ 2–3, *De La Haye v. Hitt*, No. 6:18-cv-00135 (M.D. Fla. Jan. 25, 2018).

81. Order at 32–34, *De La Haye v. Hitt*, No. 6:18-cv-00135 (M.D. Fla. July 10, 2018).

82. Paolo Uggetti, *How Things Have Come Full Circle for the UCF Kicker Who Chose YouTube Over Football*, ESPN (Sept. 9, 2022, 9:00 AM), https://www.espn.com/college-football/story/_/id/34494288/how-things-come-full-circle-ucf-kicker-chose-youtubefootball [<https://perma.cc/PWN3-STV5>].

on the eve of the watershed year of 2021, the NCAA's principle of amateurism continued to state:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.⁸³

So, Sarita, the saxophone-playing scholarship recipient, could freely exploit the professional and commercial opportunities afforded by her musical talents, while Bethany, the basketball-playing scholarship recipient, could not.

B. *Erosion of the Amateurism Principle in the Twenty-First Century*

The dollars pouring into college sports set the stage for increasing athlete unrest over NCAA paternalism and subordination of athletes' educational and economic well-being. Athletes have challenged, and continue to challenge, the "student-athlete" model on multiple legal fronts, primarily invoking publicity rights, antitrust, and labor and employment law.⁸⁴ Each challenge exposed the deep rift between the athletes' campus experience and that of the general student population, a rift that, in large degree, validated the legal arguments advanced by the athletes. Review of the athletes' lawsuits proceeds in roughly chronological order because history matters,⁸⁵ with each decision bearing persuasive, if not precedential, value on the next.

1. Publicity Rights Challenges to Amateurism

Publicity rights are the intangible property associated with the personality and identity of an individual and encompass NIL.⁸⁶ The right is a creature of state law, situated in judicial decisions, statutes, or both in some states.⁸⁷ The right also finds support in the Lanham Act, which

83. NCAA, *supra* note 3, at 3. Arguably, the disparate treatment of Bethany and Sarita is justified by the fact that colleges are competitors in sports, and not in music (other than competing to recruit the best musicians). But that argument just perpetuates the logical inconsistency this article explores: colleges justify *differentiating* athletes from musicians to better *integrate* athletes and musicians on campus.

84. *See infra* Section II.B.

85. Derek E. Bambauer, *Everything You Want: The Paradox of Customized Intellectual Property Regimes*, BERKELEY TECH. L.J. (forthcoming 2023) (manuscript at 20) (noting that "each [doctrinal] regime's evolution has a gravitational effect on future ones"), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4548113 [<https://perma.cc/K557X465>].

86. *See* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 167–78 (1993), <https://doi.org/10.15779/Z383M86> (recounting the history of the celebrity-driven shift from a privacy-based to a property-based right of publicity).

87. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977) (holding that an action based on the right of publicity is a state law claim); *see, e.g.*, CAL. CIV. CODE

protects consumers against the confusing use of trademarks.⁸⁸ Typical state enactments to establish and protect the right of publicity are laws of general application, and do not distinguish among covered individuals based on any set of characteristics, including whether they are enrolled in college or play sports.⁸⁹

The early innings of college athlete publicity rights lawsuits skirted a direct challenge to the amateur status and compensation limits the NCAA imposes on athletes still attending college.⁹⁰ Instead, in 2009, former college football and basketball players asserted claims against the NCAA and a video game developer for the game's use of avatars that closely resembled the athletes.⁹¹ In 2013, the Ninth Circuit in *Keller* and the Third Circuit in *Hart* each held that the athletes could be entitled to compensation for use of their NIL in these video games.⁹² Given that its amateurism rules prohibited such compensation, the NCAA settled these publicity rights claims and removed from production all video games featuring college athletes so it would not have to pay current "student-athletes" for their NIL.⁹³

Just like the laws on which these publicity rights claims were predicated, the judicial decisions did not differentiate between college athletes and other celebrities who might seek to vindicate this right. Both *Keller* and *Hart* arose before the onslaught of state laws addressing college athlete NIL, and therefore, the plaintiffs asserted claims under laws

§ 3344 (West 1984); *Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) ("[A] man has a right in the publicity value of his photograph . . .").

88. 15 U.S.C. §§ 1114(1), 1125(a); *see, e.g.*, *Rogers v. Grimaldi*, 875 F.2d 994, 1000 (2d Cir. 1989) ("[The Lanham Act] insulates from restriction titles with at least minimal artistic relevance that are ambiguous or only implicitly misleading but leaves vulnerable to claims of deception titles that are explicitly misleading as to source or content . . .").

89. *See, e.g.*, 765 ILL. COMP. STAT. 1075/10 (1999) ("The right to control and to choose whether and how to use an individual's identity for commercial purposes is recognized as each individual's right of publicity."); KY. REV. STAT. ANN. § 391.170 (West 1984) ("The General Assembly recognizes that a person has property rights in his name and likeness which are entitled to protection from commercial exploitation."); WASH. REV. CODE § 63.60.010 (1998) ("Every individual or personality has a property right in the use of his or her name, voice, signature, photograph, or likeness."); *but see* ARIZ. REV. STAT. ANN. § 13-3726 (2007) (prohibiting the use of a deceased soldier's NIL).

90. An earlier scrimmage actually occurred in 2002, in a lawsuit arguing that the NCAA breached a duty of good faith and fair dealing when it declared him ineligible under bylaws barring athlete NIL activities. *See Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621 (Colo. App. 2004) (upholding NCAA decision finding football player ineligible because, among other things, he earned endorsement money in previous athletic career in Olympic and professional skiing).

91. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1272 (9th Cir. 2013) [commonly and hereinafter referred to as *Keller*]; *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 146 (3d Cir. 2013). The term publicity rights include NIL rights and the terms are often used synonymously.

92. *Keller*, 724 F.3d at 1284; *Hart*, 717 F.3d at 170.

93. *Keller*, 724 F.3d at 1276-77; *Hart*, 717 F.3d at 170; *see NCAA Reaches Settlement in EA Video Game Lawsuit*, NCAA (June 9, 2014, 10:53 AM), <https://www.ncaa.org/news/2014/6/9/ncaa-reaches-settlement-in-ea-video-game-lawsuit.aspx> [https://perma.cc/8RSHTWMY].

of general application.⁹⁴ Keller's suit was predicated on the right of publicity established under California statutory and common law.⁹⁵ Hart's suit alleged claims under New Jersey's common law right of publicity.⁹⁶

At no point did the circuit court rulings suggest that the plaintiffs' status as student-athletes compromised their legal rights under those laws of general application. To the contrary, the Ninth Circuit majority in *Keller* rejected the position taken by a dissenting judge that college athletes are not entitled to pursue publicity rights claims because the NCAA has restricted those rights.⁹⁷ Instead, the majority applied the same principle underlying any celebrity's NIL rights—Keller was entitled to capture the value arising from “his talent and years of hard work on the football field.”⁹⁸ The *Keller* court acknowledged that NCAA rules at the time could prohibit the athlete from monetizing his NIL while in school, but emphasized that Keller was not “indefinitely bound” by those rules and after college could “capitalize on his success on the field during college in any number of ways.”⁹⁹ The Third Circuit in *Hart* similarly did not hesitate to apply laws of general application to the plaintiffs, despite that their claims arose from their activities as college athletes.¹⁰⁰

Although *Keller* and *Hart* delivered a victory for the former college athletes, the decisions did not dismantle the various rules and procedures constructed by the NCAA to uphold the amateurism principle. The relief provided was limited to allowing former athletes to seek due compensation for the NCAA's use of their NIL under the same laws relied upon by professional athletes and other celebrities. These decisions left unchanged NCAA rules that barred athletes still in school from commercially exploiting their NIL. Further, the NCAA's decision to abandon its own participation in that commercial activity meant no future video game royalties would line the athletes' pockets. By contrast, Emma Watson, who famously played Hermione Granger in the *Harry Potter* movies, was attending Brown University as *Keller* and *Hart* progressed through the courts, during which time she was free to reap the royalties from the 2010 video game based on the movies.¹⁰¹ College athletes needed to turn to antitrust to pursue more sweeping changes.

94. *Keller*, 724 F.3d at 1272 (citing CAL. CIV. CODE § 3344 (1984)); *Hart*, 717 F.3d at 150–51.

95. *Keller*, 724 F.3d at 1272 (citing CAL. CIV. CODE § 3344 (1984)).

96. *Hart*, 717 F.3d at 150–51.

97. *Keller*, 724 F.3d at 1289 (Thomas, J., dissenting).

98. *Id.* at 1281.

99. *Id.* at 1277–78 n.9.

100. *Hart*, 717 F.3d at 145, 150–51.

101. See *LEGO Harry Potter: Years 1–4*, HARRY POTTER WIKI, https://harrypotter.fandom.com/wiki/LEGO_Harry_Potter:_Years_1-4 [https://perma.cc/79CU-NUQH].

2. Antitrust Challenges to Amateurism

Building on *Keller* and *Hart*, *O'Bannon v. National Collegiate Athletic Ass'n* took the next step and argued that NCAA rules prohibiting schools or third parties from compensating athletes for their NIL violated antitrust laws.¹⁰² Among the most significant rulings in *O'Bannon* was the Ninth Circuit's refusal to read the 1984 Supreme Court decision in *National Collegiate Athletic Ass'n v. Board of Regents* to exempt NCAA amateurism regulations from antitrust scrutiny.¹⁰³ In this regard, the court moved in the direction of parity in the law's treatment of athletes and nonathletes on campus. The decision affirmed an injunction requiring the NCAA to permit its member schools to pay athletes a share of NIL revenues up to the full true "cost of attendance" as determined by the institution and not some centrally dictated lower amount like "grant-in-aid."¹⁰⁴

While *O'Bannon* was pending, the NCAA, perhaps anticipating the outcome, increased the aid cap to cost-of-attendance for all Division I athletes, regardless of NIL use or revenue. Thus, by 2015, schools had begun paying athletes stipends ranging from \$1,500 to \$6,000 per year to cover incidental expenses of attending college.¹⁰⁵ Significantly, those amounts rarely corresponded to the relative cost-of-living at the school's location, but rather tracked relative status as a high-powered athletic program willing to engage in a bidding war to recruit top athletes.¹⁰⁶ De facto pay-to-play had arrived.

Although a significant victory for the athletes, *O'Bannon* turned out to be just another skirmish in the antitrust war against the amateurism principle.¹⁰⁷ The cost-of-attendance boundary it set was soon breached in the *Alston* case. The *Alston* plaintiffs challenged any NCAA restriction on athlete eligibility and compensation as an antitrust violation.¹⁰⁸

102. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1079 (9th Cir. 2015).

103. *Id.* at 1063 (characterizing as "dicta" references to amateurism rules as procompetitive in *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85 (1984)).

104. *Id.* at 1075–76.

105. Joel Feigenbaum, *From Broke to Bespoke: Providing Financial Security to Student-Athletes Within the Confines of Amateurism*, ARIZ. ST. SPORTS & ENT. L.J., Spring 2019, at 13–14.

106. *Id.* at 13–15.

107. The NCAA won one skirmish shortly after *O'Bannon*, but that victory was limited to an antitrust endorsement of the transfer rule, which required athletes who transfer to a Division I college to wait one full academic year before they can play for their new school. *See Deppe v. Nat'l Collegiate Athletic Ass'n*, 893 F.3d 498, 503–04 (7th Cir. 2018) (holding the transfer rule falls within the Supreme Court's *Board of Regents* presumption of procompetitiveness). Despite this victory, soon after the NCAA revised the transfer rule to confer one-time immediate eligibility on athletes who transfer. Michelle Brutlag Hosick, *DI Council Adopts New Transfer Legislation*, NCAA (Apr. 15, 2021, 4:41 PM), <https://www.ncaa.org/news/2021/4/15/di-council-adopts-new-transfer-legislation.aspx> [https://perma.cc/SX6Q-7SEH].

108. *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1062, *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *aff'd sub nom.* NCAA v. *Alston*, 594 U.S. 69 (2021).

Applying the rule of reason at a bench trial, the *Alston* district court found antitrust liability, but more limited than the athletes sought. In order to preserve amateurism as a distinct brand of sports entertainment product, the holding allowed the NCAA to restrict benefits that were unrelated to education, such as cash salaries.¹⁰⁹ But, the challenged NCAA rules were held to be more restrictive than necessary in barring certain noncash educational benefits such as computers, musical instruments, science equipment, study abroad, and post-eligibility tuition and internships.¹¹⁰

In June 2021, the Supreme Court affirmed the *Alston* injunction that allowed NCAA member institutions to offer athletes any in-kind benefit that is tethered to education.¹¹¹ In its opinion, the Court demolished the NCAA's long-standing position that, under *National Collegiate Athletic Ass'n v. Board of Regents*,¹¹² amateurism rules were entitled to an antitrust exemption based on the social objectives they arguably serve.¹¹³ Observing how much "market realities" have changed since *Board of Regents* was decided in 1984, the Court implicitly invited future antitrust challenges if those realities change again.¹¹⁴

In a scathing concurrence, Justice Kavanaugh more explicitly invited antitrust challenges to the NCAA's remaining compensation rules:

[I]t is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes. And if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules.¹¹⁵

Noting that "[e]veryone agrees that the NCAA can require student athletes to be enrolled students in good standing," Justice Kavanaugh rejected that student status requires athletes to play their sport as unpaid amateurs.¹¹⁶ He dismissed the social justifications for differentiating college athletes from other providers of revenue-generating labor, offering, for example, that newspapers cannot "curtail pay to reporters to preserve a 'tradition' of public-minded journalism."¹¹⁷ In this spirit, many college newspapers, in fact, pay their student editors and reporters, illustrating again how NCAA rules have exacerbated rather than

109. *Id.* at 1082–83.

110. *Id.* at 1087–88.

111. *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 107 (2021).

112. *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 101–02 (1984) ("The identification of [college football] with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable . . .").

113. *Alston*, 594 U.S. at 94.

114. *Id.* at 102.

115. *Id.* at 110–111 (Kavanaugh, J., concurring).

116. *Id.* (Kavanaugh, J., concurring).

117. *Id.* at 110 (Kavanaugh, J., concurring).

alleviated disparities between the campus experience of athletes versus other students.¹¹⁸ Justice Kavanaugh's concurrence may be the clearest judicial statement to date in opposition to the bifurcation of American campuses.

Antitrust challenges to amateurism soldier on, including two lawsuits by state Attorneys General attacking NCAA rules that allegedly conflict with state NIL laws and interfere with athletes' freedoms to choose the school best suited to them and to maximize their earning potential.¹¹⁹ First, Tennessee and Virginia won a preliminary injunction against NCAA rules that ban NIL compensation offers to high school athletes during the recruitment process.¹²⁰ There, a Tennessee federal court found irreparable harm to athletes arising out of "suppression of negotiating leverage and the consequential lack of knowledge" of the athlete's true value.¹²¹

Second, Ohio and six other states won a preliminary injunction against the NCAA's transfer rule that requires certain athletes to wait a year before competing when they switch institutions.¹²² There, a West Virginia federal court found irreparable harm to athletes in forgoing opportunities to transfer to a school in their "personal best interest" because of the risk of sitting out athletic contests.¹²³ To compound this defeat, the Department of Justice later joined the West Virginia suit, announcing that "[c]ollege athletes should be able to freely choose the institutions that best meet their academic, personal and professional development needs."¹²⁴ These lawsuits echo this Article's call to place athletes on the same footing as their fellow students as a matter of fairness and opportunity.¹²⁵

Private antitrust lawsuits have also multiplied, including *House v. National Collegiate Athletic Ass'n*, which seeks to enjoin any NCAA

118. Hannah Doctor-Loeb, *Journalism at Small Liberal Arts Colleges Shouldn't Be Inaccessible*, NIEMANLAB (Apr. 12, 2022, 9:00 AM), <https://www.niemanlab.org/2022/04/journalism-at-small-liberal-arts-colleges-shouldnt-beinaccessible/#:~:text=I%20spoke%2C%20via%20email%2C%20with,student%20role%20at%20the%20paper> [https://perma.cc/LHB7-T8CG]; see also Fischer, *supra* note 55 (discussing the salaries paid to the student staffers of the Stanford Daily); *The Collegiate Student Newspaper*, GRAND RAPIDS CMTY. COLL., <https://www.grcc.edu/schools-departments/languageandthought/journalism/collegiate> [https://perma.cc/S74C-S7L9]; *Join the Washington Square News*, WASH. SQUARE NEWS, <https://nyunews.com/join> [https://perma.cc/7Z93-47KM].

119. See Complaint, *Tennessee v. Nat'l Collegiate Athletic Ass'n*, No. 3:24-cv-33 (E.D. Tenn. Jan. 31, 2024); Complaint, *Ohio v. Nat'l Collegiate Athletic Ass'n*, No. 1:23-cv-00100 (N.D. W. Va. Dec. 7, 2023).

120. Tennessee, 2024 WL 755528, *18.

121. *Id.* at *13.

122. Ohio, 2023 WL 9103711, at *13.

123. *Id.* at *10.

124. Press Release, Justice Department Joins Lawsuit Challenging National Collegiate Athletics Association's (NCAA) Transfer Eligibility Rule, Office of Public Affairs, U.S. Dep't of Justice (Jan. 18, 2024), <https://www.justice.gov/opa/pr/justice-department-joins-lawsuit-challenging-national-collegiate-athletics-associations-ncaa>.

125. See *infra* Part IV.

rules interfering with athletes profiting from their NIL, and to extract backpay for lost NIL revenues.¹²⁶ Here, athletes are going a step further than their peers in other campus activities that generate revenue by asking for a percentage of the take, specifically from broadcast rights referred to in the lawsuit as “BNIL.”¹²⁷ The court in *House* has already certified an injunctive relief class of all Division I athletes who competed since the complaint was filed on June 15, 2020,¹²⁸ and a monetary damages class of Division I athletes who competed since 2016.¹²⁹ Notably, the damages class certification decision credited the athletes’ claim that “their [BNIL] value is at least ten percent of the revenues of Defendants’ broadcasting contracts.”¹³⁰ If the BNIL claims are successful, the payouts to athletes would be astronomical and destroy the amateurism model.¹³¹ A 2025 trial date has been set in *House*, but more likely, the claims will be settled or resolved through the next category of challenges to the amateurism model.¹³²

3. Labor and Employment Law Challenges to Amateurism

Parallel to antitrust scrutiny, athletes challenged the amateurism model on labor and employment law grounds. As the argument goes, athletes, especially in revenue sports, should be treated as university employees, and their participation in college athletics should not be characterized as simply an extracurricular activity.¹³³ While no court has

126. *House v. Nat’l Collegiate Athletic Ass’n*, 545 F. Supp. 3d 804, 808, 810 (N.D. Cal. 2021) (granting in part and denying in part motion to dismiss by defendants NCAA and Power 5 conferences; now captioned *In re College Athlete NIL Litigation*). *See also* Complaint, *Carter v. Nat’l Collegiate Athletic Ass’n*, No. 23-cv-6325 (N.D. Cal. Dec. 7, 2023) (antitrust class action against the NCAA and Power 5 to block all restraints on compensation to athletes); Complaint, *Hubbard v. Nat’l Collegiate Athletic Ass’n*, No. 4:23-cv-01593 (N.D. Cal. Apr. 4, 2023) (antitrust damages class action against the NCAA and Power 5 for depriving class members of *Alston*-approved educational benefits and academic achievement awards).

127. *In re Coll. Athlete NIL Litig.*, No. 20-cv-03919, 2023 BL 442182, at *6 (N.D. Cal. Nov. 3, 2023).

128. *In re Coll. Athlete NIL Litig.*, No. 20-cv-03919, 2023 WL 7106483, at *6–7 (N.D. Cal. Sept. 22, 2023).

129. *In re Coll. Athlete NIL Litig.*, 2023 BL 442182, at *5.

130. *Id.* at *18.

131. *See* Amanda Christovich, *The NCAA’s Amateurism Model Is on Trial: Everything You Need to Know*, FRONT OFF. SPORTS (Dec. 18, 2023, 4:16 PM), <https://frontofficesports.com/the-ncaas-amateurism-model-is-on-trial-this-week/> [<https://perma.cc/6GX4-ULRW>].

132. Josh Goldberg, *What You Need to Know About House v. NCAA Prior to Class Certification Hearing this Thursday*, GREENSPOON MARDER LLP (Sept. 20, 2023), <https://www.gmlaw.com/news/what-you-need-to-know-about-house-v-ncaa-prior-to-class-certification-hearing-this-thursday> [<https://perma.cc/24LK-S9VZ>].

133. Early efforts in this vein unsuccessfully asserted employee status on behalf of individual athletes so they could receive workers compensation benefits for athletics-related injuries. *See, e.g.,* *Waldrep v. Tex. Emps. Ins. Ass’n*, 21 S.W.3d 692, 701 (Tex. App. 2000) (rejecting workers compensation claim because the court viewed football players a students); *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170 (Ind. 1983) (same).

yet definitively ruled that athletes are employees entitled to unionize or to protection under fair labor standards laws, momentum is building in that direction.

On the labor front, athletes at private universities have petitioned for employee status under the National Labor Relations Act (“NLRA”).¹³⁴ They seek to be treated like any worker on campus whose efforts contribute to providing a service or bringing revenue to the university.¹³⁵ And indeed, many students do enjoy employee status at their universities in work-study programs and as graduate assistants, including as union members.¹³⁶ Early attempts to attain similar status for college athletes sputtered, with the National Labor Relations Board (“NLRB”) rejecting the Northwestern football players’ petition to unionize for prudential reasons.¹³⁷

However, in September 2021, emboldened by the *Alston* decision, the NLRB General Counsel (“GC”), Jennifer Abruzzo, changed course and opined that some college athletes are employees for purposes of the NLRA.¹³⁸ The GC memorandum indicated a willingness to bring actions against institutions that term such employees “student-athletes” to the extent that misclassification chills athletes’ protected activity under the NLRA.¹³⁹ Two groups of athletes so far have taken up the GC’s offer.

First, Dartmouth men’s basketball players filed a representation election petition asking to form a union.¹⁴⁰ In February 2024, an NLRB

134. 29 U.S.C. §§ 151–152 (discussing the policy of the NLRA and defining relevant terms like “employee”).

135. See BYERS & HAMMER, *supra* note 46, at 11, 69 (remarking on the “excellent salaries” paid to “university officials, coaches, and athletics department staff,” and that “the performance of football and basketball players” is what pays for “stadium employees, field house ticket takers, and restroom attendants”).

136. *Federal Work-Study (FWS) Program*, U.S. DEP’T OF EDUC. (Apr. 17, 2014), <https://www2.ed.gov/programs/fws/index.html> [<https://perma.cc/C3VV-UHJZ>]. For example, at New York University, student work-study positions, some in union shops, can include “office assistants, photo imaging technicians, IT techs, phone surveyors, housing resource center assistants, tutors, newspaper reporters, medical assistants, gym personnel, sales assistants, and more.” *On-Campus Employment FAQs*, NYU, <https://www.nyu.edu/students/student-information-and-resources/career-development-and-jobs/find-a-job-or-internship/on-campus-employment/on-campus-employment-faqs.html> [<https://perma.cc/M6FB-GG9Y>]; Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1096 (2016) (finding graduate research assistants are employees entitled to unionize because the university exercises “requisite control” over their work and “specific work is performed as a condition of receiving the financial aid award”).

137. *Nw. Univ.*, 362 N.L.R.B. 1350, 1354 (2015) (declining to certify a bargaining unit including only football players at Northwestern, the only private school in its conference, because it “would not promote stability in labor relations” as the state schools in the conference are not subject to the NLRB’s jurisdiction).

138. OFF. OF THE GEN. COUNS., MEMORANDUM GC 21-08, STATUTORY RIGHTS OF PLAYERS AT ACADEMIC INSTITUTIONS (STUDENT-ATHLETES) UNDER THE NATIONAL LABOR RELATIONS ACT (2021), <https://apps.nlr.gov/link/document.aspx/09031d458356ec26> [<https://perma.cc/7FPV-3STR>] (footnotes omitted).

139. *Id.* at 4.

140. NLRB RC Petition, Trs. Of Dartmouth Coll., No. 01-RC-32563326 (Sept. 13, 2023).

regional director granted the petition, finding that the players are employees within the meaning of the NLRA.¹⁴¹ The regional director's decision notably rejected Dartmouth's argument that the basketball players do not receive the requisite compensation to be deemed employees, given that they are non-scholarship athletes playing in an unprofitable program.¹⁴² Instead, the regional director interpreted the compensation requirement expansively to find it present in other "fringe benefits" provided to the athletes, including equipment, apparel, game tickets, and early consideration for need-based financial aid.¹⁴³ Further justifying employee status was factual evidence that Dartmouth exercised significant control over the work performed by basketball team members.¹⁴⁴ As of the time of this writing, the university's appeal to the full Board is pending. However, the players moved forward with a vote in favor of union representation, requiring the university to engage in collective bargaining.¹⁴⁵

If followed elsewhere, the Dartmouth decision more than equalizes the playing field for college athletes vis-à-vis their nonathlete classmates. In the regional director's view, "hypothetical student journalists, actors, and musicians" would *not* be entitled to employee status in the absence of a record that suggests these extracurricular activities "dominate students' schedules" or the students "are recruited and admitted through a special process because of their investigatory and artistic skills."¹⁴⁶

Second, the National College Players Association filed an unfair labor practice charge on behalf of University of Southern California ("USC") athletes in the revenue sports of football and men's and women's basketball.¹⁴⁷ The NLRB found merit in the charge, filed a formal complaint, and is now conducting hearings.¹⁴⁸ Among other things, the complaint alleges the NCAA, the Pac-12 Conference, and USC misclassified athletes in revenue sports as nonemployees and violated their rights under the NLRA by restricting their speech in social media posts and communications with third parties and the media.¹⁴⁹ Such restraints, beyond potentially violating labor laws, indicate the degree

141. Trustees of Dartmouth College and Service Employees Int'l Union, Local 560, 01-RC-325633 (N.L.R.B. Region 01 Feb. 7, 2024).

142. *Id.* at 15–16.

143. *Id.* at 20.

144. *Id.* at 21.

145. Michael McCann, *Ten Key Issues for Dartmouth Men's Basketball Moving Forward*, SPORTICO (Mar. 7, 2024), <https://www.sportico.com/law/analysis/2024/dartmouth-mens-basketball-legal-implications-1234769654/> [<https://perma.cc/K3S4-N263>].

146. *Id.*

147. NLRB Charge Against Emp., Univ. S. Cal., No. 31-CA-290326 (Feb. 8, 2022).

148. Complaint and Notice of Hearing, Univ. S. Cal., No. 31-CA-290326 (May 18, 2023); Craig Clough, *NLRB Pushes USC Official on Control Over Athletes' Lives*, LAW360 (Jan. 22, 2024), <https://www.law360.com/articles/1788805/nlrb-pushes-usc-official-on-control-over-athletes-lives> [<https://perma.cc/Q5YC-FGEW>].

149. Complaint and Notice of Hearing, *supra* note 148, at ¶ 6.

of control these institutions exercise over athletes, a factor that can determine employee status in the first place.¹⁵⁰ To that point, typically, the only other students on campus who are subject to speech restraints are those employed in work-study programs for student affairs offices or research labs that deal with confidential student information or intellectual property and require non-disclosure or confidentiality agreements.¹⁵¹ Students not so employed, and not part of an athletic team, are free to discuss their campus experience with anyone.¹⁵² Differentiating athletes from the general population in this way and subjecting them to special rules thus subverts the very amateurism those rules were intended to preserve.

The question of employee status has also arisen under wage and hour laws such as the Fair Labor Standards Act (“FLSA”).¹⁵³ Three recent cases—*Berger*, *Dawson*, and *Johnson*—take this approach.¹⁵⁴ In *Berger v. National Collegiate Athletic Ass’n*, non-scholarship track-and-field athletes sued the University of Pennsylvania, querying why the work-study participants who sold popcorn and programs at school athletic competitions were paid hourly wages, while the athletes whose performance created those jobs were paid nothing.¹⁵⁵ In a 2016 decision, the Seventh Circuit rejected employee status for the athletes and affirmed the dismissal of the complaint, leaning on the NCAA’s “tradition of amateurism” as endorsed by the Supreme Court in *Board of Regents*.¹⁵⁶

Two caveats moderate the *Berger* holding. First, *Alston* subsequently discredited the tradition of amateurism.¹⁵⁷ Second, Judge Hamilton’s concurrence in *Berger* suggests the outcome might have been different if plaintiffs were scholarship athletes playing a revenue sport like Division I football and men’s basketball.¹⁵⁸ The concurrence faults the plaintiffs for pursuing a “broad theory,” the logic of which would have required the court to apply the FLSA to “not only any college athlete in any sport and any NCAA division, but also college musicians, actors, journalists, and debaters.”¹⁵⁹ The concurrence thus implicitly

150. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

151. Colleen Flaherty, ‘What Is Said or Done at the Center,’ *INSIDE HIGHER ED* (Aug. 29, 2019), <https://www.insidehighered.com/news/2019/08/30/marybeth-gasman-requiredstudents-her-research-center-sign-blanket-nondisclosure> [<https://perma.cc/4K7F-JFLW>].

152. *See id.*

153. 29 U.S.C. §§ 201–219.

154. *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 288 (7th Cir. 2016); *Dawson v. Nat’l Collegiate Athletic Ass’n*, 932 F.3d 905, 907 (9th Cir. 2019); *Johnson v. Nat’l Collegiate Athletic Ass’n*, 556 F. Supp. 3d 491, 495 (E.D. Pa.), *motion to certify appeal granted*, No. 19-5230, 2021 WL 6125095, at *2 (E.D. Pa. Dec. 28, 2021).

155. *Berger*, 843 F.3d at 293.

156. *Id.* at 291.

157. *Nat’l Collegiate Athletic Ass’n v. Alston*, 594 U.S. 69, 94 (2021).

158. *Berger*, 843 F.3d at 294 (Hamilton, J., concurring).

159. *Id.*

acknowledges the bifurcation of American campuses into athlete and nonathlete populations.¹⁶⁰

In 2019, the Ninth Circuit affirmed the dismissal of *Dawson v. National Collegiate Athletic Ass'n*, brought by Division I football players in the Pac-12 conference.¹⁶¹ There, FLSA claims were found defective because the athletes sued only the NCAA and the conference, neither of which actually award scholarship aid or supervise athletes.¹⁶² Notably, the court expressly rejected *Berger's* analytical approach and its reliance on the amateurism principle.¹⁶³ Instead, the decision rested on the NCAA and Pac-12's roles as regulatory bodies, without direct control over the athletes.¹⁶⁴

Blending the approach of the former two cases, *Johnson v. National Collegiate Athletic Ass'n* lodged FLSA claims against the NCAA and Division I schools by athletes in both revenue and nonrevenue sports.¹⁶⁵ The *Johnson* district court declined to dismiss these claims, invoking *Alston* to rebuff defendants' reliance on the "tradition of amateurism."¹⁶⁶ Instead, the court applied the "primary beneficiary" test used to determine if an unpaid intern should be deemed an employee.¹⁶⁷ The court allowed the athletes to proceed to discovery on their alleged employee status based principally on three factors set forth in that test: (1) the athletic activities were not sufficiently tied to academic credit; (2) the schools forced athletes to participate in more than thirty hours per week of athletic commitments, which interfered with their academic commitments; and (3) participation in athletics did not provide any significant educational benefits.¹⁶⁸ As of this writing, the litigation is stalled, awaiting rare interlocutory review by the Third Circuit as to whether athletes can be classified as school employees for the purposes

160. Although not mentioned in Judge Hamilton's brief concurrence, college musicians, actors, journalists, and debaters can freely monetize their talents off campus, and some even do so on campus. For example, New York University pays its news reporters. *On Campus Employment*, NYU, <https://www.nyu.edu/students/student-information-and-resources/student-visa-and-immigration/current-students/employment-and-tax/on-campusemployment.html> [https://perma.cc/NWA7-9T9D]; see also Jackson, *supra* note 53, at 1162 (referencing college education as an economic transaction which gives students the means for professional success).

161. *Dawson v. Nat'l Collegiate Athletic Ass'n*, 932 F.3d 905, 908 (9th Cir. 2019).

162. *Id.* at 909–10.

163. *Id.* at 908 n.2.

164. *Id.* at 911.

165. *Johnson v. Nat'l Collegiate Athletic Ass'n*, 556 F. Supp. 3d 491, 495 (9th Cir. 2021).

166. *Id.* at 501.

167. *Id.* at 509–10 (citing *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2016)).

168. *Id.* at 510–12. In a separate opinion, the court denied the NCAA's motion to dismiss because the NCAA was plausibly a joint employer given that it has the power to suspend, or "fire" athletes and it exercises control over athlete compensation, benefits, work schedules, records, and day-to-day activities. *Johnson v. Nat'l Collegiate Athletic Ass'n*, 561 F. Supp. 3d 490, 500–03 (E.D. Pa.), *motion to certify appeal denied*, No. CV 19-5230, 2021 WL 6125453, at *1 (E.D. Pa. Dec. 28, 2021).

of the FLSA “solely by virtue of their participation in interscholastic athletics.”¹⁶⁹

The publicity rights, antitrust, and labor and employment law cases collectively illustrate confusion over the role and status of athletes on college campuses. But what rings clear is that their experience diverges significantly from nonathlete students by virtue of layers of specialized rules and disparate treatment all designed to preserve a version of amateurism.

III. NIL REGULATION EXACERBATES DISPARATE TREATMENT OF ATHLETES

Against this backdrop, this Part surveys the current NIL regulatory environment, including both state laws and the NCAA’s response, which combine in a patchwork quilt of inconsistent and confusing guidance. This Part further describes current trends in NIL activity, including the NIL collective, and the pursuit of a federal legislative solution to provide uniformity and clarity to college athletics.

A. Current NIL Regulatory Environment

1. State NIL Laws

While *Alston* was making its way through the courts, a number of states enacted new laws reinstating the rights of college athletes to exploit their NIL through endorsement deals and other commercial activity free from NCAA interference. California was the first with the Fair Pay to Play Act.¹⁷⁰ Other states soon followed suit, with Florida’s law setting the earliest effective date of July 1, 2021.¹⁷¹ As of this writing, 32 states have passed NIL laws, largely modeled on California’s Act.¹⁷²

169. *Johnson*, 2021 WL 6125095, at *1.

170. CAL. EDUC. CODE § 67456 (2021). The act was signed into law in 2019, with an original effective date of January 1, 2023. *College Football Notebook: Fair Pay to Play Act Signed into California Law*, REUTERS (Sept. 30, 2019, 8:28 PM), <https://www.reuters.com/article/us-football-ncaa-notebook/college-football-notebook-fair-pay-to-play-act-signed-into-california-law-idUSKBN1WG2J3/> [<https://perma.cc/2QCW-9JQT>].

171. FLA. STAT. § 1006.74 (2021); see Anita M. Moorman & Adam R. Cocco, *College Athlete NIL Activities and Institutional Agreements at a Crossroads: An Analysis of the Regulatory Landscape and “Conflict Language” in State NIL Legislation*, 33 J. LEGAL ASPECTS SPORT 59, 60 (2023), <https://doi.org/10.18060/27106>.

172. *NIL Legislation Tracker*, SAUL EWING, <https://www.saul.com/nil-legislation-tracker> [<https://perma.cc/FC6M-BU2T>]; see generally Moorman & Cocco, *supra* note 171, at 59. In addition, “there are currently 29 states that have enacted laws allowing a high school athlete to be compensated for their NIL.” Lauren Bernstein & Dan Lust, *Beware Patchwork of State NIL Laws for Student-Athletes*, LAW360 (May 17, 2023, 3:17 AM), <https://www.law360.com/articles/1678034/beware-patchwork-of-state-nil-laws-for-student-athletes> [<https://perma.cc/989N-X593>]. Treatment of high school athlete NIL is beyond the scope of this Article. However, it should be noted that the NCAA is already facing an antitrust challenge by two basketball athletes for declaring them ineligible to

These various state bills differed slightly in language, but they shared the same basic provisions:

- (1) An athlete's NIL rights cannot be restricted by schools, conferences, or the NCAA.¹⁷³
- (2) Athlete NIL deals may not conflict with deals entered by the school.¹⁷⁴
- (3) Athletes can hire an agent.¹⁷⁵
- (4) Athlete NIL deals must be disclosed to the school.¹⁷⁶
- (5) NIL deals cannot be used as recruiting inducements or pay-for-play.¹⁷⁷

Although ostensibly intended to empower college athletes, note the paternalism in athlete NIL laws and their divergence from laws of general application. State NIL statutes go far beyond merely reinstating athletes' publicity rights and erect all sorts of guardrails and obligations with respect to this commercial activity. For example, Tennessee's law requires athletes to disclose NIL deals to the institution; file annual reports identifying anyone who provides compensation to the athlete; curtail their NIL activity if it conflicts with team agreements or activities; limit the duration of such deals to the period in which the athlete participates in the athletic program; and refrain from promoting "gambling, tobacco, alcohol, and adult entertainment" or activities "reasonably considered to be in conflict with the values of the institution."¹⁷⁸ In effect, despite liberating athletes to monetize their NIL, the Tennessee law and those like it inhibit the right to work and impose content-specific restrictions on athletes' freedoms of speech and association.¹⁷⁹

Other Tennessee college students encounter no such hurdles in monetizing their NIL. Nonathletes proceed under Tennessee's publicity rights statute of general application, which in relevant part merely states: "[e]very individual has a property right in the use of that person's name, photograph, or likeness in any medium in any manner."¹⁸⁰ In an information age dominated by social media, nonathlete students across the country are freely exploiting their publicity rights as influencers, entering marketing deals with fashion and consumer product brands, and, in some cases, even being paid by their schools to promote the

compete because they received NIL compensation while in high school. *See* Complaint and Demand for Jury Trial, *Bewley v. NCAA*, No. 1:23-cv-15570 (N.D. Ill. Nov. 1, 2023).

173. *See, e.g.*, OKLA. STAT. tit. 70, § 820.23 (2021).

174. *See, e.g.*, TEX. EDUC. CODE ANN. § 51.9246(g) (West Supp. 2023).

175. *See, e.g.*, MICH. COMP. LAWS § 390.1733(b) (2020).

176. *See, e.g.*, GA. CODE ANN. § 20-3-681(d) (2021).

177. *See, e.g.*, TENN. CODE ANN. § 49-7-2802(b) (2022).

178. *See, e.g., id.* § 49-7-2802(d), (f), (g), (i), (k).

179. *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), <https://doi.org/10.52214/jla.v45i1.8954> (doubting the constitutionality under the First Amendment of state proscriptions on athlete speech in the context of NIL deals). The constitutional defects in state NIL laws are beyond the scope of this Article.

180. TENN. CODE ANN. § 47-25-1103(a) (2013).

institution.¹⁸¹ In other words, the nonathlete influencer these days regularly enters into NIL deals that serve as recruiting inducements and pay-for-performance.¹⁸² The economics student and gaming design whiz are not required to disclose to their university deals with third parties, file reports, defer to preexisting university deals, or eschew association with so-called “vice” products.

This disparity raises the question of why Tennessee and other states did not enact laws that simply declare that participation in intercollegiate athletics in no way detracts from any college student’s right to control and profit from their NIL under state law. Instead, specialized NIL laws largely defer to the NCAA’s disparate treatment of athletes, encumbering their restored publicity rights with a raft of provisos and protections of school prerogatives and rents. Thus, even in today’s permissive NIL world, universities continue to function *in loco parentis* toward their athletes.¹⁸³

Despite broad resemblance among state NIL laws, differences abound, turning the college sports industry into the “wild, wild west.”¹⁸⁴ For example, the states have adopted two distinct frameworks for NIL laws, one directly restricting athletes and the other mandating or permitting institutions to restrict athletes.¹⁸⁵ States have taken widely different approaches in dealing with “conflicts of interest,” that is when athlete commercial activity is at odds with the student’s contract with the university, the student’s obligation to the team, the university’s contracts with sponsors, or the university’s institutional mission, values, or honor code.¹⁸⁶ And there is even greater variation in state procedures to address those conflicts, including with respect to disclosure requirements, opportunities to revise athlete deals, processes for appealing a university decision regarding a conflict, and state enforcement methods.¹⁸⁷ This medley of state legislation has caused confusion among athletes and their schools as to what is permissible and what risks an NCAA infraction.¹⁸⁸ None of this oversight constrains the nonathletes

181. Lindsay McKenzie, *Big Influencers on Campus*, INSIDE HIGHER ED (Dec. 4, 2019), <https://www.insidehighered.com/news/2019/12/05/working-student-social-media-influencers> [<https://perma.cc/WN84-DTDU>].

182. Ezra Marcus, *Colleges Are Hiring Their Own Students as Covid-19 Safety Influencers*, N.Y. TIMES (Sept. 29, 2020), <https://www.nytimes.com/2020/09/26/style/coronaviruscampus-influencers.html> [<https://perma.cc/L95P-RXEC>] (reporting that colleges hire student influencers to market to high schoolers).

183. Carter, *supra* note 9, at 894–95 and accompanying text.

184. Mark Wogenrich, *Penn State’s James Franklin Calls NIL ‘the Wild, Wild West,’* FANNATION (Dec. 26, 2022, 12:37 AM), <https://www.si.com/college/pennstate/football/penn-state-football-james-franklin-nil-wild-wild-west> [<https://perma.cc/PT7M-MARQ>].

185. See Moorman & Cocco, *supra* note 171, at 67.

186. *Id.* at 70–74.

187. *Id.* at 75, 77.

188. Josh Moody, *Lack of Clear-Cut NCAA Rules Creates Confusion about NIL*, INSIDE HIGHER ED (Jan. 3, 2022), <https://www.insidehighered.com/news/2022/01/04/lack-clear-ncaa-rules-creates-confusion-around-nil> [<https://perma.cc/2WGT-EXHX>].

on campus, such as social media influencer Katey Feeney, Penn State class of 2025, who, despite the university's sponsorship deal with Nike, freely hawks a variety of competing athletic wear to her two million followers.¹⁸⁹

Even more confounding, state NIL law is a moving target as states amend their statutes to preserve their competitive advantage in recruiting. For example, Arkansas and Oklahoma updated their laws to allow schools to facilitate NIL deals and to offer donor incentives, like game tickets, for NIL giving.¹⁹⁰ Missouri and Texas amended their NIL laws to allow coaches and university officials to play a more active role in NIL deals.¹⁹¹ Separately, California is considering protections and rights for athletes beyond the current NIL regime with a “revenue sharing” bill that would require universities in the state to pay the athletes a share of broadcast rights fees and other athletic revenue generated above a 2021–2022 baseline.¹⁹² If similar bills find backers in other states, college athletics, especially nonrevenue sports, may be drained of resources depending on where they are located.

Other states, like Alabama, repealed their NIL laws after the NCAA announced its permissive approach to NIL.¹⁹³ While the Alabama repeal was motivated more by recruiting needs and not a concern for the athletes, its effect was to situate athletes exactly as their nonathlete counterparts under state publicity rights law.¹⁹⁴ Despite this backtracking from specialized NIL legislation, schools located in Alabama still may impose their own policies tailored to athlete NIL exploitation. The University of Alabama (“UA”) has done exactly that, requiring, among other things, that its athletes disclose representation and compensation agreements and refrain from associating with vice products.¹⁹⁵ The stated “scope” of the policy “applies to all UA student-athletes”; in

189. Anderley Penwell, *Penn State's Queen of Tik Tok: Katie Feeney*, ABC 27 (Oct. 27, 2022), <https://www.abc27.com/sports/nittany-nation/influencer-uses-penn-state-to-grow-brand/> [https://perma.cc/ZW3E-T7B6]; see Katie Feeny, AMAZON, <https://www.amazon.com/shop/katiefeeney> [https://perma.cc/WA4N-XHSK]; *Penn State Wrestling Gear*, PENN STATE CLOTHES, <https://www.pennstateclothes.com/sports-gear-wrestling/browse/brand/nike> [https://perma.cc/JD56-PVND].

190. ARK. CODE § 4-75-1303(b) (2023) (permitting universities to directly negotiate NIL deals on behalf of athletes); OKLA. STAT. tit. 70, § 820.27B (2023) (prohibiting NCAA from investigating or punishing schools for enabling athlete NIL opportunities).

191. MO. REV. STAT. § 173.280(4)(2)(b) (2023); TEX. EDUC. CODE § 51.9246 (2023).

192. College Athlete Protection Act, No. 252, 2023 Cal. Legis. (2023).

193. Act of Apr. 19, 2021, 2021 Ala. Laws 227 (repealed 2022); H.R. 76, 2022 Leg., Reg. Sess. (Ala. 2022). Like most states, the initial Alabama statute barred athletes from entering contracts that conflict with college deals and required athletes to disclose all NIL deals. 2021 Ala. Laws 227. South Carolina has suspended, although not yet repealed, its college athlete NIL law. S.C. CODE ANN. § 59-158-20 (2022).

194. William Lawrence, *Alabama Has Repealed Its NIL Law – Can Alabama's Student-Athletes Still Get Paid?*, JDSUPRA (Feb. 17, 2022), <https://www.jdsupra.com/legalnews/alabama-has-repealed-its-nil-law-can-7729528/> [https://perma.cc/VM3X-VMPPM].

195. *Student-Athlete Name, Image, and Likeness Compensation Policy*, UNIV. OF ALA., <https://secure2.compliancebridge.com/uat/public/getdocUA.php?file=134> [https://perma.cc/8K3H-GMXG].

other words, nonathlete students are free to exploit their NIL without comparable restrictions.¹⁹⁶

In 2023, Florida similarly scaled back its NIL law, amending the landmark 2021 legislation to eliminate restrictions and burdens on athlete NIL activity.¹⁹⁷ Notably, the current version articulates the rights of college athletes in terms of affording “equal opportunity” to control and profit from their NIL.¹⁹⁸ This formulation communicates that, at least as a matter of state law, college athletes should not be treated any differently than their campus peers or other celebrities in exercising NIL rights. To the extent the amended law differentiates athletes from other students, it is to confer the benefit of requiring schools to offer athletes “financial literacy, life skills, and entrepreneurship workshops.”¹⁹⁹ The amended law also makes explicit what likely is already presumed as to the institution’s relationship with nonathlete students, namely, that the school cannot be held liable for damages as a result of routine athletic department decisions that might reduce the value of an athlete’s NIL.²⁰⁰ Whether or not intended, Florida has meaningfully moved toward equalizing athletes’ rights vis-à-vis other students and celebrities. But parity will not be achievable unless the NCAA and universities similarly refrain from private regulation.

2. NCAA Response to State NIL Laws

The NCAA initially responded to the passage of state NIL laws with threats to ban member schools located in those states and to seek an injunction stopping the laws as constitutionally defective.²⁰¹ After *Alston* came down, the NCAA reassessed its strategy and decided to police rather than prevent this dimension of the commercialization of college athletics. To be clear, the *Alston* decision did not in any way address college athlete publicity rights.²⁰² Rather, the coincidental arrival of the Court’s unanimous, amateurism-defeating decision on June 21, 2021, only days before the July 1, 2021, effective date of the first state NIL law, likely dissuaded the NCAA from following up on their litigation threats against the states.²⁰³

196. *Id.*

197. H.B. 7B, 2023 Leg., Reg. Sess. (Fla. 2023)

198. FLA. STAT. § 1006.74(1) (2023).

199. *Id.* § 1006.74(2).

200. *Id.* § 1006.74(3).

201. *Report: NCAA May Ban California Schools if Bill Pushing NIL Rights Isn’t Squashed*, NBC SPORTS (June 24, 2019, 8:03 AM) <https://www.nbcsports.com/college-basketball/news/report-ncaa-may-ban-california-schools-if-bill-pushing-nil-rights-isnt-squashed> [<https://perma.cc/GF9H-JLMR>]; Ross Dellenger, *With Recruiting in Mind, States Jockey to One-Up Each Other in Chaotic Race for NIL Laws*, SPORTS ILLUSTRATED (Mar. 4, 2021), <https://www.si.com/college/2021/03/04/name-image-likeness-state-laws-congress-ncaa> [<https://perma.cc/H2GR-9CWG>].

202. *See generally* Nat’l Collegiate Athletic Ass’n v. *Alston*, 594 U.S. 69 (2021).

203. *See id.* at 107.

Accordingly, on June 30, 2021, the NCAA issued interim rules that permit college athletes to “engage in NIL activities that are consistent with the law of the state where the school is located.”²⁰⁴ The policy also allows athletes to retain a “professional services provider” in association with NIL activities and instructs the schools to develop procedures for athletes to disclose their NIL contracts.²⁰⁵ That policy was followed by November 2021 guidance in which the NCAA clarified that the amateurism principle still forbids: (1) NIL compensation without requiring the athlete to perform any work; (2) NIL agreements contingent upon enrollment at a particular school (recruiting inducements); (3) compensation for athletic participation or achievement (pay-for-play); and (4) schools compensating athletes in exchange for using the athlete’s NIL.²⁰⁶ Again, no regulatory body similarly restricts nonathlete students who seek to monetize their NIL.

Additional guidance arrived in October 2022, allowing schools to administer a marketplace that matches athletes with NIL opportunities, facilitate on-campus meetings, and promote athlete NIL activity, as long as the schools do not fund the entities that are paying athletes for their NIL.²⁰⁷ In a rare retreat from regulatory differentiation of athlete and nonathlete students, this guidance also prohibits privileging athletes with free services like representation in NIL deals, legal review of contracts, tax preparation, and graphic design assistance, unless such services are available to all students.²⁰⁸ This position ostensibly reflects the concern that when a university provides a special service solely to athletes it is providing a form of pay-for-play. Yet, the NCAA never similarly policed the long-standing practice of universities providing athletes alone on campus with special living accommodations, dining facilities, and even academic majors.²⁰⁹ This inconsistency further exposes the misbegotten nature of the NCAA’s regulatory project from the outset.

Despite these guardrails, it became increasingly apparent that third parties were using NIL deals as recruiting inducements.²¹⁰ In response, the NCAA, in a June 27, 2023, memorandum, cautioned that boosters and

204. Hosick, *supra* note 18.

205. *Id.*

206. *Name Image and Likeness Policy Question and Answer*, NCAA (Nov. 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf [https://perma.cc/A5FNHJHF].

207. Meghan Durham, *DI Board Approves Clarifications for Interim NIL Policy*, NCAA (Oct. 26, 2022, 1:21 PM), <https://www.ncaa.org/news/2022/10/26/media-center-di-boardapproves-clarifications-for-interim-nil-policy.aspx> [https://perma.cc/BB4H-GNC5]; *Institutional Involvement in a Student-Athlete’s NIL Activities*, NCAA (Oct. 26, 2022), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf [https://perma.cc/2FU9-LRT4].

208. NCAA, *supra* note 180, at 1.

209. *See supra* note 46 and accompanying text; *see* Standen, *supra* note 68, at 1120.

210. *See infra* note 238 and accompanying text.

collectives may not engage in recruiting activities or conversations.²¹¹ The memo also warned that member institutions must “adhere to NCAA legislation (or policy) when it conflicts with permissive state laws.”²¹² That warning is likely a dead letter because, as a private association, the NCAA may enforce its rules only to the extent that doing so does not conflict with applicable state law.²¹³ Accordingly, the NCAA has desisted from pursuing NIL infractions to the extent the process would penalize athletes, who are expressly protected under state NIL laws.²¹⁴ In the one NIL enforcement action concluded so far, the NCAA sanctioned the University of Miami women’s basketball program and its coach for infractions involving the recruitment of transfer students Hanna and Haley Cavinder, but did not penalize the athletes.²¹⁵

Even as to institutional sanctions, the threat of state NIL law enforcement against the NCAA has caused it to pull some punches. In a 2023 NCAA enforcement action against the University of Tennessee football program, the NCAA found over 200 violations during an earlier three-year span, and imposed an \$8 million fine and five-year probation, among other sanctions.²¹⁶ Ordinarily, such serious and numerous violations would also result in suspension from postseason bowl games. That didn’t materialize after the Tennessee Attorney General (“AG”) sent a letter to the NCAA threatening legal action for any prospective bowl ban, citing the state’s NIL statute and warning that “NCAA rules cannot supersede Tennessee law.”²¹⁷ The AG argued that suspending the

211. E-mail from NCAA National Office to NCAA Athletics Directors, Conference Commissioners, Presidents, Chancellors, Senior Compliance Administrators, Sports Information Directors, Student-Athlete Affairs Administrators, Senior Woman Administrators, & Select NCAA Staff in Division I (June 27, 2023), <https://mc97gsxn49y6wmpf4p2n764zq7z1.pub.sfmc-content.com/2ezhy1105pc> [hereinafter E-Mail from NCAA].

212. *Id.*

213. See Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 544 (7th Cir. 1978); see also Patrick O’Donnell, *There is No NCAA Supremacy Clause, Especially for NIL*, LAW360 (Mar. 5, 2024, 4:13 PM), <https://www.law360.com/articles/1808965/there-is-no-ncaa-supremacy-clause-especially-for-nil> [https://perma.cc/D5NS-EZPB].

214. See *supra* notes 178–85 and accompanying text. It should be noted that the NCAA does not assert authority to directly regulate the conduct of students, alumni, boosters and other outside entities, and places the compliance obligation on the member institutions, at risk of disciplinary action. NCAA CONST., art. I.E Institutional Control (2022); NCAA, 2023-24 DIVISION I MANUAL §§ 8.01, 8.4 (2023).

215. Pat Forde & Ross Dellenger, *NCAA Issues First NIL Ruling, with Cavinder Twins at the Center of It*, SPORTS ILLUSTRATED (Feb. 24, 2023), <https://www.si.com/college/2023/02/24/cavinder-twins-miami-womens-basketball-infractions-nil-ncaa> [https://perma.cc/CWX2-7YQ].

216. Meghan Durham Wright, *Hundreds of Violations Occurred in Tennessee Football Program Over 3 Seasons*, NCAA (July 14, 2023, 11:00 AM), <https://www.ncaa.org/news/2023/7/14/media-center-hundreds-of-violations-occurred-in-tennessee-football-program-over-3-seasons.aspx> [https://perma.cc/6N6Z-CXBR].

217. Andrew Hope, *A Look at Recent Changes to the NIL Landscape for Student Athletes*, LAW.COM (Aug. 24, 2023, 12:36 PM), <https://www.law.com/thelegalintelligencer/2023/08/24/a-look-at-recent-changes-to-the-nil-landscape-for-student-athletes/> [https://perma.cc/AZZ4-7HYL].

postseason would undermine the statutory rights of current, faultless members of the football team to earn compensation for their athletic success.²¹⁸ When the NCAA later threatened to enforce its ban on using NIL as a recruiting inducement, the AG convinced a federal court to enjoin that ban.²¹⁹

The uncertain future of NCAA NIL enforcement efforts is compounded by the unpredictable path the divisions will take under the NCAA's new constitution. Adopted in the wake of *Alston* and the inception of NIL exploitation, the new constitution decentralizes the NCAA's authority and shifts power to schools and conferences.²²⁰ Going forward, each of the three divisions will set its own rules, including eligibility, academic standards, and NIL activity.²²¹ Those policies already diverge considerably.²²² At the time of this writing, Division I is moving forward with further NIL proposals that establish uniform rules regarding disclosure of NIL agreements and urge the use of standardized contract terms in those agreements.²²³ All these policies regulate athletes alone among students on campus.

Each installment of private rulemaking is shaped in part by state legislative activity, which in turn begets further NCAA and divisional response in a perpetual cycle of specialized regulation and differentiation of college athletes. And the risk of antitrust scrutiny hovers over all the private legislative efforts. The result is a body of private law as muddled as the combined state NIL laws, offering little clarity or predictability to the college athletes subject to these laws.

218. Luis Ferro, *Tennessee's Stand: Attorney General Skremetti Challenges the NCAA*, UNIV. MIAMI L. REV. (Oct. 16, 2023), <https://lawreview.law.miami.edu/tennessees-stand-attorney-general-skremetti-challenges-the-ncaa/> [https://perma.cc/SDT2-UYHC].

219. See *supra* notes 120–24 and accompanying text.

220. Corbin McGuire, *NCAA Members Approve New Constitution*, NCAA (Jan. 20, 2022, 6:12 PM), <https://www.ncaa.org/news/2022/1/20/media-center-ncaa-members-approvenewconstitution.aspx> [https://perma.cc/BQ9H-68J8].

221. *Id.*; NCAA CONST. art. 2(B) (2021).

222. See generally *Name, Image and Likeness Interim Policy Resources*, NCAA, <https://www.ncaa.org/sports/2021/2/8/about-taking-action.aspx> [https://perma.cc/U4DQ-RWA4]; NCAA DIVISION I, INTERIM NAME, IMAGE AND LIKENESS POLICY GUIDANCE REGARDING THIRD PARTY INVOLVEMENT (2022), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf [https://perma.cc/78AR-83NY]; NCAA DIVISION II, INTERIM NAME, IMAGE AND LIKENESS POLICY GUIDANCE REGARDING THIRD PARTY INVOLVEMENT (2022), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/July2022D2NIL_Guidance.pdf [https://perma.cc/VM4G-DL3J]; NCAA DIVISION III, INTERIM NAME, IMAGE AND LIKENESS POLICY GUIDANCE REGARDING THIRD PARTY INVOLVEMENT (2022), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/Oct2022D3NIL_Guidance.pdf [https://perma.cc/2WVF-WXU8].

223. *DI Council Introduces Proposals to Boost Student-Athlete NIL Protections*, NCAA (Oct. 3, 2023, 6:43 PM), <https://www.ncaa.org/news/2023/10/3/media-center-di-councilintroduces-proposals-to-boost-student-athlete-nil-protections.aspx> [https://perma.cc/8T8K-XX8Q].

B. Trends in NIL Activity

The lack of clarity in NIL regulation has contributed to three trends that both expose the bifurcation of college campuses and, in some instances, mitigate it. These trends have surfaced in: (1) the transfer portal, (2) high school recruiting, and (3) NIL collectives.

First, NIL opportunities have unlocked the NCAA's transfer portal, which long constrained athletes from pursuing their ideal educational and sport-related setting. Until a rule change in 2021, athletes who transferred to a Division I school had to wait one full academic year before they could play for their new school.²²⁴ Athletes might consider transferring for a variety of reasons related to their sport, such as coaching changes or not advancing up the depth chart. By the same token, athletes might consider transferring because of a desire to return closer to home, a family emergency, or a preference as to climate or social setting. None of these reasons would spare them a year of sitting out of their sport.²²⁵

Contrast the nonathlete student who could transfer freely for any reason, even our hypothetical saxophone scholarship student seeking a better opportunity in another university's orchestra. While the NCAA's relaxing of transfer restrictions ameliorated this disparity to some degree,²²⁶ in combination with NIL permissiveness, it also introduced financial considerations into an athlete's decision on whether to transfer. Athletes began to treat the transfer portal as a gateway to free agency, not only to negotiate better playing time but also to access more valuable NIL opportunities.²²⁷ With athletes freer to seek the compensation they deserve, the façade of amateurism continues to erode.²²⁸

The second trend parallels the first. High school recruiting battles began to center around NIL deals. High school athletes, especially those with substantial market value, began to consider potential NIL revenue

224. NCAA, 2019-20 DIVISION I MANUAL § 14.5.5.1 (2019) ("A transfer student from a four-year institution shall not be eligible for intercollegiate competition at a member institution until the student has fulfilled a residence requirement of one full academic year . . ."); see *Deppe v. NCAA*, 893 F.3d at 503–04 (7th Cir. 2018). In 2021, the NCAA revised this rule to grant all Division I athletes a one-time opportunity to transfer and compete immediately. NCAA, 2021-2022 DIVISION I MANUAL § 14.5.5.2.10 (2021).

225. NCAA, *supra* note 224, § 14.5.5.2 (waiving the one-year residence requirement for bona fide exchange student programs, discontinued academic program, military service, and international study requirements).

226. Hosick, *supra* note 107 (permitting a one-time transfer with immediate eligibility to play).

227. Joe Moglia, *If Congress Wants to Fix NIL, We Need More Than Half Measures*, SPORTICO (Aug. 31, 2023, 5:55 AM), <https://www.sportico.com/leagues/college-sports/2023/ncaa-federal-legislation-gaps-joe-moglia-1234735411/> [<https://perma.cc/TR6E-FTXE>].

228. The West Virginia federal court's preliminary injunction of NCAA transfer rules has accelerated this phenomenon. See *supra* notes 123–25 and accompanying text.

when evaluating their college suitors.²²⁹ Until the Tennessee federal court enjoyed the relevant NCAA rules, colleges could not expressly pledge NIL money to recruit those athletes at risk of an infraction.²³⁰ That development epitomizes the cycle of private regulation begetting a public law response. In parallel, states have enacted and amended existing laws that extend the special treatment of athletes to those in high school, usually perpetuating disparities with nonathlete students.²³¹

Third, NIL collectives have emerged as a dominant presence in athletic recruiting. Collectives pool resources from fans, alumni, and donors to fund NIL opportunities for athletes at a particular school. At the time of this writing, over 120 collectives exist, and the number is climbing steadily.²³² As opposed to self-facilitated NIL transactions where athletes seek out opportunities for themselves, collectives deliver those opportunities to recruit or retain athletes on school teams.²³³ Once again, the NCAA responded to market innovation with additional regulation, deeming collectives to be booster organizations subject to a host of restrictions on how they interact with recruits.²³⁴ But, the transformative power of NIL collectives cannot be overstated. Largely driven by those entities, the earnings of college athletes are predicted to exceed \$1 billion from NIL activity in 2023–2024.²³⁵ NIL valuations for top college athletes run in the millions of dollars.²³⁶

229. Tan Boston, *The NIL Glass Ceiling*, 57 U. RICH. L. REV. 1107, 1136–37 (2023), <http://dx.doi.org/10.2139/ssrn.4218277>; Pete Nakos, *High School Recruiting's Multi-Million NIL Bidding Wars Seeing "Reset,"* ON3NIL (May 16, 2023), <https://www.on3.com/nl/news/high-school-football-recruitings-multi-million-nil-bidding-wars-seeing-reset/> [<https://perm.a.cc/LM5L-FUQA>].

230. Ross Dellenger, *The Doors Are Opening for NCAA to Close in on NIL Violations*, SPORTS ILLUSTRATED (Jan. 30, 2023), <https://www.si.com/college/2023/01/30/ncaa-enforcement-name-image-likeness-more-room-investigations> [<https://perma.cc/A3TY-U3EF>]; see *supra* notes 120–21 and accompanying text.

231. See generally Francesca Casalino, *Call to the Bullpen: Saving High School Student Athlete Name, Image, and Likeness Rights*, 29 JEFFREY S. MOORAD SPORTS L.J. 263, 278–81 (2022) (weighing the pros and cons of allowing high school student athletes to capitalize on their NIL, and ultimately arguing for congressional legislation on the issue); Chavez et al., *NYSPHSAA Says High School Athletes Can Profit From Name and Image. What We Know*, DEMOCRAT AND CHRONICLE (Oct. 20, 2021, 5:21 PM), <https://www.democratandchronicle.com/story/sports/high-school/2021/10/20/ny-high-school-athletes-can-benefit-nil-deals-nysphsaa-says/6107729001/> [<https://perma.cc/7ETLK9XS>]. But see ALA. HIGH SCHOOL ATHLETIC ASS'N, 2020-21 HANDBOOK § 8 (2020).

232. *Tracker: University-Specific NIL Collectives*, BUS. OF COLL. SPORTS (Oct. 4, 2023), <https://businessofcollegesports.com/tracker-university-specific-nil-collectives/> [<https://perma.cc/QY5HUBX3>].

233. Tan T. Boston, *NIL Data Transparency*, 83 LA. L. REV. 905, 913–14 (2023), <https://dx.doi.org/10.2139/ssrn.4271838>.

234. See *supra* notes 210–15 and accompanying text; *Name, Image and Likeness Interim Policy Resources*, NCAA (2021), <https://www.ncaa.org/sports/2021/2/8/about-takingaction.aspx> [<https://perma.cc/7Y44-AB6W>]; E-mail from NCAA, *supra* note 211.

235. OPENDORSE, *supra* note 19, at 5.

236. Nick Cottongim, *Top 20 College Athletes with the Highest NIL Valuations*, THE FAN (Sept. 15, 2023), <https://1075thefan.com/playlist/top-20-college-athletes-with-the-highest-nil-valuations/> [<https://perma.cc/Y5QF-L5MR>].

Accompanying the financial windfall of NIL, college athletes began to access a host of benefits long available to similarly situated nonathletes, including business and brand building, entrepreneurial freedom, community engagement, and career preparation.²³⁷

These three trends undoubtedly manifest the use of NIL as recruiting inducements, regardless of the NCAA's admonitions.²³⁸ And the future likely holds further disruption as stories of flagrant pay-for-play and predatory deals made with vulnerable athletes generate more private rulemaking and public law rejoinders.²³⁹ Overlooked by NCAA naysayers are early signs that NIL activity can further the organization's values. Female athletes have thrived in the NIL space, earning both money and a platform to advance gender equity in college and professional sports.²⁴⁰ More athletes may now opt to stay in school because deferring a professional career no longer means deferring opportunities to earn money.²⁴¹ And competitive balance may be a beneficiary, as NIL compensation has facilitated spreading out talent among more schools, rather than concentrating it among the best and richest programs.²⁴² But it seems unlikely that the NCAA will soon abandon the amateurism principle or trust in a self-correcting market, given its pursuit of a federal legislative solution, discussed in Section III.C.

C. Federal Legislative Response Unlikely

Deeming the status quo untenable, schools, conferences, coaches, and other stakeholders have clamored for federal legislation to create

237. *Id.*

238. Dodd, *supra* note 23.

239. Nicole Sadek & Ronnie Greene, *Fake Contracts and 40% Fees: College Athletes Get Scammed on NIL Deals*, BLOOMBERG (July 18, 2023, 4:04 AM), <https://www.bloomberg.com/news/articles/2023-07-18/college-athletes-get-scammed-sign-away-their-likenesses?embedded-checkout=true> [https://perma.cc/8Y96-3HGX]; Bomani Jones, *Even the Supreme Court Can't Save the NCAA from Itself*, N.Y. TIMES (Mar. 21, 2023), <https://www.nytimes.com/2023/03/21/opinion/ncaa-march-madness-college-athlete-compensation.html> [https://perma.cc/62VV-T6AB].

240. OPENDORSE, *supra* note 19, at 5; Katie Lever, *'I Would Not Have As Many Opportunities': How NIL is Helping Women College Athletes Bypass Barriers*, GLOBAL SPORT MATTERS (Sept. 27, 2022), <https://globalsportmatters.com/business/2022/09/27/opportunities-nilwomen-college-athletes/> [https://perma.cc/SM7L-WDUL]. *But see* Boston, *supra* note 229, at 1134 (arguing that NIL collectives disproportionately benefit male athletes in violation of Title IX's prohibition on sex discrimination in higher education).

241. Amanda Cristovich, *Men's Basketball Players Are Staying in School Longer Thanks to NIL*, FRONT OFF. SPORTS (July 26, 2023), <https://frontofficesports.com/nil-impact-on-the-nba-draft/> [https://perma.cc/KJ9B-CGSZ]; Molly Geary, *NIL Could Give Women's College Basketball One of Its Biggest Wins*, (Nov. 1, 2023, 8:30 AM), <https://www.sportico.com/leagues/college-sports/2023/angel-reese-caitlin-clark-wnbacollege-nil-return-1234744080/> [https://perma.cc/KY3S-NATB].

242. Dennis Dodd, *How NIL, Transfer Portal Have Surprisingly Brought Some Much-Needed Talent Parity to College Football*, CBS SPORTS (Oct. 5, 2023, 2:54 PM), <https://www.cbssports.com/college-football/news/how-nil-transfer-portal-have-surprisingly-brought-some-much-needed-talent-parity-to-college-football/> [https://perma.cc/SVZ4-UCFL].

uniformity and facilitate governing NIL in college athletics. From the perspective of these interests, four significant issues demand legislative attention: (1) NIL payments that serve as improper recruiting inducements; (2) athlete employee status; (3) NCAA authority to regulate without antitrust liability; and (4) Title IX treatment of NIL payments.²⁴³ Dozens of bills have been proposed, but none have made it beyond the early stages of the legislative process.²⁴⁴

Some of the bills emphasize the rights and economic interests of college athletes and are unsurprisingly opposed by the NCAA.²⁴⁵ For example, the College Athlete Economic Freedom Act (“CAEFA”) contemplates an unrestricted federal NIL right that the NCAA, conferences, and schools could not constrain.²⁴⁶ Under this right, athletes would be free to collectively negotiate NIL contracts, including through legal representatives, athlete agents, and players’ associations.²⁴⁷ Correspondingly, CAEFA requires schools, conferences, and the NCAA to pay for a group license from college athletes to use their NIL for any promotional purposes, including in broadcast rights deals.²⁴⁸ This provision echoes the athletes’ antitrust claims in the *House* litigation seeking a share of broadcast revenue from the NCAA and the most elite Division I conferences.²⁴⁹ CAEFA also prohibits college and NIL collective practices that discriminate on the basis of gender, race, or sport.²⁵⁰

On the other hand, the Protecting Athletes, Schools, and Sports Act (“PASS”) is far more deferential to the NCAA.²⁵¹ Like most of the federal proposals, the bill prohibits the NCAA and universities from barring athletes who engage in NIL activity.²⁵² However, to advance the uniformity the NCAA seeks, the bill would preempt state laws that conflict with the federal statute’s NIL guardrails, that allow college athletes to receive a direct share of the revenue they help to generate, or that are inconsistent with Title IX’s prohibition on sex discrimination in higher education.²⁵³

243. Amanda Christovich, *The Debate Over Amateurism Is Holding Up an NIL Law*, FRONT OFF. SPORTS (Oct. 30, 2023, 2:59 PM), <https://frontofficesports.com/the-debate-over-amateurism-is-holding-up-an-nil-law/> [https://perma.cc/3SWA-5PU9].

244. Dan Murphy, *Senators Offer Latest Bill Aimed at College Sports, NIL Reform*, ESPN (July 20, 2023, 7:00 AM), https://www.espn.com/college-sports/story/_/id/38039799/senators-offer-latest-bill-aimed-college-sports-nil-reform [https://perma.cc/V6R7-RUJS].

245. Matt Ford, *The NCAA’s Plot to Protect Its Riches from Labor Unions*, NEW REPUBLIC (Oct. 24, 2023), <https://newrepublic.com/article/176393/congress-ncaa-college-athleteunions> [https://perma.cc/699L-A39J].

246. H.R. 4948, 118th Cong. (2023).

247. *Id.* § 3(a)(3).

248. *Id.* § 3(a)(4).

249. See Doctor-Loeb, *supra* note 118; Grant House v. Nat’l Collegiate Athletic Ass’n, 545 F. Supp. 3d 804, 808 (N.D. Cal. 2021).

250. H.R. 4948 § 3(b)(2)(B).

251. S. 2495, 118th Cong. (2023).

252. *Id.* § 5(d)(1).

253. *Id.* § 11(a).

PASS also delivers on much of the NCAA's wish list for NIL regulation, including a certification process for NIL agents, a uniform contract for athletes to use in NIL deals, limitations on the activities of boosters and collectives, including recruiting inducements, and reinstatement of the NCAA's authority to regulate the transfer portal.²⁵⁴ Athletes can be prohibited from endorsing vice products and wearing anything with the insignia of an entity while also wearing athletic gear provided by the school or while participating in a competition.²⁵⁵ In a salve to athletes' interests, PASS requires athletic departments that meet certain revenue floors to cover athletes' medical costs for two years after their playing career.²⁵⁶ Most critically, PASS shields the NCAA, conferences, and universities from liability under federal or state law for entering any agreements or adopting any rules that are otherwise consistent with PASS and affirms the validity of such agreements or rules.²⁵⁷

Regardless of their evident concern for athletes, bills like these sharpen the divide between athletes and nonathletes on campus. CAEFA insists on paying athletes a share of the value of what they create but does not similarly insist on protecting the economic interests of nonathletes. College students who work in a university lab on scientific research projects with commercial potential rarely participate in the profits from any patents generated, depending on the inclination of the university.²⁵⁸ Yet no federal legislation is being proposed to impose national standards on and create student rights under university intellectual property policies. PASS suffers from the same bifurcation and *in loco parentis* approach as the state laws discussed earlier.²⁵⁹

All the federal bills face difficult odds of securing passage.²⁶⁰ As of the time of this writing, despite favorable media coverage, no NIL bill has advanced out of committee.²⁶¹ In this hyper-regulated environment, college athletics stakeholders across the board will continue to face

254. *Id.* §§ 3–5, 6(b).

255. *Id.* § 5(c)(2)(A), (B).

256. *Id.* § 7(c)(2)(B)(ii).

257. *Id.* § 10.

258. Beryl Lieff Benderly, *Who Counts as an Inventor? The Answer Could Be Worth Millions*, SCIENCE (Aug. 2, 2017), <https://www.science.org/content/article/who-counts-inventoranswer-could-be-worth-millions> [<https://perma.cc/7CQZ-9D3H>].

259. See *supra* Section III.A.

260. Ross Dellenger, *Will Congress Find Middle Ground and Pass NIL Legislation? Ted Cruz Thinks it's '60-40.' Others are Less Optimistic.*, YAHOO! SPORTS (Sept. 19, 2023), <https://sports.yahoo.com/will-congress-find-middle-ground-and-pass-nil-legislation-ted-cruz-thinks-its-60-40-others-are-less-optimistic-210036462.html> [<https://perma.cc/BBY6-HNTH>]; Eric Prisbell, *Examining the NCAA's Aggressive Push for Federal NIL Laws*, ON3NIL (Sept. 25, 2023), <https://www.on3.com/nil/news/ncaa-aggressively-pushes-for-federal-nil-bill-coreybooker-lindsey-graham-tommy-tuberville-joe-manchin/> [<https://perma.cc/Y9FH-FMCX>].

261. Nicole Auerbach, *The NCAA's Hopes to Control NIL Laws Hinge on Congress. Will It Get What It Wants?*, ATHLETIC (June 2, 2023), <https://theathletic.com/4566889/2023/06/02/ncaa-nil-rules-laws-congress-bills/> [<https://perma.cc/GE93-MV3L>].

uncertainty and complexity in organizing their affairs with respect to NIL activity, recruiting, and compliance.

IV. THE FREE-MARKET SOLUTION

As demonstrated, not only is the current regulatory landscape a compliance minefield, but it has also exacerbated the bifurcation of higher education. Instead, all stakeholders should consider a free-market solution that removes both the states and the NCAA—and dissuades the federal government—from regulating athlete NIL beyond those laws and rules that apply to all college students. This Part will argue that complete withdrawal from special interest NIL lawmaking is both necessary and optimal. It is necessary because athletes are entitled to at least equal treatment with fellow students who are not subject to legislated redistribution of their worth. It is optimal because it is more likely to achieve the objectives sought by all stakeholders, including the NCAA and the athletes, and may clear a path toward deregulating other areas of college athletics.

Customized rules addressing a specific industry or class of individuals—whether set forth in public or private law—are often a form of rent seeking by an interest group.²⁶² Professor Bambauer observes that, while they may be cloaked in rhetoric about societal values or the broader welfare, customized rules “result[] in systems that deliberately bias the distribution of benefits.”²⁶³ In this vein, the NCAA has promulgated a private legal system ostensibly to protect the values of amateurism and students from commercial exploitation.²⁶⁴ State NIL laws also manifest this phenomenon to the extent that: (1) the earliest iterations represent the efforts of college athletes and their advocates to restore athletes’ rights, and (2) later iterations reflect states’ wish to even the recruiting playing field.

Scholars take a pessimistic view of special interest legislation because it “foster[s] the redistribution of wealth from large groups, including the public as a whole, to small ones.”²⁶⁵ In the case of college athletics,

262. See Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982) (explaining that interest groups seek special interest legislation because they receive a concentrated benefit or “rent,” while the costs are dispersed on the general public as taxpayers who have few incentives to oppose it). Rent seeking is when an entity seeks to gain added wealth without reciprocal contribution or productivity. Christina Majaski, *What Is Rent Seeking in Economics, and What Are Some Examples?*, INVESTOPEDIA (Dec. 3, 2021) <https://www.investopedia.com/terms/r/rentseeking.asp> [<https://perma.cc/7VRZ-TVDT>].

263. Derek E. Bambauer, *Everything You Want: The Paradox of Customized Intellectual Property Regimes*, BERKELEY TECH. L.J. (forthcoming 2023) (manuscript at 7), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4548113 [<https://perma.cc/K557X465>] (exploring the debate over customized intellectual property regimes versus rules of general application).

264. NCAA, DIVISION I 2020–21 MANUAL § 2.9 (2020).

265. Posner, *supra* note 262, at 266; see also Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 231 (2012) (“[R]ent-seeking activity distorts the economic market and discourages economic productivity.”).

the body of customized private rules has effectuated a similar transfer of wealth from revenue-sport athletes to nonrevenue sports, athletic departments, conferences, and the NCAA.²⁶⁶ Founded in an age of minimal revenues, the NCAA may not have started out rent seeking, but that is where it has landed today with its layers of rules that prohibit the principal contributor to its athletics prosperity from capitalizing on it.²⁶⁷ An additional layer of customized public laws arrived in the NIL era, ostensibly to liberate athletes from the redistributive burden. But, as described, those laws have embraced paternalistic treatment of athletes to protect the rents flowing into the coffers of the NCAA and its member institutions.²⁶⁸

In perpetuating this cycle of dueling regulation, the NCAA and state actors are, in Walter Byers's words, "attempting to achieve what in fact is an impossible dream."²⁶⁹ Ostensibly insisting that the athlete be treated just like any other student, they have shackled the athlete with endless proscriptions, while nonathletes enjoy more campus freedom each decade.²⁷⁰ Those freedoms include free speech rights to endorse and associate with any commercial enterprise,²⁷¹ and rights to work at jobs that best align with their abilities and interests.²⁷² The colleges argue that athletes have contracted away these freedoms in exchange for the right to play their sport and, for many, to receive full cost-of-attendance.²⁷³ However, no other students are asked to make such sacrifices to enjoy participation in extracurricular activities, even when the university offers scholarships dedicated to participants in those activities.²⁷⁴ With the abandonment of *in loco parentis* control of the larger student population, equity demands that athletes enjoy the same freedoms, unfettered by private or public restraints.

Further, deregulation is more likely to achieve the goals of the stakeholders on both sides of the issue. It is a paradox of special interest legislation that those who succeed in obtaining customized legal treatment for their members nonetheless often find themselves disappointed with

266. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1151–52 (N.D. Cal. 2014) (explaining that the NCAA's revenue-sharing system redistributes wealth from players to teams and sports other than football and basketball).

267. BYERS & HAMMER, *supra* note 46, at 346.

268. See Marcus, *supra* note 182 and accompanying text.

269. BYERS & HAMMER, *supra* note 46, at 337.

270. *Id.*

271. See Carter, *supra* note 9, at 894–95.

272. See *id.* at 906–07.

273. See *id.* at 900.

274. See, e.g., *Kenan Music Scholars Program*, *supra* note 1 (for student musicians); *Tuition, Financial Aid & Awards*, USC SCH. OF DRAMATIC ARTS, <https://dramaticarts.usc.edu/u/programs/undergraduate/tuition/> [<https://perma.cc/GK2Z-PC57>] (for student actors, producers, designers, and other creatives); *Thomas More University Scholarships*, THOMAS MORE UNIV., <https://www.thomasmore.edu/admissions/scholarships-financial-aid/scholarships/> [<https://perma.cc/C43Z-V4Y4>] (for members of the cheerleading squad or dance team).

the results.²⁷⁵ As Professor Bambauer describes, the interest groups campaigning for specialized systems are often not homogenous, forcing the adoption of rules that are more politically feasible, as opposed to more sustainable and profitable.²⁷⁶ In addition, “despite their expertise and private information, interest groups are no better at predicting economic and technological change than any other observer.”²⁷⁷ As a result, they adopt short-sighted rules incapable of adapting to inevitable change.

This phenomenon is evident in the NCAA’s continually evolving guidance on NIL commercial activity.²⁷⁸ The push-and-pull among universities, conferences, and NCAA headquarters has coalesced around a “worst-case” mentality that greater freedom conferred on athletes and alumni will result in a recruiting advantage or competitive advantage for some members.²⁷⁹ That mentality is also reflected in state NIL laws that initially sought to micromanage the NIL space and were later narrowed or repealed.²⁸⁰

Professor Bambauer has identified possible gauges for the effectiveness of customized legal rules, including their efficacy in managing an industry’s transition between business models.²⁸¹ He offers the example of the Audio Home Recording Act of 1992 (“AHRA”), which sought to manage the music world’s transition from analog to digital recording.²⁸² The Act’s technical provisions regulated digital audio tape technology to curtail unlawful copying and piracy but did not reach home computer hard drives.²⁸³ At the same time, the Act made it legal for consumers to copy records at home for private, non-commercial use.²⁸⁴ Consumers exploited the Act’s loophole by copying CDs on home computers and sharing them over the internet, unleashing file-sharing networks and rendering the AHRA obsolete within a decade of its enactment.²⁸⁵ That episode sounds eerily like the NIL legal landscape, as state and NCAA efforts to manage the transition from amateurism to professionalism produced private and public laws that become successive dead letters.

Considering the underlying interests of the stakeholders in the NIL space, deregulation offers a better path. On one side, the NCAA primarily seeks to prevent the recruitment process from devolving into bidding wars and disguised pay-for-play and, correspondingly, to maintain a competitive balance on the playing field. Basic economics instructs

275. Bambauer, *supra* note 263, at 8.

276. *Id.*

277. *Id.*

278. *See supra* Section III.B.

279. BYERS & HAMMER, *supra* note 46, at 375.

280. *See* Section II.C; *supra* notes 193–200 and accompanying text.

281. Bambauer, *supra* note 263, at 19–20.

282. *Id.* at 29.

283. *Id.* at 39.

284. *Id.*

285. *Id.* at 39–40.

that expanding the permissible resources to recruit athletes will better distribute those athletes across college programs and improve competitive balance.²⁸⁶ Before NIL, caps on scholarship aid meant that schools had to funnel their resources solely through hiring the top coach, building the best facilities, and offering the most television exposure. It follows that athletic talent would concentrate in fewer schools. Introduce outside sources of athlete compensation and freedom of movement through the transfer portal, and the result is talent dispersed across a wider swath of athletic programs.²⁸⁷ NIL activity has thus far closed the talent gap across schools, some of which were never before contenders in their sport.²⁸⁸ While it is too soon to predict the long-term, at least in the short-term NIL activity has brought greater competitive balance in college athletics.²⁸⁹ If athlete NIL were fully deregulated, these benefits might extend even further.

NIL deregulation would also strengthen the NCAA's financial position. It would enable the NCAA to divert enforcement budgets to other worthier causes within its purview, including athlete health, safety, and educational programs.²⁹⁰ While some enforcement staff may be out of a job, the organization and its members would benefit from dialing down the negative public attention generated by the NCAA infractions process.²⁹¹ On the revenue side, the NCAA already plans to revive business lines that incorporate athlete NIL. The NCAA announced it would resume licensing video games abandoned after the 2013 *Keller* decision required compensating athletes to use their NIL in those games.²⁹² Freeing up schools to partner with athletes in NIL exploitation will raise the value of an athletic department's existing sponsorship deals and open new markets.²⁹³

286. Jay Bilas, *Why NIL Has Been Good for College Sports . . . and the Hurdles That Remain*, ESPN (June 29, 2022, 7:00 AM), https://www.espn.com/collegesports/story/_/id/34161311/why-nil-good-college-sports-hurdles-remain [https://perma.cc/LVZ9-Z8LR].

287. Dodd, *supra* note 23.

288. *Id.*

289. Mark Owens et al., *The Impact of Name, Image, and Likeness Contracts on Student-Athlete College Choice*, SOC. SCI. RSCH. NETWORK 5 (Mar. 11, 2023), <http://dx.doi.org/10.2139/ssrn.4385246>.

290. *Well-Being*, NCAA, <https://www.ncaa.org/sports/2021/2/10/health-and-safety.aspx> [https://perma.cc/U4CW-Z7J5].

291. See, e.g., Mike Vernon, *Bill Self vs. The NCAA: The Inside Story that Nearly Changed KU Hoops History*, KU HEARINGS (Oct. 12, 2023), <https://www.kuhearings.com/p/bill-self-vs-ncaa-inside-story-nearly-changed-ku-hoops-history> [https://perma.cc/W263-Q7RG] (describing the NCAA as “the worst bureaucracy in the history of bureaucracies” and criticisms of its enforcement process).

292. See NCAA, *supra* note 93 and accompanying text; Michael Rothstein, *EA Sports Letting FBS Players Opt in to 2024 Video Game*, ESPN (May 17, 2023, 8:30 AM), https://www.espn.com/college-football/story/_/id/37668089/ea-sports-letting-fbs-players-opt-2024-video-game [https://perma.cc/ZWE3-WQMV].

293. Dan Murphy, *NCAA to Discuss NIL Changes Allowing More School Involvement*, ESPN (Oct. 9, 2023, 1:17 PM), https://www.espn.com/college-sports/story/_/id/38615589/ncaa-discuss-nil-changes-allowing-more-school-involvement

From the athletes' perspective, further deregulating NIL would enhance their share in the wealth they help create. To the extent regulatory constraints and complexity deter some avenues of NIL exploitation, athletes would be better off with a simplified system that eliminates these obstacles. It is self-evident that athletes would benefit from restoring their economic and expressive freedoms. And to the extent all stakeholders share the goal of advancing athletes' education, broader NIL opportunities would offer incentives to stay in school, regardless of an athlete's professional prospects.²⁹⁴

Mechanically, it is a simple matter for states to repeal their NIL laws, as Alabama and Florida have already done, and announce that college athletes have the same publicity rights as anyone covered by state laws of general application.²⁹⁵ In turn, the NCAA and its divisions would strip down the rule book to the initial straightforward guidance that athletes may "engage in NIL activities that are consistent with the law of the state where the school is located."²⁹⁶ The NCAA would discard limits on using professional service providers, institutional support for NIL activity, and booster involvement. Conferences and universities could scrap their athlete-specific NIL policies and default to campus rules applicable to all students with respect to rights of publicity.

NIL deregulation would not be an invitation to intellectual property lawlessness but rather to nondiscrimination. All stakeholders would continue to be subject to laws of general application. So, an athlete engaged in NIL commercial activity is no more entitled to incorporate school trademarks into the deal than any person seeking to exploit individual publicity rights. Trademark law would continue to protect schools and conferences from unlicensed, unauthorized commercial use of their names and logos. Athletes would still have to wear the uniforms designated by their school and comply with school branding deals while practicing and playing their sport, just as a member of the university orchestra must dress in all black while on stage.

Nor does NIL deregulation require absolute parity between athletes and nonathletes in every regard. For example, for certain athletic programs and sports, it may be that the athletes are deemed employees by the courts or the NLRB and covered by labor and employment laws of general application.²⁹⁷ Nonathletes employed by the university in facilities such as dining halls, libraries, and bookstores are already similarly

[<https://perma.cc/9FCR-ZBZU>]; see also Andy Wittry, *An Examination: To What Degree Will NIL Deals Affect Athletic Department Revenue?*, OUT OF BOUNDS (July 16, 2021), <https://andywittry.substack.com/p/an-examination-will-nil-deals-affect> [<https://perma.cc/WXS6-LTHK>] (comparing the Olympic games where athlete endorsement deals have enhanced rather than cannibalized existing sponsorship deals).

294. Bilas, *supra* note 286.

295. See H.B. 76, 2021 Leg., Reg. Sess. (Ala. 2022); H.B. 7B, 2023 Leg., Reg. Sess. (Fla. 2023).

296. Hosick, *supra* note 18.

297. See *supra* notes 140–46 and accompanying text.

protected. But students engaged in extracurricular activities that do not create employee status would not access those same rights and benefits.

Likewise, the NCAA and its members would still be subject to Title IX's prohibitions on sex discrimination in higher education. Individual schools would need to align their NIL activity with Title IX constraints on benefiting male students disproportionately to female students. That law might dictate distancing the school from directly compensating athletes or closely coordinating with boosters and collectives, but it applies to every campus program, not just athletics, in ensuring gender equity.²⁹⁸ Additionally, NIL deregulation would not preclude continued scrutiny of NCAA practices under the antitrust laws, unlike some proposed federal legislation that would immunize those practices.²⁹⁹

Given the tenor of federal legislation being contemplated at the time of this writing, both sides have much to lose depending on whether momentum favors CAEFA, PASS, or some other proposal.³⁰⁰ Every proposal Congress is considering extends special treatment beyond NIL to some other title of the U.S. Code, whether labor, Title IX, or antitrust. In that regard, federal legislation will create more problems than it will solve in this transitional stage of the professionalization of college athletics. Subjecting athletes to the same laws—public and private—governing the NIL of nonathletes and the broader society will avoid those unintended consequences, ameliorate the bifurcation of campus life, and return essential freedoms to students who play sports.

V. CONCLUSION

On a deregulated campus, Sarita, the saxophone player, and Bethany, the basketball player, could both pursue NIL opportunities without restraint. Like Sarita, Bethany would be able to serve as a brand ambassador for myriad products and services, monetize her social media feeds, appear in sponsored programming and at promotional events, sign autographs, and receive cash and in-kind benefits to associate her NIL with whoever is willing to pay. She could do so with maximum freedom, flexibility, and access to representation, and without disclosing her business affairs to her university, waiting for conflicts checks and clearance, or eschewing associations that offend university “values.” A salutary byproduct of this freedom would be to enhance Bethany’s autonomy in choosing a school and charting her educational path.

From the school’s perspective, simplifying the legislative landscape will create efficiencies throughout the athletic program and the campus beyond. While colleges—or their boosters—may need to find money to pay for athlete NIL, deregulation will reduce operating costs, encourage

298. Boston, *supra* note 229, at 1141–42.

299. See S. 2495, 118th Cong. § 8(b) (2023).

300. See H.R. 4948, 118th Cong. (2023); S. 2495.

innovation, facilitate expanding athletics programs, enable accessing a wider range of athletic talent, and permit offering a richer variety of student experiences. It may also short-circuit ongoing legal challenges to remaining NIL restrictions and relocate that dispute from the courthouse to the bargaining table, a more efficient medium. In this regard, expect the professional players' unions to have a role in organizing college athlete labor. Similarly, the professional leagues may consider investing in college teams in revenue sports like football and basketball, especially those required to pay BNIL to their athletes, to sustain their value as developmental leagues.

This Article offers an essentially modest proposal, addressed solely to the regulation of athlete NIL rights. But the arguments apply equally to other spheres of regulation of intercollegiate athletics. A broader free market approach would entertain innovations such as proactively classifying students as employees and paying them, realigning conferences by sport, or spinning off revenue sports to a special purpose asset vehicle that operates pursuant to university intellectual property licenses.³⁰¹

Granted, such proposals drop all pretense that the athletic competitions are being contested by amateurs. But schools can still market their programs as college athletics even if the students are not amateurs. As Justice Kavanaugh remarked in his *Alston* concurrence: "Everyone agrees that the NCAA can require student athletes to be enrolled students in good standing."³⁰² And that seems to be enough from the consumer's perspective. Despite dire warnings about the fate of college sports in the NIL era, the industry is booming. Fans apparently do not care about amateurism anymore, if they ever did, and college sports media rights agreements continue to increase in value.³⁰³ Whether or not NIL is deregulated, college sports are inexorably moving away from amateurism, and the NCAA should lead that charge or find itself left behind.

301. See Michael McCann, *supra* note 145; Jeff Schultz, *It's Time for College Football to Leave Conferences and Let Other Sports Make Sense*, *ATHLETIC* (Aug. 9, 2023), https://theathletic.com/4759133/2023/08/09/college-football-realignment-schultz/?access_token=10904340 [<https://perma.cc/2U7T-HZVF>]; cf. Mark J. Drozdowski, *Is Private Equity the Next Big Thing in College Sports?*, *BEST COLLEGES* (Oct. 23, 2023), <https://www.bestcolleges.com/news/analysis/private-equity-in-college-sports/> [<https://perma.cc/WJS3-RDRK>].

302. *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 110 (2021) (Kavanaugh, J., concurring).

303. Debbie Spander, *NCAA's NIL Answer Is Not in Congress—It's in Athletes' Rights*, *SPORTICO* (Nov. 1, 2023, 8:30 AM), <https://www.sportico.com/leagues/college-sports/2023/ncaa-nil-congress-athletes-labor-market-1234744052/> [<https://perma.cc/JD4L-TCWW>].