

A FINE MESS: THE NCAA, THE COLLEGIATE MODEL, AND THE POST-*ALSTON* WORLD

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I. Introduction

At the NCAA's inception, its bylaws embodied the collegiate model of college athletic programs.¹ The collegiate model meant that college athletic programs should be integrated into the greater university and that athletes who competed in college sports should be students in more than name only.² The collegiate model also meant that college athletes neither should be paid to compete³ nor permitted to exploit their name, image, likeness ("NIL").⁴ The consequence was that competition in college athletics had an identity distinct from professional sports and appealed to a different commercial market.⁵

The collegiate model matched aspiration with reality in the beginning, when college sports did not generate large revenues, when there was no large, centralized NCAA administrative structure with rules governing athletic

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1. As recently as the 2021-22 Constitution, the collegiate model was described as the NCAA's "fundamental policy." See NCAA CONSTITUTION art. 1.3 (repealed 2022) in NCAA, 2021-22 NCAA DIVISION I MANUAL 1 (2021) [hereinafter 2021-22 NCAA DIVISION I MANUAL], <https://www.ncaapublications.com/productdownloads/D122.pdf>. The collegiate model included the principle of amateurism and the principles of sound academic standards. *Id.* arts. 2.5, 2.9, in 2021-22 NCAA DIVISION I MANUAL, *supra*, at 3.

2. For an overview of how collegiate sports historically was structured, see generally, WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 40 (1995).

3. 2021-22 NCAA DIVISION I MANUAL, *supra* note 1, art. 12.1.2, at 63.

4. See *id.* art. 12.5.2, at 77.

5. See NCAA CONSTITUTION art. 1.3.1, in 2021-22 NCAA DIVISION I MANUAL, *supra* note 1, at 1 ("clear line of demarcation between intercollegiate athletics and professional sports").

academic eligibility that were separate from a university's admissions standards, when coach and athletic administrator salaries matched those of the faculty, when athletic fundraising was part of overall university fundraising, and when athletic administration, spending, and scholarship were subject to campus protocols and financial constraints.⁶

Over time, however, things changed. Football viewing became a passion that extended beyond students, faculty, and alumni at an individual school to national fan bases, often from those who neither attended nor were employed by the university they supported.⁷ Athletic departments did their own fundraising, had their own marketing and sponsorship deals, and received substantial donor support focused specifically on them.

The Supreme Court's 1984 decision in *NCAA v. Board of Regents of the University of Oklahoma*⁸ was the real game changer. The case freed athletic departments and their conferences from NCAA broadcast constraints, permitting them to enter lucrative football broadcast deals that, in turn, generated bigger and more lucrative sponsorships and exclusive licensing

6. For an overview of the historical structure of collegiate sports, see, for example, BYERS WITH HAMMER, *supra* note 2, at 40.

7. For a description of the mutation of college athletic programs from extra-curricular student avocations to year-round commitments with substantial fan bases and donor support, see Josephine (Jo) R. Potuto et al., *What's in a Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student-Athletes*, 92 ORE. L. REV. 879, 891-92 (2014). NCAA bylaws now dictate minimum standards for initial eligibility. Standards include an academic component that connects NCAA calculation of high school grade-point average to grades and credits in specified core courses. There also are initial eligibility requirements for transfer college athletes. NCAA continuing eligibility requirements focus on individual college athletes and specify progress-toward-degree markers. The Committee on Academic Performance focuses on team academic performance and excludes from NCAA championship competition teams with poor records of academic performance. Some critics claim that, even at the outset, college athletic programs failed to promote the goals of higher education. See, e.g., ANDREW ZIMBALIST, *UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS* 7 (1999).

8. 468 U.S. 85 (1984). The Court prohibited the NCAA from limiting the television appearances of the major college football powers. *Id.* at 120. The antitrust laws focus on consumers, and the impact violations have on the quality and cost of products. A defense in an antitrust case must be economic. The Board of Regents Court seemed to suggest that the NCAA could not survive economic scrutiny by claiming it was in the education business or that it produced a public good. See *id.* Instead, the Court implied that the NCAA could prevail only by showing that its bylaws had a procompetitive effect for consumers evaluated solely in economic terms. See *id.* at 104-08. The Court in *NCAA v. Alston* made explicit that there is no special antitrust category for NCAA eleemosynary activity. See 141 S. Ct. 2141, 2159-60 (2021).

arrangements. Although substantial funds still went to college athletes in the form of athletic scholarships,⁹ enhanced medical services, training, nutrition, tutors, and academic support services,¹⁰ the largest and most visible part of revenues went to coach and administrator salaries and athletic facilities.¹¹

Athletic departments and conferences in the football bowl subdivision (“FBS”)¹² of NCAA Division I¹³ benefitted the most in the aftermath of *Board of Regents*. By 2021, the College Football Playoff produced \$470 million,¹⁴ most of which going to universities in the five autonomy (“A5”)

9. It is estimated that Division I universities spend 18.2% of their total revenues on scholarships. Andrew Zimbalist, *Who Wins with College Sports*, ECONOFACT (Jan. 23, 2023), <https://econofact.org/who-wins-with-college-sports>.

10. At A5 programs, benefits also typically include dieticians, weight trainers, and sports psychologists. See generally *Power 5 Conferences*, FOOTBALLCOLLEGES.COM (Dec. 27, 2022), <https://www.footballcolleges.com/power-5-conferences/> (defining Power 5 conferences). College athletes also have access to additional funds to cover education-related expenses writ broadly, including campus parking, campus transportation, and training expenses for national championships. Potuto et al., *supra* note 7, at 901–02; NCAA DIV. I TRANSFORMATION COMM., FINAL REPORT 7 (2023) [hereinafter DIV. I TRANSFORMATION COMM. REPORT], https://ncaaorg.s3.amazonaws.com/committees/d1/transform/Jan2023D1TC_FinalReport.pdf. The recommendations of the Division I Transformation Committee would expand these services to include two years of medical coverage for athletically related injuries after a college athlete no longer competes, degree completion funding for ten years, additional academic, career, and life skills counseling and enhanced mental health treatment. *Id.* at 6, 12–13. Post-*Alston*, the NCAA may not cap academic recognition awards at less than what a university is permitted to spend on athletic achievement awards. The current amount that a university may provide is just short of \$6,000 annually. Herbert Hovenkamp, *A Miser’s Rule of Reason: The Supreme Court and Antitrust Limits on Student Athlete Compensation*, 78 NYU ANN. SURV. AM. L. 1, 3 (2022).

11. DI universities spend an estimated 53% of their revenues on administrative and coach salaries (salaries 35%; facilities 18%). Zimbalist, *supra* note 9. The median FBS head football coach salary is \$3.5 million. *Id.* For a description of athletic facilities, and the disparity between them and campus projects, see Potuto et al., *supra* note 7, at 897–98.

12. The FBS is a subdivision of NCAA Division I. NCAA, 2022-23 NCAA DIVISION I MANUAL, at xi (2022) [hereinafter 2022-23 NCAA DIVISION I MANUAL], <https://www.ncaa.com/publications/productdownloads/D123.pdf>.

13. The NCAA has three divisions. *Id.* at x (referencing NCAA Divisions I (DI), II (DII), and III (DIII)).

14. NCAA v. Alston, 141 S. Ct. 2141, 2150 (2021). At the same time, the NCAA broadcast contract for the DI men’s basketball tournament was \$1.1 billion. *Id.* The tournament provides approximately 85% of all NCAA revenues. Eben Novy-Williams, *March Madness Daily: The NCAA’s Billion Dollar Cash Cow*, SPORTICO (Mar. 26, 2022, 9:00 AM), <https://www.sportico.com/leagues/college-sports/2022/march-madness-daily-the-ncaas-billion-dollar-cash-cow-1234668823/>. Out of these revenues, the NCAA not only funds programs that directly advantage college athletes, but it handles membership services;

conferences (Big Ten, SEC, Pacific 12, ACC, and Big 12).¹⁵ Beginning in 2024, the SEC will distribute \$300 million annually, divided among its member schools from its ESPN broadcast contract.¹⁶ At the same time, the Big Ten Conference will distribute \$350 million, the bulk of the money coming from its media deal.¹⁷

Dean Smith, the long-time head men's basketball coach at the University of North Carolina at Chapel Hill, once described college athletics as a university's "front porch"; its "most visible part, but certainly not the most important."¹⁸ The question increasingly became whether the college athletic

enforcement/infractions and student-athlete reinstatement cases; provides staff support and also covers expenses for all meetings of boards, councils, cabinets, and committees; funds national office staff salaries and expenses; and operates the Eligibility Center, which certifies eligibility for domestic and international prospects on academic and amateurism grounds. Potuto et al., *supra* note 7, at 915. On average, around 60% of those revenues are distributed to member institutions. *Finances*, NCAA, <https://www.ncaa.org/sports/2021/5/4/finances.aspx> (last visited Sept. 20, 2023) ("About 60% of the NCAA's annual revenue — around \$600 million — is annually distributed directly to Division I member schools and conferences, while more than \$150 million funds Division I championships.").

15. The A5 Conferences (sometimes referred to as the Power 5, or P5) were the five conferences that comprised all the major football powers, excluding Notre Dame. They had proportionately greater voting power in NCAA Division I FBS compared to other conferences and they also had bylaw authority specific to them in selected subject areas. 2022-23 NCAA DIVISION I MANUAL, *supra* note 12, at xi. In 2023, the Pac 12 Conference imploded. Four universities relocated to the Big Ten Conference, four to the Big 12 Conference, and two to the ACC. Amanda Christovich, *The Pac-12 Plays Its Final Regular-Season Game. Then a Court Decides Its Fate*, FRONT OFFICE SPORTS (Dec. 1 2023, 1:17 PM), <https://frontofficesports.com/the-pac-12-plays-its-final-regular-season-game-then-a-court-decides-its-fate/>. The voting structure of DI FBS is now in flux, due to both the demise of the Pac 12 Conference and also to proposals to create a new subdivision comprised by the major football powers. See text accompanying *infra* note 150.

16. Kevin Draper & Alan Binder, *SEC Reaches \$3 Billion Deal with Disney, Drawing CBS Ties Toward an End*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/sports/ncaafootball/sec-disney-deal.html>.

17. See, e.g., Adam Rittenberg, *Big Ten Completes 7-Year, \$7 Billion Media Rights Agreement with Fox, CBS, NBC*, ESPN (Aug. 18, 2022), https://www.espn.com/college-football/story/_/id/34417911/big-ten-completes-7-year-7-billion-media-rights-agreement-fox-cbs-nbc. In 2019-20, the last year before the coronavirus pandemic, the Big Ten Conference distributed more than \$55 million to each member university. *Id.*

18. Douglas S. Dibbert, *Athletics and Academics on the Same Team*, CAROLINA ALUMNI REV. (Nov. 6, 1984), <https://alumni.unc.edu/news/athletics-and-academics-on-the-same-team/>.

enterprise, particularly football and men's basketball, was the front porch or had set up residence in a mansion down the street.¹⁹

The influx of money brought more and increasingly louder calls by and on behalf of athletes that they were entitled to a share.²⁰ Whether one evaluated FBS athletic spending in the absolute or compared to overall campus spending, many agreed that it was out of control.²¹ Ultimately, a spate of litigation challenged NCAA bylaws that limited benefits provided to college athletes.²² State legislatures enacted new laws to give college athletes the right to make NIL deals.²³ Several bills were introduced in Congress.²⁴

19. See generally Josephine (Jo) R. Potuto, *They Take Classes, Don't They?: Structuring a College Football Post Season*, 7 J. BUS. & TECH. L. 311 (2012); Lenn Robbins, *Smaller Conferences Need Their Own Playoff*, N.Y. POST (July 27, 2013, 4:00 AM ET), <https://nypost.com/2013/07/27/smaller-conferences-need-their-own-playoff/>; George Schroeder, *College Football Playoff Revenue Distribution Set*, USA TODAY (Dec. 12, 2012, 12:41 AM ET), <http://www.usatoday.com/story/sports/ncaaf/bowls/2012/12/11/college-football-bcs-playoff-revenue-money-distribution-payouts/1762709/>; see also sources cited *infra* note 20.

20. See generally, e.g., MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION (2000); COALITION ON INTERCOLLEGIATE ATHLETICS (COIA), A FRAMEWORK FOR COMPREHENSIVE ATHLETICS REFORM (2003); WILLIAM G. BOWEN & SARAH A. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES (2003); BYERS WITH HAMMER, *supra* note 2, at 40; JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT'S PERSPECTIVE (2000); JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES (2001); JOHN R. THELIN, GAMES COLLEGES PLAY: SCANDAL AND REFORM IN INTERCOLLEGIATE ATHLETICS (1994).

21. See, e.g., COMM'N ON INTERCOLLEGIATE ATHLETICS, KNIGHT FOUND., A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION 16–18 (2001), https://www.knightcommission.org/wp-content/uploads/2008/10/2001_knight_report.pdf.

22. E.g., NCAA v. Alston, 141 S. Ct. 2141 (2021); *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1068 (N.D. Cal. 2019); *O'Bannon v. NCAA*, No. C-09-1967, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010); *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108, (N.D. Cal. Feb. 8, 2010), *aff'd sub nom.*, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 145 (3d Cir. 2013).

23. At least twenty-nine states have laws governing name, image, and likeness activities for college athletes. Tim Shaw, *The Long Read: Tax Implications of College Collectives, NIL Deals*, ON3 (Oct. 6, 2022), <https://tax.thomsonreuters.com/news/the-long-read-tax-implications-of-college-collectives-nil-deals/>; see Pete Nakos, *How NIL Legislation Varies on a State-by-State Basis*, ON3 (July 8, 2022), <https://www.on3.com/nl/news/how-nil-legislation-varies-on-a-state-by-state-basis/>. Some statutes already have been, or are in the works to be, revised. The reasons are: (1) matching what other states are doing, particularly to avoid providing a competitive advantage to athletic programs in other states; (2) revising scope and language after seeing the NIL landscape; (3) buyer's

In 2021, the Supreme Court decided *NCAA v. Alston*.²⁵ The *Alston* Court held that the NCAA could limit neither educational spending nor benefits that universities provide to college athletes.²⁶ The Court's unanimous, strongly worded decision against the NCAA was perceived to have wide-ranging impact on any NCAA bylaw that prohibited universities from providing economic opportunities to their college athletes.²⁷ Following the *Alston* decision, the NCAA suspended bylaws that prohibited college athletes from entering NIL deals.²⁸ NIL deals became permissible so long as they were bona fide and not pretext to recruit and retain elite athletes at a university²⁹

remorse. See, e.g., Richard Johnson, *Year 1 Of NIL Brought Curveballs, Collectives and Chaos. Now What?*, SI (July 12, 2022), <https://www.si.com/college/2022/07/12/nil-name-image-likeness-collectives-one-year>.

24. See, e.g., Press Release, U.S. Senate Comm. on Com., Sci. & Transp., Wicker Reintroduces Bill Establishing a National Framework for Student Athlete NIL (Sept. 14, 2022), <https://www.commerce.senate.gov/2022/9/wicker-reintroduces-bill-establishing-a-national-framework-for-student-athlete-nil>; Press Release, Cory Booker, Booker, Blumenthal, Schatz, Wyden, Padilla Introduce College Athletes Bill of Rights (Aug. 3, 2022), <https://www.Booker.Senate.Gov/News/Press/Booker-Blumenthal-Schatz-Wyden-Padilla-Introduce-College-Athletes-Bill-Of-Rights>.

25. 141 S. Ct. 2141 (2021).

26. *Id.* The Court also held that the NCAA may not prohibit universities from providing academic achievement cash awards in an amount equal to that spent on athletic achievement awards. See *id.* at 2153, 2165–66.

27. Following *Alston*, the NCAA also decentralized, and vested bylaw authority in this and other areas to each NCAA division for application to all member universities in that division. *NCAA Adopts New Constitution and Pursues NIL Violations*, DAVIS & GILBERT (Feb. 7, 2022), <https://www.dglaw.com/ncaa-adopts-new-constitution-and-pursues-nil-violations/>; *Division I Transformation Committee*, NCAA, <https://www.ncaa.org/sports/2021/11/3/division-i-transformation-committee.aspx> (last visited Sept. 23, 2023).

28. The NCAA acted in response to the decision in *Alston*. The Court held unanimously that the NCAA may limit benefits that a member university provides to players when they are unrelated to education but that the NCAA may neither limit institutional education-related benefits nor limit academic achievement cash awards to an amount less than that spent on athletic achievement awards (currently \$5,980 annually). *Alston*, 141 S. Ct. at 2164–65.

29. *Name, Image and Likeness Policy, Question and Answer*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf (last visited Sept. 24, 2023) (noting these requirements in the answers to questions 8, 11, and 12). Additional NCAA documents explicating and clarifying NCAA NIL policy include NCAA, *NCAA Division I Institutional Involvement in a Student-Athlete's Name, Image and Likeness Activities 1* (Oct. 26, 2022), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf; NCAA, *Interim Name, Image and Likeness Policy Guidance Regarding Third Party*

and so long as they were consistent with state law and rules adopted by an athlete's university or the athletic conference to which it belonged.³⁰

No doubt college athlete NIL deals, even the small ones, have produced positive benefits for college athletes. NIL deals likely have permitted some college athletes to remain in college rather than turn professional. They have relieved economic stress on families.³¹ They have given college athletes a vehicle to launch career opportunities. They have provided extra spending money to college athletes whose funds are limited to athletic scholarships. The picture is not uniformly rosy, however. The advent of NIL deals has produced bidding wars among universities for elite athletes, particularly in football.³² They also have generated skepticism about whether the deals are bona fide.

This Article addresses on-the-ground implementation and practical consequences of NIL deals. Impacts include collectives, the effect on recruiting and competitive equity, NCAA enforcement issues, questions regarding the applicability of Title IX, the impact on high school and even younger athletes, conflicts with athletic department exclusive sponsorship deals, the need for a federal legislative solution, and the slippery slope to pay-for-play.

II. College Athlete NIL Deals: The Background

NIL activity falls into three general categories. First are deals by which college athletes market non-athletic skills, such as giving piano lessons, selling home-made jewelry, or running an online company. Second are deals by which college athletes market athletic skills, such as coaching a club team or giving batting lessons. In this category, platforms exist where athletes may

Involvement 1 (effective July 1, 2022) [hereinafter NCAA Interim NIL Guidance], https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf.

30. 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>. The NCAA interim policy directed athletes to report name, image, and likeness activities to their university while reinforcing that NCAA recruiting bylaws would continue to apply. NCAA Interim NIL Guidance, *supra* note 29.

31. *See, e.g.*, Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows to Create 'Chaotic' NIL Market*, SI (May 2, 2022), <https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting>.

32. *Id.* ("Across the U.S. college sports landscape, from the heartland of Texas to the shores of Florida and hills of Tennessee, high-level boosters are privately or publicly using name, image and likeness deals to bankroll their teams, attempting to outbid one another for talent and creating a new arms race in college sports.").

sell sports-specific knowledge and expertise.³³ Deals in these first two categories typically generate modest revenues and payments are sometimes in products rather than cash.³⁴ These deals are comparatively easy to police, and fair market value is relatively easy to assess.³⁵

Not so with big money deals that fall in the third category. These deals typically involve large money payouts and contracts whose bona fides can be challenging to assess.³⁶ They include athletes signing autographs, endorsing products, and providing social media content. What guideposts are available, for example, to decide what should be the top value that an athlete's autograph is worth to a donor, or whether a multimillion-dollar endorsement contract is a realistic assessment of the value that the endorsement brings to brand visibility and good will in addition to product sales? This Article exclusively discusses NIL in the context of this third category.

Critics rooted their opposition to college athlete NIL opportunities in this third category. They feared that permitting college athletes to enter these deals would lead to bidding wars for prospective athletes among donors of different schools.³⁷ They believed that these deals, especially when combined with expanded transfer opportunities,³⁸ would skew the academic/athletic

33. See, e.g., COACHUP, <https://www.coachup.com> (last visited Sept. 24, 2023); OBSESH, <https://www.obsesh.com/> (last visited Sept. 24, 2023).

34. See Dan Whateley & Margaret Fleming, *How NIL Deals and Brand Sponsorships Are Helping College Athletes Make Money*, INSIDER (Sept. 19, 2023), <https://www.businessinsider.com/how-college-athletes-are-getting-paid-from-nil-endorsement-deals> (“But many of the 460,000-plus student-athletes across the US ended up working with local businesses like restaurants or participating in one-off marketing campaigns with bigger brands, and receiving free products, gift cards, or smaller cash payments, rather than big paydays, for their NIL promotions.”).

35. Cf. *id.*; Erica Hunzinger, *One Year of NIL: How Much Have Athletes Made?*, U.S. NEWS & WORLD REP. (July 6, 2022, 4:56 PM), <https://www.usnews.com/news/sports/articles/2022-07-06/one-year-of-nil-how-much-have-athletes-made>.

36. See Bill Carter, *NIL Has a Student-Athlete Valuation Problem*, SPORTS BUS. J. (June 27, 2023), <https://www.sportsbusinessjournal.com/SB-Blogs/OpEds/2023/06/27-Carter.aspx>.

37. Perhaps the best example of the lengths to which commercial entities might go is the criminal conduct of Adidas representatives who steered elite high school players to universities at which Adidas was the corporate sponsor. *Ex-Adidas Officials Sentenced to Prison in NCAA Recruiting Scandal*, NBC NEWS (Mar. 5, 2019, 2:53 PM), <https://www.nbcnews.com/news/sports/ex-adidas-officials-sentenced-prison-ncaa-recruiting-scandal-n979656>.

38. All NCAA college athletes, including football and basketball athletes, are eligible to transfer once and compete immediately at the school to which they transfer; they also are guaranteed an athletic scholarship at the transferee school until they graduate. Meghan Durham, *Division I Board Adopts Changes to Transfer Rules*, NCAA (Aug. 31, 2022, 4:45

balance and undermine the best interests of college athletes.³⁹ A year's experience with these deals seems to prove that the critics were right.

Currently, there is no reporting system for NIL deals that assures reliable and complete data.⁴⁰ Most likely, NIL deal monetary value is inflated because high numbers provide status and visibility to college athletes and to agents seeking even more clients. Some deals are multi-year, moreover, and, particularly given that elite athletes may turn professional prior to graduation—some later-year payments may never be made. Even adjusting for suspected inflated values, however, the numbers are high. Gene Smith, athletic director at Ohio State University, estimated that the cost to keep football college athletes at Ohio State might reach \$13 million.⁴¹ That price tag underscores that athletic departments in the A5 Conferences, with the most resources and wealthiest donors, will win the war.

College athlete NIL deals do not directly impact an athletic department's budget or revenues since outside entities foot the bill. Even well-heeled donors, however, likely have an outside limit on what they spend on promotions and donations. In a zero-sum game, expenditures on college athlete NIL deals will likely come from funds that otherwise would have gone to an athletic department. Nearly 70% of NCAA DI athletic directors

PM), <https://www.ncaa.org/news/2022/8/31/media-center-division-i-board-adopts-changes-to-transfer-rules.aspx>. The NCAA transfer portal manages the administration of transfers. See *How Does the NCAA Transfer Portal Work?*, THE GIST (July 24, 2023), <https://www.thegist.com/article/7aaee1b5-de3b-4368-ac45-d98b016ce0a0/#:~:text=Then%20in%20October%202018%2C%20the,Easy%20peasy>.

39. See Scott Rosner, *NCAA Transfer Tumult Talk Misses the Point: Will Athletes Graduate?*, SPORTICO (May 25, 2022, 8:45 AM), <https://www.sportico.com/leagues/college-sports/2022/ncaa-transfer-tumult-misses-graduation-1234675565/>; Erik Evans, *The NCAA Is Destroying Student-Athlete Education to Turn a Buck*, SB NATION: ROLL BAMA ROLL (July 26, 2022), <https://www.rollbamaroll.com/2022/7/26/23278778/the-ncaa-is-destroying-student-athlete-education-to-turn-a-buck>. Data on graduate college athlete transfers show the same thing: there is a high likelihood they will not complete their graduate degree post transfer. Luke Thompson, *Degree Rare for Grad Transfers in Revenue Sports*, NEWS STAR (Monroe, La.) (May 27, 2016, 6:03 PM CT), <https://www.thenewsstar.com/story/news/local/2016/05/27/degree-rare-grad-transfers-revenue-sports/85060646/>.

40. See, e.g., Hunzinger, *supra* note 35.

41. Dennis Dodd, *Ohio State AD Gene Smith: Schools Being Involved with NIL Deals Could Help Crack Down on Inducements*, CBSSPORTS.COM (June 27, 2022, 12:02 PM), <https://www.cbssports.com/college-football/news/ohio-state-ad-gene-smith-schools-being-involved-with-nil-deals-could-help-crack-down-on-inducements/>; see Johnson, *supra* note 23.

already have reported a decrease in contributions since the onset of college athlete NIL deals.⁴²

NIL deals also move college athletics farther from the collegiate model. Every chink in that model leaves the structure less clear, less sound, and more difficult to defend as a coherent whole. The ultimate objection to permitting NIL opportunities to college athletes, therefore, is that their participation in commercial and promotional ventures would leave the collegiate model too weakened to serve as a bulwark against pay-for-play.⁴³

III. College Athlete NIL Deals: How Structured

College athletes may make NIL deals directly with outside commercial entities or through what has come to be called “collectives.” In the future, it is possible that college athletes could also earn NIL revenues from a percentage of NCAA, conference, or university revenues derived from marketing, promotional, licensing, or even broadcast ventures in which their names and likenesses are used.⁴⁴

A. Outside Commercial Entities

Certainly commercial entities expect to make a profit. Successful teams and athletes enhance product value. The Adidas scandal that produced criminal convictions for Adidas personnel involved efforts to get the best players to universities whose athletes wore Adidas gear.⁴⁵ Adidas’ intent was

42. See Johnson, *supra* note 23. An earlier NCAA reform authorized athletic scholarships to cover the full cost of attendance (COA) at a university, rather than limiting them to tuition, room and board, and books. COA scholarships directly relate to the academic best interests of college athletes. Nonetheless, even COA scholarships met opposition as critics worried that the money used to fund them would come from cutting non-revenue sports. In fact, such cuts have occurred. Ross Dellenger & Pat Forde, *A Collegiate Model in Crisis: The Crippling Impact of Schools Cutting Sports*, SI (June 11, 2020), <https://www.si.com/college/2020/06/11/college-sports-program-cuts-ncaa-olympics>. COA scholarships are not the sole reason for the cuts. For example, tax support for higher education has declined. In addition, the COVID years saw decreases in, among other things, donor support, ticket and concession sales. Over time, Title IX also has had an impact on participation opportunities. Although not the sole reason, the need to fund COA scholarships likely contributed to the cuts.

43. For discussion of pay-for-play, see *infra* text accompanying notes 126–27, 144–47, 157–72.

44. See *infra* text accompanying notes 126–27, 144–47.

45. See Mark Schlabach, *Three Sentenced in Adidas Recruiting Scandal*, ESPN (Mar. 5, 2019), https://www.espn.com/mens-college-basketball/story/_/id/26141993/three-sentenced-adidas-recruiting-scandal.

not only to enhance product sales but also to represent the athletes in their professional careers.⁴⁶ Local entities also often are university donors and fans of its teams. By contrast to national entities such as Adidas, their interest in enticing athletes to attend—and remain enrolled at—a university comes from being fans and not solely or even primarily from a profit motive.

Many universities outsource their marketing operations to exclusive rights holders.⁴⁷ These rights holders manage and enlarge a university's contracts with commercial entities.⁴⁸

In the NIL space, exclusive rights holders collaborate with NIL platforms that provide school-specific marketplaces by which college athletes may express interest in NIL deals. A prominent example is Learfield-Opendorse.⁴⁹ Learfield is a major and long-time player in managing university marketing operations.⁵⁰ Opendorse is the largest NIL platform.⁵¹ The Learfield-Opendorse collaboration facilitates matches between corporate brands at a particular school and college athletes at that school who best fit brand needs.

College athletes may enter deals with commercial entities by one-on-one negotiations or collaborations. In both instances, a commercial entity may be an active supporter or even a donor of the athlete's university. In both

46. Tom Ramstack, *College Sports Faces Bribery Scandal After Convictions of Adidas Marketeers*, THE WELL (Jan. 25, 2021), <https://www.thewellnews.com/sports/college-sports-faces-bribery-scandal-after-conviction-of-adidas-marketers/>.

47. More than 170 universities are clients of one exclusive rights holder, Learfield. See *Learfield Partners*, LEARFIELD, <https://www.learfield.com/schools/partners/> (last visited Sept. 24, 2023). For example, in 2014 Alabama renegotiated a ten-year deal paying out between \$15 million and \$16 million a year. Brian Leigh, *Alabama Signs Multimedia Extension with Learfield Sports for Up to \$160M*, BLEACHER REP. (Apr. 21, 2014), <https://bleacherreport.com/articles/2036648-alabama-signs-multimedia-extension-with-learfield-sports-for-up-to-160m>.

48. These rights holders, among other things, negotiate deals for commercial entities to display their names on big screens and ribbon boards during games.

49. Another prominent collaboration is Barstool/TwoYay. For an entity such as Barstool a collaborative is a valuable mechanism to build its brand with a college student market. Matt Brown, *Barstool's Big NIL Platform May End Being About Much More Than NIL*, EXTRA POINTS (Sept. 16, 2022).

50. See *supra* note 47 (noting Learfield's extensive influence as the dominant exclusive rights holder in college athletics).

51. Opendorse provides a marketplace for college athletes to monetize their NIL. See *OPENDORSE*, <https://opendorse.com/> (last visited Sept. 24, 2023) ("Opendorse is the leading NIL marketplace and technology company."). It manages at least twelve collectives. Dellenger, *supra* note 31.

instances, the commercial entity seeks team and athlete success, as that success enhances the value of the NIL deal.

B. Collectives

Although college athletes may enter NIL deals with outside entities including boosters, NCAA bylaws still prohibit payments that are made directly by a university or by boosters when the payments are made for a recruiting purpose.⁵² As with collaboratives, collectives are university specific, created and administered by a university's alumni, former athletes, sponsors, and donors.⁵³ Collectives solicit contributions and arrange NIL work.⁵⁴ Their explicit purpose is to assist a university's athletic programs.⁵⁵ Most often that means helping the football team win. In fact, many collectives limit their NIL deals to collegiate football players and those in one or two other sports.⁵⁶ Although comprised of university donors and supporters, and although explicitly aimed to assist a university recruit, in

52. 2022-23 NCAA DIVISION I MANUAL, *supra* note 12, art. 12.1.2, 13.2.1, at 42, 98.

53. There also are collectives created and managed by college athletes, often with the assistance of an outside agency. There are other collective arrangements. For example, the University of Southern California signed with a media agency that works exclusively with USC college athletes to obtain NIL deals. Pete Nakos, *What Are NIL Collectives and How Do They Operate?*, ON3 (July 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/>. There also are collectives created and managed by college athletes, often with the assistance of an outside agency. *Id.* (detailing collectives at Auburn, Kansas State, Texas, Michigan State, and Minnesota that meet these criteria). For a more in-depth description of the various models for collectives and their collection structures, see *id.*

54. At the outset, many collectives attempted to claimed tax exempt status as a way to encourage donations. The IRS recently released a memorandum clarifying that many NIL organizations are not eligible for tax-exempt status. Laura C. Giles, *IRS Addresses Non-Exempt Tax Status for NIL Organizations*, BALLARD SPAHR (June 26, 2023), <https://www.ballardspahr.com/insights/alerts-and-articles/2023/06/irs-addresses-non-exempt-tax-status-for-nil-organizations>.

55. See, e.g., Bill Landis, *How 2 Emerging Collectives Are Aiming to Keep Ohio State Competitive in the NIL Race*, ATHLETIC (Apr. 25, 2022), <https://theathletic.com/3267780/2022/04/25/how-2-emerging-collectives-are-aiming-to-keep-ohio-state-competitive-in-the-nil-race/>.

56. For example, Canes Connection, a prominent NIL collective associated with the University of Miami, lists a long roster of college football team members but only four men's basketball players and no other athletes. See *Our Athletes*, CANES CONNECTION, <https://canesconnection.com/our-athletes/#foogallery-807/f:Basketball/p:1> (last visited Sept. 25, 2023).

form at least, collectives are independent of a university.⁵⁷ If independent, they neither trigger NCAA bylaws aimed at university conduct nor are subject to NCAA bylaws governing boosters.⁵⁸

Some collectives pay athletes to work at charities selected by the collective; the charities often have significant ties to the university or its athletic department.⁵⁹ Other collectives are Direct Payment entities. Collectives both collect and manage donor contributions and pay athletes directly for NIL work that they arrange.⁶⁰

57. As described by a partner at a major CPA firm, collectives are “affiliated with, yet independent from, a college or university that generates funding to support NIL opportunities for student-athletes.” Shaw, *supra* note 23. See *infra* notes 96–99 and accompanying text for discussion whether collectives are independent.

58. For a list of relevant bylaws and bylaws, see *infra* notes 80–95, 100–06 and accompanying text.

59. An early entry is the Foundation, set up by Ohio State booster Brian Schottenstein and former Ohio State quarterback Cardale Jones. Landis, *supra* note 55. Brian Schottenstein is a member of a prominent Ohio family. A distant relative, Jerome, donated \$12.8 million to kickstart the building of the Schottenstein Center (named after Jerome), a \$115 million multipurpose facility that is home to the Ohio State basketball and men’s hockey teams. *History - Schottenstein Center*, SCHOTTENSTEIN CTR., <https://www.schottensteincenter.com/arena-info/history> (last visited Sept. 24, 2023). The Foundation uses donated funds to pay football and basketball players for charitable work. Becky Raspe, *Schottenstein’s ‘The Foundation’ Now Live at Ohio State*, COLUMBUS JEWISH NEWS (Apr. 6, 2022, 1:58 PM), https://www.columbusjewishnews.com/news/sports/schottensteins-the-foundation-now-live-at-ohio-state/article_3b46cb70-b12a-11ec-b3a6-8b7c77e1a388.html. Cohesion Foundation is another Ohio State collective. Its board members include former Ohio State head coach Urban Meyer, as well as the sons of sports legends Archie Griffin and Jack Nichlaus. Landis, *supra* note 55. The Big Red Collective at the University of Nebraska is comprised of former Nebraska players and business leaders; its advisor is an executive at the Nebraska College of Business. Evan Bland, *Big Red Collaborative, Nebraska’s First Nonprofit NIL Collective, Debuts*, OMAHA WORLD-HERALD (Sept. 15, 2022), https://omaha.com/sports/huskers/big-red-collaborative-nebraskas-first-nonprofit-nil-collective-debuts/article_45b9227f-15fa-5396-b8d2-5cfae8fa9a59.html. The Big Red Collective provides athletes to three charities: Team Mates, Team Jack, and the Nebraska Greats Foundation. *Id.* Team Mates is a mentoring program founded and run by former head football coach and athletic director Tom Osborne. *Id.* Team Jack is a charity focused on pediatric cancer founded by a fan whose son was “adopted” by the football program. *Id.* The Nebraska Greats Foundation is run by former football players. *Id.*

60. Nakos, *supra* note 53.

IV. NIL Landscape

Athletic competition needs competitive balance. Critics opposed to NIL opportunities for college athletes believe that they further advantage the major football powers. Although complete information regarding the number and amount of NIL deals is unavailable, the critics seem to be right.⁶¹

Sports business experts have concluded that NIL money is often the driving motivator in a recruit's selection⁶² of a university to attend, or remain enrolled at, a university.⁶³ Collectives in the A5 conferences have the money to spend.⁶⁴ Opendorse currently manages twelve collectives that have raised a combined total of nearly \$50 million.⁶⁵ Its CEO expects collectives at A5 schools to raise more than \$500 million.⁶⁶ A University of Florida collective planned to raise \$20 million by the end of 2022 while one at Florida State University expected to raise at least \$7 million.⁶⁷ A collective led by Barry

61. See Hunzinger, *supra* note 35.

62. See, e.g., Christopher Brooks, *In Choosing Colleges, Top Young Athletes Say: "Show Me the NIL"*, CBS NEWS (June 3, 2022, 7:57 AM), <https://www.cbsnews.com/news/nil-college-athletes-boosters-collectives-nick-saban-coaches/>. One "high-profile coach" said that the first question recruits ask is how much they will make on NIL deals. Dodd, *supra* note 41. This coach likely is not the only one to whom the question is asked, and likely not the only one to whom this is the first question.

63. It was widely reported that a basketball athlete at the University of Miami, Isaiah Wong, threatened to transfer if his \$100,000 NIL deal was not increased. Madison Williams, *Miami Star Isaiah Wong Threatening Transfer over NIL Compensation*, SI (Apr. 20, 2022), <https://www.si.com/college/2022/04/29/miami-isaiah-wong-basketball-threatening-transfer-portal-nil-compensation-nijel-pack-john-ruiz-lifewallet>. Wong later recanted. It is not clear whether he was prompted by bad publicity or the refusal of his NIL brand sponsor to up the deal. Madison Williams, *Miami's Isaiah Wong Won't Enter Transfer Portal After Threatening Move over NIL Compensation*, SI (Apr. 30, 2022), <https://www.si.com/college/2022/04/30/miami-isaiah-wong-transfer-portal-statement-threat-nil-deal-lifewallet-nba-draft>. These behaviors are a far cry from that advocated by Jim Delany, the former Big Ten Conference Commissioner, that "the educational and lifetime economic benefits associated with a university education [should be] the appropriate quid pro quo for athletic participation." Declaration of James E. Delany in Support of the NCAA's Class Certification Opposition Brief at 4, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 09-cv-1967-CW (N.D. Cal. Mar. 14, 2013); see Jon Solomon, *Big Ten in Division III? Jim Delany Says It's Possible If College Players Can Share Revenue*, AL.COM (Mar. 19, 2013), https://www.al.com/sports/2013/03/would_big_ten_move_to_division.html.

64. For a description of the scope and conduct of big collectives and their supporters, see Dellenger, *supra* note 31.

65. *Id.*

66. *Id.*

67. *Id.* The University of Florida is in the SEC; Florida State University is in the ACC.

Switzer, the former head football coach at the University of Oklahoma, guaranteed \$50,000 to each Oklahoma football player.⁶⁸

The available data show that between July 1, 2021 and June 30, 2022, more than \$915 million was spent on NIL deals.⁶⁹ A5 football college athletes were the top earners.⁷⁰ At \$85,000, the football team at Texas A&M University had the highest per-athlete NIL average earnings.⁷¹ Football athletes at the University of Michigan averaged \$65,000.⁷² By contrast, the average NIL earnings for football athletes across all NCAA divisions, a number that includes A5 football athlete earnings, was \$3,400, and the average for all college athletes was estimated at between \$1,500 and \$1,800.⁷³

Averages neither tell how many college athletes earned NIL money, nor identify the big money deals or to whom they went. But the data underscore that A5 football athletes scored the biggest deals.⁷⁴ The top A5 football athlete was valued at \$5.2 million as of September 2023;⁷⁵ the fifteenth had an NIL value of \$954,000.⁷⁶ College football athletes also had nearly 30% of all NIL deals; the next nearest sport had 8%.⁷⁷

Next in NIL popularity, after football athletes, are college athletes with the largest social media followings. Although college athletes typically are classified as “micro” (under 100,000 followers) or “nano” (under 10,000 followers) social media influencers, they are the “best performing” in these

68. *Id.* The University of Oklahoma will exit the Big 12 Conference after the 2023 year and join the SEC. *OU Board of Regents Approves Agreements to Exit the Big 12, Join the SEC*, OU NEWS (May 5, 2023), <https://www.ou.edu/news/articles/2023/may/ou-board-of-regents-approves-agreements-to-exit-the-big-12-and-join-the-sec>.

69. Hunzinger, *supra* note 35.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* With football excluded, women college athletes fared better than males. Kaitlin Balasaygun, *In the College Sports Pay Era, Female Athletes Are Emerging as Big Economic Winners*, CNBC (Nov. 4, 2022, 3:22 PM EDT), <https://www.cnbc.com/2022/10/15/that-nike-bronny-james-nil-deal-was-a-big-deal-for-women-too.html> (“Excluding football, Opendorse found that NIL-compensated female athletes are engaging in 19.6% more social media activities for their deals than male counterparts.”).

74. *See* Hunzinger, *supra* note 35.

75. *College Football NIL Rankings*, ON3, <https://www.on3.com/nil/rankings/player/college/football/> (last visited Sept. 24, 2023).

76. *Id.*

77. Hunzinger, *supra* note 35 (providing 2023 statistics).

categories and consequently are attractive to commercial entities.⁷⁸ Social media permit college athletes to reach fans and build their own brand. The more social media followers a player has, the more known that player becomes, and the more that player's NIL value increases.

V. Enforcement and Title IX

The close relationship between a collective and a university raises two areas of concern. One is bylaw violations and enforcement oversight. The other is the import of Title IX.

A. Enforcement

Although Post-*Alston* the NCAA suspended its bylaws prohibiting NIL payments to college athletes, all other bylaws remain in force. Pay-for-play⁷⁹ is prohibited even if the money comes from an entity unarguably independent of a university.⁸⁰ Universities may not be involved in athlete NIL deals.⁸¹ Boosters may neither offer nor provide money to solicit a recruit's enrollment.⁸² Booster NIL payments must be bona fide, therefore not disguised enticements to an athlete to enroll or remain at a university. Universities are responsible for the conduct of their boosters.⁸³

Post-*Alston*, the NCAA issued several policy clarifications regarding NIL conduct.⁸⁴ The clarifications emphasized that bylaws regarding boosters, recruiting, and coach conduct remained in effect.⁸⁵ They also elaborated on bylaw prohibitions, particularly with regard to university and booster conduct prior to a recruit's formal commitment to a university.⁸⁶ For universities,

78. Whaley & Flemming, *supra* note 34.

79. Pay-for-play includes incentive payments based on level of performance.

80. Hosick, *supra* note 30 ("While opening name, image and likeness opportunities to student-athletes, the policy in all three divisions preserves the commitment to avoid pay-for-play and improper inducements tied to choosing to attend a particular school. Those rules remain in effect."); 2022-23 NCAA DIVISION I MANUAL, *supra* note 12, arts. 12.1.2, 12.1.2.1.4–5, at 42–44. Pay-for-play means a college athlete has professionalized him/herself and lost amateur status. *See id.* art. 12.1.2, at 42. The source of the funds is, therefore, irrelevant.

81. *See* 2022-23 NCAA DIVISION I MANUAL, *supra* note 12, art. 11.1.3, at 28.

82. *Id.* arts. 13.02.14, 13.2.1, at 78, 97–98.

83. *Id.* art. 8.4.2, at 13.

84. *See* sources cited *supra* notes 29–30.

85. *See Name, Image and Likeness Policy, Question and Answer*, *supra* note 29.

86. *Id.*

prohibited conduct includes communicating or guaranteeing an NIL deal.⁸⁷ For boosters, prohibited conduct includes contact with a recruit or entering an NIL agreement that is contingent on a recruit's enrollment at the booster's school.⁸⁸

The post-*Alston* clarifications also demonstrated an understanding that collectives meet the NCAA definition of a booster—an individual or entity that a university knows or should know is promoting its athletic interest⁸⁹ by, among other things, assisting in recruiting or providing benefits to enrolled college athletes.

On virtually every front, collectives are boosters.⁹⁰ Their publicly stated purpose is to assist in recruiting; their NIL payments demonstrate that they both are assisting in recruiting and that their university knows that they are. Commercial entities and collaboratives also are boosters if they are donors to an athletic department. Otherwise, their booster status depends factually on

87. *Id.*

88. *See id.*; 2022-23 NCAA DIVISION I MANUAL, *supra* note 12, arts. 13.1.2.1, 13.2.1, at 79, 97.

89. 2022-23 NCAA DIVISION I MANUAL, *supra* note 12, art. 8.4.2, at 13.

Representatives of Athletics Interests. An institution's "responsibility" for the conduct of its intercollegiate athletics program shall include responsibility for the acts of individuals, a corporate entity (e.g., apparel or equipment manufacturer) or other organization when a member of the institution's executive or athletics administration or an athletics department staff member has knowledge or should have knowledge that such an individual, corporate entity or other organization: . . .

- (a) Has participated in or is a member of an agency or organization as described in Bylaw 8.4.1;
- (b) Has made financial contributions to the athletics department or to an athletics booster organization of that institution;
- (c) Has been requested by the athletics department staff to assist in the recruitment of prospective student-athletes or is assisting in the recruitment of prospective student-athletes;
- (d) Has assisted or is assisting in providing benefits to enrolled student-athletes; or
- (e) Is otherwise involved in promoting the institution's athletics program.

Id.

90. They are alumni and donors of an athletic department. They likely promote the athletic department. Donors certainly, and alumni most likely, make donations to the athletic department. Members of collectives more than likely are season ticket holders; donors may have suites in the football stadium and basketball arena. Payments by collectives to college athletes to work for charities may constitute provision of benefits to them.

what they do. That said, a starting point is that they have a business interest in the success of a university's teams.

NCAA bylaws prohibiting booster contact with a recruit are not new. Neither are NCAA bylaws cabining coach conduct.⁹¹ They also are bylaws that frequently have been broken. The NCAA major case database is full of infractions cases involving rules-violative behavior by coaches and boosters committed to entice college athletes to attend or remain at their schools.⁹² The evidence to date provides good reason to believe that these behaviors have not improved with the advent of NIL.

Universities and the NCAA are justly concerned that athletes and fans interact with reputable entities.⁹³ Universities also and obviously seek to be competitive in the recruiting environment. NCAA bylaws attempt to thread the needle in delineating between permissible information delivery to college athletes, fans, and donors and rules-violative activity such as recruiting inducements or payments to college athletes directly attributable to universities. On the one hand, the NCAA is clear that a university, including its coaches, may neither be an intermediary for a college athlete nor a facilitator of an NIL deal.⁹⁴ On the other hand, the NCAA permits a university to introduce a college athlete to an NIL representative, to provide an athlete with NIL contact information, and to share with an athlete available NIL opportunities.⁹⁵ The NCAA also permits a university to assist

91. Coaches also are still tied to a recruiting calendar, designation of who may recruit, and the number of contacts a coaching staff may have with a recruit. *See* 2022-23 NCAA DIVISION I MANUAL, *supra* note 12, art. 13.17, at 135-48.

92. *See, e.g.*, NCAA, REP. NO. 193, UNIVERSITY OF ALABAMA, TUSCALOOSA PUBLIC INFRACTIONS APPEALS COMMITTEE REPORT (2002), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102485>; NCAA, REP. NO. 208, REPORT OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION DIVISION I INFRACTIONS APPEALS COMMITTEE: UNIVERSITY OF MICHIGAN, ANN ARBOR, MICHIGAN (2003), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102494>; NCAA COMM. ON INFRACTIONS, SOUTHERN METHODIST UNIVERSITY INFRACTIONS REPORT (1987), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=101734>; *see also* DAVID WHITFORD, A PAYROLL TO MEET: A STORY OF GREED, CORRUPTION, AND FOOTBALL AT SMU, at xiii (1989); Cindy Boren, *NCAA Says Ohio State Coach Hid Violations*, WASH. POST (Apr. 25, 2011), https://www.washingtonpost.com/blogs/early-lead/post/ncaa-says-ohio-state-coach-hid-violations/2011/04/25/AFztWejE_blog.html.

93. NCAA policies require universities to provide NIL information and education to their college athletes. DIV. I TRANSFORMATION COMM. REPORT, *supra* note 10, at 9, 13.

94. NCAA Interim NIL Guidance, *supra* note 29, at 2.

95. NCAA, NCAA Div. I: Institutional Involvement in Name, Image and Likeness Activities 3 (Oct. 26, 2022), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf.

an NIL collective to raise funds, request fans and donors to contribute to an NIL collective, and to facilitate meetings between donors and an NIL collective.⁹⁶

NIL deals, particularly by collectives, also present significant enforcement issues.⁹⁷ The NCAA enforcement staff will need to police coaches and athletic staff to confirm that they neither facilitate nor arrange meetings with recruits and a collective.⁹⁸ The enforcement staff also must conduct an “independent case-by-case analysis of the NIL value that each athlete brings” to an NIL deal to confirm that payments are bona fide assessments of that value rather than compensation for an athlete’s athletic prowess or incentive payments to get an athlete to enroll or remain at a university.⁹⁹

In the self-contained artificial world of athletic competition, there is no independent fair market, and fan fervor can define athlete value far in excess of what seems reasonable in an arms length evaluation. In addition, NCAA enforcement staff cannot compel witness cooperation or subpoena documentary evidence.¹⁰⁰ It therefore can be difficult to demonstrate when and whether an NIL deal, or surrounding circumstances and conversations,

96. For example, Ohio State University told its fans and ticket holders that it “welcome[d] your help in keeping Ohio State at the top of the athletics landscape.” *See, e.g.*, Andrew Lind, *Ohio State’s Gene Smith Soliciting “Additional Support” for NIL Collectives*, FAN NATION (Dec. 8, 2022, 12:29 PM EST), <https://www.si.com/college/ohiostate/football/ohio-state-gene-smith-soliciting-additional-support-for-name-image-likeness-collectives>. It also provided information about three collectives “seeking additional support.” *Id.* The University of Nebraska, as another example, told its fans and ticket holders that it “fully” supports three named collectives and touted NIL opportunities as helping coaches recruit “the best talent” to the university. *NIL Update from Nebraska Athletics*, HUSKERS.COM (Jan. 12, 2023), <https://huskers.com/news/2023/1/12/nil-update-from-nebraska-athletics>.

97. The close relationship between a university and at least some business entities, including university-specific collaborations such as Learfield/Opendorse, also triggers concerns. To make an NIL deal, a commercial entity—often a booster—necessarily will interact with an athlete. As with collectives, the NCAA enforcement staff may be hard put to evaluate whether a coach or athletic staff member facilitated or arranged meetings between a recruit and that commercial entity. *See* NCAA Interim NIL Guidance, *supra* note 29. Universities also are lending online space to these NIL activities. *See, for example*, Mississippi State’s Official NIL Marketplace, powered by Opendorse. MSTATE MARKETPLACE, <https://opendorse.com/mississippi-state-bulldogs> (last visited Sept. 24, 2023).

98. NCAA Interim NIL Guidance, *supra* note 29.

99. *Id.*

100. While the NCAA lacks formal subpoena power, the enforcement staff has some leverage over coaches and other university staff, as NCAA bylaws require their cooperation with an investigation and they can be sanctioned for their failure to do so. *See* 2022-23 NCAA DIVISION I MANUAL, *supra* note 12, art. 19.5.5.2, at 347.

crosses over into prohibited recruiting. As the NCAA Vice President of Enforcement described the NIL situation: “We’d hold our nose and move on because without documentary information and evidence to confront witnesses with, they tend to lie to you. So we were stuck with cases that smelled to high heaven but could not substantiate them under the procedures that we had.”¹⁰¹

In partial response to the problems faced by the NCAA enforcement staff, the NCAA now employs a presumption of violation that is triggered when there is some minimal information that an infraction may have occurred.¹⁰² To rebut the presumption, a university must “clearly” show that all behaviors are rule compliant.¹⁰³

Perhaps the most benign of the reported questionable behaviors involves Mississippi State University. The NCAA permits universities to provide awards for academic achievement equal to what they spend on athletic achievement awards.¹⁰⁴ The maximum amount of these awards can change; for academic year 2021 the cap per student was \$5,980.¹⁰⁵ In the fall 2021 academic semester, Mississippi State University paid an average of \$3200 award per athlete, including a \$2000 award for satisfying minimum NCAA eligibility criteria.¹⁰⁶ At Brigham Young University, a commercial entity paid all athletes on the football team, including walk-ons, to wear commercial

101. Grant T. Williamson & Jonathan D. Wohlwend, *That Seems Presumptuous: NCAA’s Bylaw Changes Evidentiary Standard for NIL Infractions*, INTEL. PROP. NEWS (Feb. 9, 2023), <https://www.bradley.com/insights/publications/2023/02/that-seems-presumptuous-ncaas-bylaw-changes-evidentiary-standard-for-nil-infractions>.

102. NCAA, KEY CHANGES TO THE NCAA DIVISION I INFRACTIONS PROCESS 1 (2023), https://ncaaorg.s3.amazonaws.com/enforcement/d1/D1ENF_KeyChangesToInfractionsProcess.pdf (“When available information supports those behaviors leading up to, surrounding and/or related to an NIL agreement or activity were contrary to NCAA Division I legislation and/or the interim NIL policy, the enforcement staff and NCAA Division Committee on Infractions shall presume a violation occurred. To rebut the presumption of a violation, the institution must clearly demonstrate that all behaviors complied with NCAA legislation and interim NIL policy.”).

103. *Id.*

104. See 2022-23 NCAA DIVISION I MANUAL, *supra* note 12, art. 16.1.4.5, at 217. This result was court-mandated as a part of the *Alston* litigation. See *supra* note 26.

105. Andy Wittry, *Mississippi State’s Alston Awards Include ‘a Lot of Options’ to Earn*, ON3 (Sept. 27, 2022), <https://www.on3.com/news/mississippi-state-university-bulldogs-alston-awards-policy-hall-academic-awards-student-athletes/> (noting the annual cap on so called *Alston* awards).

106. See *id.* NCAA minimum standards are minimal. To be eligible to compete in their second year, college athletes must meet 90% of a university’s GPA to graduate. 2022-23 NCAA DIVISION I MANUAL, *supra* note 12, art. 14.4.3.3, at 161. On a 4.0 scale that GPA typically is a 2.0.

brands on their practice helmets.¹⁰⁷ The consequence was that all team members received the equivalent of a full scholarship and effectively exceeded NCAA scholarship limits.¹⁰⁸

One of the most widely reported instances of potential NIL violations erupted between Alabama's head football coach Nick Saban and Texas A&M's then head football coach Jimbo Fisher.¹⁰⁹ Each coach accused the other of NIL cheating to entice recruits to their respective schools.¹¹⁰ Saban and Fisher are not the only coaches who believe there is cheating.¹¹¹ The two stand out because they spoke publicly and specifically. The NCAA enforcement staff currently is investigating NIL arrangements,¹¹² but it is unlikely that coaches have provided information. Although they often believe other coaches are taking an unfair advantage, they rarely report what they know.¹¹³

High-profile recruits have committed to attend a university after being offered very large NIL deals. Recruits have also switched their commitments to another university, prompted by more lucrative offers.¹¹⁴ The most notorious of these stories involves Jaden Rashada. Rashada orally committed to the University of Miami after reportedly being offered \$9.5 million by a

107. Sean Walker, *BYU Just Used NIL, Built Bar to Essentially Put Every Football Player on Scholarship*, KSL (Aug. 12, 2021, 4:27 PM), <https://www.ksl.com/article/50222512/byu-just-used-nil-utah-based-built-bar-to-put-every-football-player-on-scholarship>.

108. *See id.*

109. Tim Capurso, *Nick Saban, Jimbo Fisher's Clandestine Moves After NIL Spat Raises Even More Questions*, CLUTCH POINT (Oct. 7, 2022, 4:07 PM CDT), <https://clutchpoints.com/nick-saban-jimbo-fishers-clandestine-moves-after-nil-spat-raises-even-more-questions/>.

110. *Id.*

111. *Narduzzi Tells Fan of NCAA/NIL Cheating, 'It's a Sad Deal'*, 93.7 THE FAN (Dec. 20, 2022, 8:02 PM), <https://www.audacy.com/937thefan/sports/pitt-panthers/narduzzi-tells-fan-of-ncaa-nil-cheating-its-a-sad-deal>.

112. *E.g.*, Antwan Staley, *NCAA Seeking Information About Oregon's Relationship with Third-Party NIL Program*, REGISTER-GUARD (Eugene, Or.) (Jan. 16, 2022, 9:11 AM PT), <https://www.registerguard.com/story/sports/college/football/2022/01/15/ncaa-seeking-information-oregon-ducks-relationship-nil-program/6541795001/>.

113. *See* Tzvi Machlin, *Report: How Many Schools Have Reported NIL Violations*, THE SPUN (May 16, 2022), <https://thespun.com/more/top-stories/report-how-many-schools-have-reported-nil-violations>.

114. One such case involved Walter Rouse, who three days after committing to Nebraska switched his commitment to Oklahoma. Will Backus, *Stanford OT Transfer Walter Rouse Flips Commitment from Nebraska to Oklahoma*, 247SPORTS (Jan. 14, 2023, 1:10 PM), <https://247sports.com/college/nebraska/Article/3-Thoughts-on-the-commitment-of-Sua-Lefotu-203809104/>.

University of Miami collective.¹¹⁵ He thereafter formally committed to the University of Florida after the Gator Collective reportedly offered him more than \$13.85 million.¹¹⁶ When the Gator Collective reneged, Rashada committed to Arizona State University.¹¹⁷

A partial list of other big money deals includes:

1. Michael Mayor was offered \$1 million to leave the University of Notre Dame to play football at the University of Alabama.¹¹⁸
2. University of Texas football athlete Xavier Worthy was offered money by the University of Oregon and University of Southern California (USC).¹¹⁹
3. Multiple universities attempted to entice North Carolina football athlete Drake Maye.¹²⁰
4. A recruit, believed to be Nico Iamaleava, signed an \$8 million three-year deal provided by an unnamed school's collective; Iamaleava is committed to Tennessee.¹²¹

115. Scott Polacek, *Jaden Rashada Reportedly Agreed to \$9.5M NIL Contract with Miami Booster John Ruiz*, BLEACHER REP. (June 26, 2022), <https://bleacherreport.com/articles/10040029-jaden-rashada-reportedly-agreed-to-95m-nil-contract-with-miami-booster-john-ruiz>; Pete Nakos, *Inside the NIL-Filled Jaden Rashada Debacle*, ON3 (June 27, 2022), <https://www.on3.com/nl/news/jaden-rashada-michael-caspino-nil-miami-hurricanes-football-john-ruiz-life-wallet-florida-gators-name-image-likeness/>.

116. Bethany Cohen, *Why Does Jaden Rashada Want Out of Florida? All You Need to Know About the QB's Release Request*, SPORTSKEEDA (Jan. 18, 2023, 10:14 PM), <https://www.sportskeeda.com/college-football/news-why-jaden-rashada-want-florida-all-need-know-qb-s-release-request>. The deal involved an initial \$500,000 payment and monthly payments that increased each year that he remained enrolled. Ryan Bologna, *Full Details of Jaden Rashada's Terminated \$13.85 Million NIL Deal*, CLUTCH POINTS (Feb. 6, 2023, 1:29 PM CST), <https://clutchpoints.com/full-details-jaden-rashadas-terminated-nil-deal>.

117. Zach Goodall, *Former Florida QB Signee Jaden Rashada Commits to Arizona State*, FAN NATION: ALL GATORS (Feb. 1, 2023, 11:15 AM EST), <https://www.si.com/college/florida/recruiting/florida-gators-recruiting-jaden-rashada-commits-arizona-state>.

118. Brian Smith, *NIL and the Transfer Portal: Which Schools Get Caught Cheating?*, FAN NATION: INSIDE THE KNIGHTS (May 4, 2022, 10:51 AM), <https://www.si.com/college/ucf/college-football-news/nl-transfer-portal-ncaa-cheating-scandal>.

119. *Id.*

120. Dan Morrison, *Mack Brown Calls NIL Out of Control: 'Cheaters Cheat'*, ON3 (Dec. 21, 2022), <https://www.on3.com/college/north-carolina-tar-heels/news/mack-brown-calls-nil-out-of-control-cheaters-cheat/>.

Rashada's NIL deals, in particular, highlight the concerns of the NCAA Vice President for Enforcement.¹²² To earn the \$13.85 million from the Gator Collective, Rashada was reported to have to live in Gainesville, the location of the University of Florida; post once monthly (with NIL sponsor's brand) on Instagram and Twitter; appear at eight fan events annually; and autograph fifteen items annually. His reported Miami and Florida deals also might be difficult to prove, as both the Gator and Miami collectives denied they made a deal with him.¹²³

In sum, the current NIL environment includes claims and rumors of cheating; increasingly strident grumblings from disgruntled coaches; and worries that an unbridled NIL market is subverting college athletics, reducing donor contributions to universities, and creating difficulties for the NCAA enforcement staff. Except for the NCAA bylaw that creates a presumption of violation, however, the NCAA has proposed no bylaws to cabin NIL excesses. The DI Transformation Committee, charged with proposing bylaw changes, issued its final report in January 2023. The Committee failed to recommend any bylaws to corral NIL behaviors.¹²⁴

B. Title IX

Title IX of the Educational Amendments of 1972¹²⁵ obliges educational institutions that receive federal funds to offer equal opportunities to women and men in educational programs and activities. Because Title IX was enacted fifty years before *Alston*, its regulations include no criterion that addresses universities paying its college athletes. Currently there are proposals to lift the NCAA bar that prevents universities from paying college athletes for promotional activities.¹²⁶ There also is litigation to eliminate

121. Nakos, *supra* note 115; Andy Staples, *Nico Iamaleava Has Arrived. If He's the \$8 Million QB Recruit, He's the Best Gamble*, ATHLETIC (Apr. 11, 2022), <https://theathletic.com/3241640/2022/04/11/nico-iamaleava-tennessee-nil/>.

122. Williamson & Wohlwend, *supra* note 101.

123. Gary Ferman, Ruiz, *Gator Collective Both Deny Advance NIL Deals on Rashada*, RIVALRY: CANES CNTY. (June 27, 2022), <https://miami.rivals.com/news/ruiz-gator-collective-both-deny-advance-nil-deals-on-rashada?guccounter=1>.

124. See DIV. I TRANSFORMATION COMM. REPORT, *supra* note 10, at 20–21 (reflecting no proposed changes related to specific NIL activity).

125. Title IX of the Educational Amendments of 1972, Pub. L. No. 92-318, §§ 901–907, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688).

126. See Kristi Dosh, *The Future of NIL and Compensating Athletes with NCAA President Mark Emmert*, BUS. OF COLL. SPORTS (Sept. 10, 2022), <https://businessofcollege>

NCAA bylaws that prevent universities from sharing broadcast or promotional revenues with college athletes.¹²⁷ It is therefore possible that universities will pay college athletes at some point in the future. The advent of NIL, and the potential of university payments to college athletes, have led to questions about the applicability of Title IX.

A prerequisite to Title IX enforcement is that payments from universities to college athletes, should they become permissible, must be interpreted as payments that are part of “education[al] programs or activities” within the ambit of Title IX¹²⁸ and not as payments for marketing activity or appearances. To be subject to Title IX requirements, then, there will need to be a definitive answer that any such payments are part of the educational mission.¹²⁹

A separate question arises regarding the applicability of Title IX to collectives. Conduct subject to Title IX must be that of educational institutions.¹³⁰ Collectives, not universities, fund NIL payments. Payments by collectives would be covered by Title IX, therefore, only if university conduct related to collectives (touting particular collectives to fans and donors, encouraging donations, directing college athletes to them, etc.) equates to a level of control sufficient to make universities responsible for the conduct of collectives notwithstanding their formal status as outside entities.¹³¹

As discussed above, NCAA bylaws prevent the involvement or intervention of universities in athlete NIL deals. If college athletes independently negotiate deals themselves or through collectives, then it should be true that any differential in money earnings between male and

sports.com/name-image-likeness/the-future-of-nil-and-compensating-athletes-with-ncaa-president-mark-emmert/.

127. *See* Consolidated Amended Complaint at 111, *In re* Coll. Athlete NIL Litig., No. 4:20-cv-03919 (N.D. Cal. July 26, 2021).

128. 20 U.S.C. § 1681.

129. *See id.* (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”).

130. *See id.* § 1687.

131. It also is possible that a university’s selection of and payment to its marketing and broadcast partners would trigger Title IX scrutiny. If so, an athletic department might need to condition the use of football and men’s basketball player names and likenesses on a marketing or broadcast partner’s compliance with Title IX.

female athletes will not violate Title IX.¹³² An analogue is media coverage of athletes and teams. Universities are expected to make equal efforts to gain media coverage for men and women, to provide the same assistance for men's and women's teams to reach media representatives and outlets, and to provide in-house sports information director assistance to all teams and athletes on a basis commensurate with the size of the team and championship season. After that, universities are not responsible for unequal media coverage.

In a world outside the NCAA NIL wild west, and independent of Title IX considerations, the number and value of an individual's NIL opportunities would relate to a commercial entity's assessment of the profits that individual's NIL will bring. Television viewership, attendance at competitive events, and overall fan interest translate to revenues in sports. In all areas, men dominate.¹³³ For women's sports, lesser fan interest and viewership means less commercial value to a team logo, less money from team gear sales, less NIL value in athletes in that sport,¹³⁴ and smaller NIL deals.

At the professional level, currently only 0.4% of sports sponsorships go to women's sports and women's athletes,¹³⁵ and only two women were among the top 100 highest-earning athletes (prize money/salary plus endorsements)

132. This assumes that NIL payments would come within the educational scope of Title IX. As discussed, this conclusion is far from clear.

133. See Brad Adgate, *Popularity of Women's Sports Surges Approaching 50th Anniversary of Title IX*, FORBES (Apr. 7, 2022, 11:52 AM), <https://www.forbes.com/sites/bradadgate/2022/04/07/popularity-of-womens-sports-has-been-surgin/?sh=23ea85e23613> (describing continued disparities in revenue between women's and men's NCAA sports).

134. On occasion an individual athlete will have "star power" independent of sport or team success. In the past, at least some media and fan interest for women's sports revolved around player appearance, uniform style, and sex appeal, and not solely or even primarily on athletic competition. See, e.g., Martin Polley, *Sport, Gender and Sexuality at the 1908 London Olympic Games*, in ROUTLEDGE HANDBOOK OF SPORT, GENDER AND SEXUALITY 30, 31 (Jennifer Hargreaves & Eric Anderson eds., 2014); PIERRE DE COUBERTIN, *Educational Use of Athletic Activity*, in OLYMPISM: SELECTED WRITINGS 184, 188–89 (Norbert Müller ed., 2000); MICHAEL A. MESSNER, TAKING THE FIELD: WOMEN, MEN, AND SPORTS, at XIX (2002); Patricia Reaney, *Female Athletes Judged by Sex Appeal*, ABC NEWS (Sept. 13, 2000), <https://abcnews.go.com/Technology/story?id=119952&page=1>. A comparison of the differences in the playing uniforms for men's and women's gymnastics and volleyball suggests these factors still are in play today, and they also may enhance the NIL value of some women.

135. Meredith Cash, *The WNBA Players' Union Has a New Strategy to Get Its Players Paid and Increase Investment in Women's Sports*, BUS. INSIDER (Aug. 26, 2021, 10:00 AM), <https://www.insider.com/wnba-players-deal-parity-boosts-sponsorship-opportunities-womens-sports-investment-2021-8>.

in 2021.¹³⁶ One might predict, therefore, that college sports would follow that pattern and that male athletes would reap the most reward from NIL deals. When excluding football college athletes from the calculus, however, more women than men have NIL deals.¹³⁷ Women gymnasts, at \$7,000, have the highest average deal.¹³⁸ That number, however, is well below what football players, and likely some men's basketball players, will earn.

VI. University Deals, Shared Revenues, and Pay for Play

Jim Delany, the former Big Ten Commissioner, suggested that pay-for-play, or a model that provides college athletes with 50% of television revenues rather than outright salaries, might prompt Big Ten universities to “downsize the scope, breadth and activity of their athletic programs,” perhaps moving to NCAA Division III, which offers no athletic scholarships.”¹³⁹ Commissioner Delany believed that downsizing would preserve the collegiate model for Big Ten Conference schools, and that preserving the model was worth doing. He also evidently believed that the Big Ten presidents and chancellors would agree. Instead, the Conference expanded its reach both geographically and financially by adding four new Conference members from the west coast, namely the Universities of Southern California and California at Los Angeles in 2022¹⁴⁰ and the Universities of Washington and Oregon in 2023.¹⁴¹ The Big Ten Conference now spans the United States from the east to west coasts, with a footprint in the major NYC and Los

136. Madison Williams, *LeBron James Tops List of Highest-Paid Athletes in 2021*, SI (May 12, 2022), <https://www.si.com/nba/2022/05/12/lebron-james-tops-list-highest-paid-athletes-sportico-2021>.

137. *Male Athletes Lead Way in NIL Money, According to Third-Party Data*, ESPN (Jan. 27, 2022, 03:45 PM ET), https://www.espn.com/college-sports/story/_/id/33160929/male-athletes-lead-way-nil-money-per-data (statement of INFLR CEO Jim Cavale) (“[I]f you remove football from the equation, transactions or activities disclosed by female student-athletes make up more than 50% of the total for all other sports.”).

138. Hunzinger, *supra* note 35.

139. See Declaration of James E. Delany in Support of the NCAA’s Class Certification Opposition Brief at 3, *In re NCAA Student-Athlete Name and Likeness Licensing Litig.*, No. 09-cv-1967-CW (N.D. Cal. Mar. 14, 2013).

140. Andrea Adelson et al., *Inside the Stunning USC-UCLA Move to the Big Ten -- and the Chaos that Followed*, ESPN (July 11, 2022, 7:45 AM ET), https://www.espn.com/college-football/story/_/id/34217498/inside-stunning-usc-ucla-move-big-ten-chaos-followed.

141. Adan Rittenberg, *Big Ten Adds Oregon, Washington as Newest Members in Blow to Pac-12*, ESPN (Aug. 4, 2023, 7:35 PM ET), https://www.espn.com/college-football/story/_/id/38135852/big-ten-adds-oregon-washington-newest-members-blow-pac-12.

Angeles broadcast markets, an expansion that promises to be increasingly lucrative to the Conference.¹⁴²

Big Ten college athletes now will have increased travel to contend with, and the potential of more class absences caused by away-game competition. Big Ten athletic departments now will have even more money to spend. With past as prologue, it is a solid prediction that the money will mean even more bloated coach salaries, more coaches and support staff at least for football teams,¹⁴³ perhaps more athletic facility construction, and even more distance between athletic departments and the greater university.

A. University Deals and Shared Revenues

University payments to college athletes would take either of two forms. One version is straightforward: universities would pay college athletes to engage in university promotional activities. This version is the subject of a current antitrust lawsuit.¹⁴⁴ The suit seeks to eliminate NCAA bylaws that prohibit universities and conferences from sharing broadcast revenues with their athletes.¹⁴⁵ A second, perhaps more creative, version effectively would

142. The Conference already has a massive media rights deal. Rittenberg, *supra* note 17. Big Ten presidents and chancellors are not alone in behavior motivated primarily by financial considerations. For example, Brit Kirwan was co-chair of the Knight Commission on Intercollegiate Athletics in 2001 when the Commission published *A Call to Action*, criticizing the state of college athletics and calling for a major directional change. He was president of the University of Maryland from 2002 to 2015, and then served as University of Maryland system chancellor. Maryland switched athletic conferences in 2014, from the ACC to the Big Ten. The move meant much greater travel for Maryland athletes and the severing of longstanding and traditional rivalries. It was largely financially motivated. Kirwan supported the move. He touted the Big Ten academic programs AND the influx of money to Maryland. Brad Wolverton, *Cache of Messages Reveals Leadership Challenges of Maryland Move to Big Ten*, CHRON. OF HIGHER EDUC. (Dec. 5, 2013), https://www.chronicle.com/article/cache-of-messages-reveals-leadership-challenges-of-maryland-move-to-big-ten/?cid=gen_sign_in.

143. See DIV. I TRANSFORMATION COMM. REPORT, *supra* note 10, at 20–21.

144. Claims to broadcast revenue shares grounded in state-based rights of publicity have not succeeded. See, e.g., *Marshall v. ESPN Inc.*, 111 F. Supp. 3d 815, 828 (M.D. Tenn. 2015); *Balt. Orioles, Inc. v. Major League Players Ass'n*, 805 F.2d 663, 674 (7th Cir. 1986); see also *Marshall v. ESPN*, 668 F. App'x 155, 157 (6th Cir. 2016). A right of publicity is a state tort. Finding such a right, therefore, depends on the tort law of the state. In addition, copyright law would appear to foreclose these claims. See Potuto et al., *supra* note 7, at 914. This assumes, of course, that payouts to universities will not be offset (or subsumed) by losses in donor contribution due to NIL payments made to athletes.

145. See Consolidated Amended Complaint at 111, *In re College Athlete NIL Litigation*, No. 4:20-cv-03919 (N.D. Cal. July 26, 2021); Jared Yaggie, *The Next Step for*

treat the athletic participation of college athletes as a form of promotional activity for which a university would pay. Former NCAA president Mark Emmert described this version as a “brand ambassador model.”¹⁴⁶ The rationale for promotional payments is that college athletes and their competition have high visibility, are attractive to donors, and bring value to a university brand.

For either version to take effect, the NCAA must amend its bylaws prohibiting universities from paying their college athletes. The NCAA might stop there and let member universities and their conferences decide the criteria and payment amounts. Alternatively, the NCAA might set parameters for these payments including caps.¹⁴⁷ In either case, the better-resourced universities would be advantaged.¹⁴⁸ If the NCAA sets no parameters, better-resourced universities would be even more advantaged.

NIL: How a New Lawsuit Is Promising Shared Broadcasting Revenue for Student-Athletes, UNIV. CIN. L. REV. (Nov. 25, 2022), <https://uclawreview.org/2022/11/25/the-next-step-for-nil/> [<https://perma.cc/BM6X-4J5P>]; Steve Berkowitz, *Name, Image and Likeness Lawsuit Targets College Sports TV Revenue Dating Back to 2016*, USA TODAY (Oct. 22, 2022, 7:58 AM ET), <https://www.usatoday.com/story/sports/college/2022/10/22/name-image-likeness-lawsuit-targets-tv-sports-revenue-dating-2016/10574424002/>. The lawsuit seeks to permit university compensation to reach back to 2016, primarily for football and men’s and women’s basketball college athletes but also for any college athlete who received NIL payments since that date. *Id.* Yet another effort to achieve revenue sharing is spearheaded by the College Football Players Association (CFPA), a self-described national organization of football college athletes who seek to achieve a voluntary agreement with their universities. Andrew Graham, *Jason Stahl and His Big Plans for the College Football Players Association*, ON3 (July 6, 2023), <https://www.on3.com/news/jason-stahl-and-his-big-plans-for-the-college-football-players-association/>. The CFPA is not a union and does not claim to be. *Id.* It is prepared to register as a labor organization (under 501(c)(5)) and begin the process to unionize should it fail in its efforts to share revenues. See Hamilton Nolan, *A New Group to Organize College Football Players Just Launched. Incredible Timing.*, IN THESE TIMES (Oct. 5, 2021), <https://inthesetimes.com/article/college-football-players-union-labor-nlr-b-cfbpa>. See generally 26 U.S.C. § 501(c)(5) (recognizing “[l]abor, agricultural, or horticultural organizations” as exempt from taxation).

146. Dosh, *supra* note 126.

147. The likelihood is that NCAA parameters would prompt college athletes to bring yet another antitrust lawsuit.

148. In fact, Emmert suggested that universities might involve their existing collectives in providing funds to cover brand ambassador payments. Dosh, *supra* note 126.

Either version would involve universities in managing the NIL terrain, a consequence many endorse.¹⁴⁹ For either version to take effect, however, the NCAA must amend its bylaws that prohibit universities from making NIL payments to their college athletes. That time may be coming. In a proposal advanced by NCAA president Charles “Charlie” Baker, a new NCAA subdivision would be created for A5 and other higher-resourced institutions; the subdivision would make NIL rules for its members.¹⁵⁰ The rules could give unfettered authority to each subdivision institution or conference to decide the criteria and amount of payments to their college athletes. Alternatively, the rules could set subdivision parameters for these payments, including capping amounts that could be paid by institutions and conferences.¹⁵¹

Should universities share revenues with college athletes, or pay them for NIL work, policy questions would arise as to how to allocate revenues¹⁵² and how revenues should be quantified.¹⁵³ How would college athletes be selected? Would a fixed amount be paid to each college athlete? How would that amount be decided? Would payments vary depending on, for example, the revenue production and visibility of each team (where football clearly would be king), the position played by each athlete, whether an athlete was a

149. Athletic administrators and coaches seek more involvement in an attempt to corral the wild west style atmosphere that is presently affecting NIL activity. *See, e.g.*, Dodd, *supra* note 41.

150. Jason Kanner, *NCAA President Charlie Baker’s Open Letter: Student-Athletes Must Join the Conversation*, JDSUPRA (Dec. 21, 2023), <https://www.jdsupra.com/legalnews/ncaa-president-charlie-baker-s-open-5180614/>. The proposal also requires an educational trust fund for at least one half of an institution’s college athletes that would provide funds of at least \$30,000. *Id.*; Doug Lederman, ‘Revolutionary’ or ‘Reactionary’? *NCAA Chief’s New Model for Big-Time Sports*, INSIDE HIGHER ED (Dec. 6, 2023), <https://www.insidehighered.com/news/students/athletics/2023/12/06/charlie-bakers-plan-paying-players-and-sustaining-ncaa>. The most recent governance iteration gave the A5 conferences bylaw authority over certain areas of college athlete benefits. 2022-23 NCAA DIVISION I MANUAL, *supra* note 12, art. 9.1.1.1.2(g), at 15 (describing “[l]egislation related to awards, benefits and expenses for enrolled student-athletes and their families and friends” as one of the areas of autonomy). A stumbling block to an entirely new subdivision was the men’s basketball tournament. The tournament funds all NCAA activities and also provides resources to lesser-resourced institutions and conferences. *See* Novy-Williams, *supra* note 14. Should a new subdivision be created, the logistics of maintaining an all Division I tournament may be insurmountable.

151. The likelihood is that subdivision parameters would prompt college athletes to bring yet another antitrust lawsuit.

152. Valuation is difficult. *See* Potuto et al., *supra* note 7, at 919.

153. *Id.* at 920.

starter or substitute, or the NIL value each athlete might bring to the table?¹⁵⁴ There also are federal tax issues to be resolved, both for college athletes and their universities.¹⁵⁵ These issues are beyond the scope of this Article, but they were addressed in some detail in a prior co-authored article.¹⁵⁶

B. Pay-for-Play

It has been eight years since the National Labor Relations Board (“NLRB”) punted the question whether scholarship college football athletes at Northwestern University were employees under the National Labor Relations Act (“NLRA”).¹⁵⁷ At that time, college athletes had already lost thirty-seven of the cases they filed under state employment laws.¹⁵⁸ Whether suing as individuals on claims particular to their circumstances or in class actions, they also routinely lost cases seeking more benefits or relaxation of NCAA limits on their conduct.¹⁵⁹

The NLRB non-decision came immediately before the crescendo of complaints about the treatment of college athletes reached break point.

154. Presumably broadcast revenues would be an additional question, specific to shared broadcast revenues.

155. See, e.g., Shaw, *supra* note 23.

156. For a full discussion, see Potuto et al., *supra* note 7, at 918–42.

157. Nw. Univ. & Coll. Athletes Players Ass’n, 362 N.L.R.B. 1350, 1350 (Aug. 17, 2015). For a review of the unionization effort at Northwestern, including data regarding NCAA revenues, expenditures, and bylaws; and the legal issues involved, see, for example, William B. Gould IV et al., *Full Court Press: Northwestern University, a New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1 (2014); Joseph A. Dempewolf, Comment, *Throwing the Red Flag: A Review of the NLRB’s Fumbled Decision Regarding Collegiate Football Players as Employees [Northwestern Univ., 362 N.L.R.B. No. 167 (Aug. 17, 2015)]*, 55 WASHBURN L.J. 789 (2016). The regional director had concluded that Northwestern scholarship football players were employees under the NLRA and that they constituted an appropriate bargaining unit. Nw. Univ. & Coll. Athletes Players Ass’n (CAPA), No. 13-RC-121359, at 2 (N.L.R.B. Mar. 26, 2014) (decision & direction of election), <https://apps.nlr.gov/link/document.aspx/09031d4581667b6f>.

158. See Mike Ingersoll, *NLRB, Labor Laws and the Impact on NCAA Athletes*, WOMBLE BOND DICKINSON (Oct. 27, 2021), <https://www.womblebonddickinson.com/us/insights/articles-and-briefings/nlr-labor-laws-and-impact-ncaa-athletes>.

159. See, e.g., Cal. State Univ., Hayward v. NCAA, 121 Cal. Rptr. 85, 88–89 (Cal. Ct. App. 1975); Bloom v. NCAA, 93 P.3d 621, 624 (Colo. App. 2004). NCAA v. Lasege, 53 S.W.3d 77, 80 (Ky. 2001); Agnew v. NCAA, 683 F.3d 328, 340–46 (7th Cir. 2012); Banks v. NCAA, 977 F.2d 1081, 1094 (7th Cir. 1992); Rock v. NCAA, 928 F. Supp. 2d 1010, 1026 (S.D. Ind. 2013); Smith v. NCAA, 139 F.3d 180, 187 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999); see also Josephine R. Potuto, *The NCAA Student-Athlete Reinstatement Process: Say What?*, 63 BUFF. L. REV. 297, 326 (2015).

NCAA bylaws now permit greater services and benefits for college athletes. State legislatures in a majority of states have enacted NIL legislation.¹⁶⁰ The Supreme Court decided *Alston*. The NCAA no longer prohibits college athlete NIL deals. In this new environment of expanded financial opportunities for college athletes, the question whether they are employees under the NLRA has resurfaced.¹⁶¹

On September 29, 2021, the NLRB General Counsel provided her legal opinion to regional NLRB offices that certain college athletes are employees under the NLRA¹⁶² and that she would take that position in future NLRB investigations and litigation.¹⁶³ Shortly thereafter, the National College Players Association charged USC, the Pacific 12 Conference (the “Pac 12”), and the NCAA with an unfair labor practice, seeking confirmation that football and basketball athletes are employees under the NLRA.¹⁶⁴ The NLRB regional office found merit in the claim that its college athletes are USC employees.¹⁶⁵ The NLRB also found merit in the claim that college athletes are employees of the NCAA and the Pac 12.¹⁶⁶ To do so, the regional office applied a “joint employer” theory to the NCAA and Conference.

The NLRB has jurisdiction over private, not public, employers.¹⁶⁷ Even if it ultimately decides that a joint employer status applies to the NCAA and private universities, all public universities still would be outside NLRB jurisdiction.

160. See sources cited *supra* note 23.

161. In her September 29, 2021 memo affirming employee status for college athletes, the General Counsel relied in part on the changed landscape of college athletics. Memorandum from Jennifer A. Abruzzo, Gen. Counsel, NLRB, to All Reg’l Dirs., Officers-in-Charge & Resident Officers, Memorandum GC 21-08, at 5 (Sept. 29, 2021), <https://apps.nlr.gov/link/document.aspx/09031d458356ec26>.

162. *Id.* at 9 (“In sum, it is my position that the scholarship football players at issue in *Northwestern University*, and similarly situated Players at Academic Institutions, are employees under the Act.”).

163. *Id.*

164. See Daniel Libit, *NLRB Region Finds USC, Pac-12 and NCAA Employ Trojan Athletes*, SPORTICO (Dec. 15, 2022, 5:50 PM), <https://www.sportico.com/leagues/college-sports/2022/nlr-usc-pac-12-ncaa-trojan-athletes-1234698669/>.

165. See Ross Dellenger, *Significant NLRB Move Will Aid Pursuit of College Athletes Becoming Employees*, SI (Dec. 15, 2022), <https://www.si.com/college/2022/12/15/nlr-college-athletes-employees-pursuit>.

166. *Id.*

167. See *Jurisdictional Standards*, NLRB, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/jurisdictional-standards> (last visited Sept. 24, 2023).

A different group of college athletes sued twenty-one universities, the NCAA, and applicable athletic conferences under the federal Fair Labor Standards Act (“FLSA”).¹⁶⁸ The district judge ordered the case go to trial on the claim that college athletes are employees under the FLSA and the claim that the NCAA, universities, and conferences are joint employers.¹⁶⁹ The decision conflicts with prior cases decided in the Seventh¹⁷⁰ and Ninth¹⁷¹ Circuits and is on appeal.¹⁷²

VII. What Comes Next

It is too early to tell how the campus environment will be affected by NIL payments made by outside entities to college athletes. Equally, it is too early to tell how university NIL payments would be perceived by the public. Potential impacts include enlarging the gulf in treatment between college athletes and students on the greater campus; undermining the equitable treatment of all college athletes; and creating resentment and strained interactions between college athletes and students on the greater campus and among college athletes.¹⁷³

The foregoing sections of this Article described some stresses and implementation issues produced by NIL and the clamor for more revenue sources for college athletes. Listed below are brief summaries of these and other issues, including university exclusive licenses, taxes, athlete entrepreneurs, Title IX, and high school athletes. The responses of the NCAA, the conferences, and Congress is also briefly considered.

168. *Johnson v. NCAA*, 556 F. Supp. 3d 491, 495 (E.D. Pa. 2021). The FLSA covers minimum wage, maximum hour requirements. It requires overtime wages for a work week of more than forty hours. 29 U.S.C. § 207(a)(2)(c).

169. *Johnson*, 556 F. Supp. at 491.

170. *Berger v. NCAA*, 843 F.3d 285, 288 (7th Cir. 2016).

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

172. See Maryclaire Dale, *US Appeals Court to Weigh NCAA Case Over Pay for Athletes*, ASSOCIATED PRESS (Jan. 17, 2023), <https://apnews.com/article/sports-college-3d98cd455c2ed1c636ce46d8dd322100>.

173. Preferential treatment of football and men’s basketball college athletes already exists. Football and men’s basketball are two of only five NCAA sports in which a scholarship athlete must receive a scholarship that covers full COA rather than a percentage. Public attention also already sets them apart. Football college athletes are featured in more local media stories than college athletes in other sports, and receive the bulk of national media attention. Talk radio is devoted to football and men’s basketball college athletes. March Madness is a national story with office bracket pools everywhere.

A. NIL

University exclusive Licenses. Universities and their athletic departments provide exclusive licenses to business entities to sell their products in university buildings and athletic venues. Retailers operate onsite and on web-based merchandise outlets. Universities have multimillion-dollar agreements with apparel and shoe companies by which they receive team uniforms and equipment without charge.¹⁷⁴ The quid pro quo for the merchandiser is that its logo or design appears on team uniforms and no competing brand is displayed in athletic facilities or worn by athletes or staff. College athlete NIL deals might conflict with university deals or might reduce the value of them. One pressing question, therefore, is whether NCAA bylaws could, and should, prohibit college athletes from entering promotional deals when they infringe on university exclusive licenses.¹⁷⁵

A related question is whether college athletes may wear licensed team uniforms or their team number when promoting their individual NIL deals. Conversely, it is unclear whether universities may profit without sharing revenues when they make use of a college athlete's NIL¹⁷⁶ in, for example, a team photograph offered for sale.

Taxes. There are questions about the application of federal and state taxes on NIL revenue (as well as on wages, if pay-for-play arrives), and also how revenues will affect the award and calculation of scholarships.

Athlete Entrepreneurs. There are questions regarding the appropriate scope of entrepreneurial behavior by college athletes with NIL deals. Consider whether college athletes with NIL deals such as social media or an athlete-owned business enterprise may hire other college athletes or recruits to work on their behalf. The answer to this question will depend in part on whether there is university involvement and also whether a college athlete may become a booster, thus subject to booster bylaws.

174. Megan Turner, *Nike Playing Hardball with Alabama Gear Contract*, OUTKICK (May 12, 2021, 7:41 AM), <https://www.outkick.com/nike-playing-hardball-with-alabama-gear-contract-could-cost-in-longrun/>.

175. Some universities already prohibit college athletes from making brand deals that interfere with their own sponsorship contracts, or at least prohibit them from promoting those deals (by, for example, wearing a competing logo) at an athletic department venue or during an athletic department event. *Playing by New Rules: Ten Considerations for Universities Implementing NIL Policies*, JONES DAY (July 2021), <https://www.jonesday.com/en/insights/2021/07/playing-by-new-rules>.

176. This article previously discussed NIL revenues in broadcasts. *See supra* note 145. The question here more clearly implicates an athlete's NIL.

Title IX. As discussed above, many collectives offer opportunities only to football college athletes and those in one or two other sports.¹⁷⁷ A football team can have upwards of over 100 college athletes (85 scholarship athletes plus walk-ons). If an independent entity, a collective is not subject to the requisites of Title IX gender equity. May a university promote collectives that fail to operate in a fashion compliant with Title IX for male and female athletes?

High School Athletes. In twenty-six states, high school athletes may make NIL deals. Some deals are reported to be quite large.¹⁷⁸ Bronny James, for example, is reported to have a \$7.5 million contract with Nike.¹⁷⁹ High school associations face some of the same concerns addressed in this Article regarding the NCAA and universities. High School Associations also face the additional concern that high school athletes will bolt to club sports if prevented from signing NIL deals. There is currently little litigation interest in high school athletes, and in any event, most deals are likely small enough to avoid antitrust scrutiny.

B. Employment

Gene Smith, the athletic director at The Ohio State University, said that he would work to find support and revenues for college athletes in addition to what they may derive from NIL deals, but if college athlete employment arrives, then he is “out.”¹⁸⁰ His comment underscores that a main area of concern, and the one with more variables and fewer certainties, is what will happen if athlete employment arrives.

NCAA DI has 364 university members.¹⁸¹ Members are enormously diverse in the number and type of sports offered, the size of educational

177. See *supra* note 56 and accompanying text.

178. *High School Athletes Are Getting Major Endorsement Deals Following State Law Changes*, BUS. OF COLL. SPORTS (Dec. 28, 2022), <https://businessofcollegesports.com/high-school-nil/>. <https://businessofcollegesports.com/high-school-nil/>.

179. Daniel Bell, *Bronny James Could Reportedly Make \$7.5 Million in NIL Money If He Attends College*, BSO ENT. (Jan. 27, 2023), <https://blacksportsonline.com/2023/01/bronny-james-could-reportedly-make-7-5-million-in-nil-money-if-he-attends-college/>.

180. See Marcus Hartman, *Paying the Players? 3 Major Voices Share Views on College Athlete Compensation*, DAYTON DAILY NEWS (Aug. 19, 2022), <https://www.daytondailynews.com/sports/paying-the-players-3-major-voices-share-views-on-college-athlete-compensation/EHAEJUMJMDDZKXVWWWJV3RWM/>.

181. Justin Berkman, *The Complete List of NCAA Division 1 Colleges (Most Recent)*, PREPSCHOLAR (Sept. 18, 2022, 9:00 PM), <https://blog.prepscholar.com/complete-list-of-division-1-colleges-by-state>.

institutions, their academic missions, the number of majors and courses they offer, the demographic profile of each university and its students, its geographical location, its donor base and endowment, and the available athletic revenues and level of athletic spending.

Matched to this diversity is a myriad of federal and state labor and employment statutes. The scope of each statute and the particular demographics of college athlete groups and their universities involve many variables and a complicated discussion tree.

Consider a single federal statute, the NLRA, and how it would apply to the diversity of DI. The NLRA applies only to private entities;¹⁸² DI has more than 200 public universities that are outside its reach.¹⁸³ For private universities, decisions about the employee status of athletes on different teams and the appropriate contours of their bargaining units would be university-specific.¹⁸⁴ In consequence, bargaining units across universities are unlikely,¹⁸⁵ and antitrust protection also is unlikely.¹⁸⁶

Federal law applies in all the states, of course, and that at least means there is a common baseline for analysis no matter the state in which a university and its college athletes are located. The number of questions to be answered are multiplied for athletes at over 200 public universities subject to state laws where there is no corresponding common baseline.¹⁸⁷

Administration of athletic competition requires that each sport has a commonality of playing rules with some level of commonality governing the off-field behavior of athletes.¹⁸⁸ No competitive system is tenable if two (or more) sets of rules apply to competing teams. A large and varied landscape of applicable law matched with an equally large and varied landscape of athlete

182. See *Directory*, NCAA, <https://web3.ncaa.org/directory/memberList?type=12&division=I> (last visited Sept. 25, 2023).

183. *Id.*

184. See Steven L. Willborn, *A New Look at NLRB Policy on Multiemployer Bargaining*, 60 N.C. L. REV. 455, 457 (1981).

185. *Id.*

186. *Id.*

187. As just two examples, see generally WAGE AND HOUR LAWS: A STATE-BY-STATE SURVEY (Gregroy K. McGillivray et al eds., 2d ed. 2011); 7 ARTHUR LARSON & LEX K LARSON, LARSON'S WORKER'S COMPENSATION LAW § 125.02 (2023) (providing an overview of how states handle workers' compensation disputes).

188. See, e.g., Josephine (Jo) R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 262 (2010).

demographics is a perfect storm for administration of competition, at least in the short run. It is no wonder that Gene Smith would want out.

What follows is a partial list of the questions to be resolved were college athletes to be recognized as employees of their universities.

1. Will the federal labor laws apply in the same manner they currently apply, or will adjustments be possible for college athletes? Will college athletes be able to strike? What happens if college football athletes at, for example, Notre Dame University strike but college football athletes at other A5 (or FBS) universities do not?
2. Should universities be able in effect to trade a player to another school, or maintain a version of the farm system where another athlete can be added to a team when a starter is hurt?
3. If adjustments to the operation of the NLRA are made, will they come from the NLRB? Will the courts intervene? Or will Congress act?
4. How will decisions as to athlete valuation be made?
5. What will be the tax consequences for universities and for college athletes?

C. NCAA Response

If college athletes at private universities become employees pursuant to the NLRA, the NCAA faces two unpalatable choices. It could expel the universities (or any of their athletic programs whose athletes are designated as employees by the NLRB). These universities might include those with prominent athletic programs such as Northwestern, USC, Stanford, and Notre Dame. Alternatively, the NCAA could amend its bylaws to permit all athletes to be employees. Athletes at public universities, however, would still be subject to different state laws regarding potential unionization and employment status and treatment.

D. How About Academics?

Virtually all the current debate centers on the economic prerogatives of college athletes and what best serves their athletic interests. The Final Report of the NCAA DI Transformation Committee offers resounding proof. No

recommendation focuses squarely on academic outcomes;¹⁸⁹ nor do any of the athletics-related recommendations substantially discuss the academic consequence should the recommendation take effect.

The DI Transformation Committee, for example, recommended that 25% of teams in a particular sport compete in a national championship.¹⁹⁰ Championship participation is undoubtedly a worthwhile and enjoyable experience for college athletes, but as more teams compete, more college athletes will miss class because of competition (and travel and added practices). The Transformation Committee offered no discussion of the academic impact of expanded championship fields. Consider the impact on men's basketball, for example. It is estimated that only 48% of DI scholarship men's basketball athletes graduate in six years.¹⁹¹ For basketball, missed time comes in the middle of the semester and therefore has an even more disruptive effect on academic outcomes.

There is, moreover, a troubling inconsistency in the athletic advantage to expanded championship opportunities. More championship opportunities requires more resources. This consequence is ultimately unfriendly to the athletic interests of students whose programs are cut. Cuts may also mean loss of scholarship aid for the students on those teams, undercutting their ability to complete their degrees.

Another example of the subordination of academic interests is the expanding geographical footprint of several conferences. The Transformation Committee recommended only that when college athletes travel 2000 or more miles to compete, air travel must be provided.¹⁹²

To be fair, the Transformation Committee recommendations will be implemented by other committees. Those committees may look more closely at academic impacts. If the contours of these rules ultimately devolve to the Conferences, then at that level it is possible that academic interests and outcomes will be better accommodated. In the view of this author, however,

189. The Transformation Committee recommended that transferee schools guarantee academic aid to transfer college athletes until they graduate. DIV. I TRANSFORMATION COMM. REPORT, *supra* note 10, at 17–18. Academic performance and fairness to college athletes may not have been the sole motivation of the Committee. Such a requirement also may have the effect of limiting transfers.

190. *Id.* at 15, 21.

191. Zimbalist, *supra* note 9. A total of 38% of football players did not graduate within the six-year timeline. *Id.*

192. DIV. I TRANSFORMATION COMM. REPORT, *supra* note 10, at 23. Even regarding this recommendation, a team might make several stops before it reaches its last competition site, the one that is 2000 miles distant.

it is more likely that a need to find more revenue sources for those displaced by NIL payments, combined with potential revenue sharing and college athlete wages, will push in the direction of larger broadcast contracts and continued prioritization of financial interests.

E. Separate Division; Separate Association

Every organizational move the NCAA has undertaken since its inception has been to provide more autonomy to the schools in the A5 conferences. It is a reasonable prediction, therefore, that at some point the A5 conferences will form their own association or, at the very least, become their own division within the NCAA.

Football, and to some extent men's basketball, are the college athletic revenue drivers. Virtually all the clamor regarding athlete exploitation centers on athletes in these two sports. Similarly, virtually all the clamor for the better treatment of college athletes centers on them. These sports differ from non-revenue sports in, among other things, academic performance and graduation rates, fan interest, media coverage, broadcast deals, and well-heeled donors willing to pay large sums to advance their competitive chances. These two sports also differ from other sports in the potential for professional careers. Although very few collegiate football and basketball athletes will have high-paying professional careers, their opportunities far exceed those of athletes in other sports. Football and basketball athletes with professional opportunities, moreover, come almost exclusively from the FBS and largely from A5 universities. Reforms focused on these sports are ill-matched and likely ill-serve other college sports. One suggestion, therefore, is to move these sports into another athletic association where rules may be made specific to their situations.¹⁹³

F. Congressional Action

Currently, the NCAA has no bylaws that speak directly to the appropriate scope of NIL deals for college athletes. The NCAA enforcement staff faces obstacles, even with the new NIL presumption bylaw, to monitor NIL deals for compliance with NCAA recruiting, booster, and coach conduct bylaws. The NCAA remains reluctant to take any meaningful action regarding regulation of NIL and other potential college athlete benefits, for fear of another run of lawsuits alleging antitrust violations.

193. One major stumbling block is how to handle the men's basketball tournament, the NCAA cash cow, that is open to all DI teams. *See* Novy-Williams, *supra* note 14 (discussing the NCAA's outsized revenue from the NCAA men's basketball tournament).

The short answer to what the future holds, or at least what the future *should* hold, is federal legislation. The NCAA has clearly signaled the need for federal legislation to help it maintain some semblance of control over college athletics.¹⁹⁴ As the current chair of the NCAA Board of Directors put it: “Congress is really the only entity that can affirm student-athletes’ unique status.”¹⁹⁵ Her concern was not simply the threat of antitrust litigation were the NCAA to act unilaterally, but also the risk that an NCAA bylaw might transgress state labor laws.¹⁹⁶ In particular, she addressed the need for a national clearinghouse of NIL deals so that the NCAA could track the NIL market and protect college athletes from exploitation.¹⁹⁷

Hopefully those knowledgeable about the management of college athletics and those knowledgeable about the requisites of higher education and the administration of universities can work with college athletes and lawmakers to produce a workable solution or a coterie of solutions. Even were Congress to act with little input from experts in the field, it may be that even a fundamentally flawed system, but one uniformly applied, will be an improvement over what currently exists.

VIII. Conclusion

The comedy team of Oliver Hardy and Stan Laurel appeared in many movies together. A catch phrase of Hardy to Laurel is remembered as, “That’s another fine mess you’ve gotten me into.”¹⁹⁸ In a comedy movie, the

194. See, e.g., Ari Shapiro et al., *NCAA Wants Congress’ Help to Stabilize Collegiate Sports*, NPR, at 00:24 (Jan. 18, 2023), <https://www.npr.org/2023/01/18/1149855933/ncaa-wants-congress-help-to-stabilize-collegiate-sports> (statement of Baylor University President Linda Livingstone); see DIV. I TRANSFORMATION COMM. REPORT, *supra* note 10, at 22.

195. Nicole Auerbach, *The NCAA Has Rallied Around Its Main Priority for 2023: Get Help from Congress*, ATHLETIC (Jan. 12, 2023), <https://theathletic.com/4086860/2023/01/12/ncaa-convention-congress-federal-nil-law/> (quoting Linda Livingstone).

196. See *2023 NCAA Convention Press Conference*, NCAA (Jan. 12, 2023), https://naaa.org.s3.amazonaws.com/ncaa/programs/convention/2023/2023NCAAconv_BakerLivingstonePressConference.pdf (providing transcript of statements by NCAA President Charlie Baker and Baylor University President Linda Livingstone).

197. *Id.* According to Livingstone, a federal statute preempting what the moderator described as the “various hodgepodge of state laws” was needed before the NCAA could create such a clearinghouse. *Id.*

198. *Oliver Hardy Quotes*, BRAINYQUOTES, <https://www.brainyquote.com/authors/oliver-hardy-quotes> (last visited Nov. 28, 2023). However, the exact line on film from Hardy to Laurel went a little differently: “Well, there’s another nice mess you’ve gotten me into.”

phrase and the dilemmas that provoked it are funny and entertaining. Certainly, the current state of the NCAA administration of college sports, the unregulated landscape of NIL deals, and the NCAA's immobility in the face of antitrust litigation may be described at a minimum as a "fine mess." College athletics, however, is not a comedy movie and the current situation is not funny.

It is possible that over time, even without congressional intervention, things will shake out to form some reconfigured version of the collegiate model. It is possible that the market for college sports will continue unabated. It is possible that there will be an end to runaway expenses,¹⁹⁹ unchecked spending, and the never-ceasing search for new and increased funding sources. It is possible that fan-donors will rethink the amount of money spent in recruiting wars. It is possible that college athletes will be assured a thriving environment for academic success. It is much more likely that congressional action must pave the way.

In the satire *Candide*, Voltaire's character Pangloss echoed the popular maxim: "Everything is for the best in this best of all possible worlds."²⁰⁰ Pangloss's optimism is meant to be ridiculed. The state of college athletics is a far cry from the evil of Pangloss's world. Nonetheless, optimism in the future of college athletics without congressional intervention seems equally misplaced, at least if the end game is a viable integration of college athletics into the greater campus and the primacy of college athlete wellbeing and success.

Chris's Movie Corner, *Laurel and Hardy - Another Fine Mess (Black and White)*, at 3:12, YOUTUBE (Jan 15, 2022), <https://www.youtube.com/watch?v=jLe4j3WZfOw>.

199. Despite the amount of athletic department spending, a large majority of athletic programs operate in the red. Zimbalist, *supra* note 9 ("[O]nly 25 of 130 schools in the high-grossing [FBS] . . . reported positive net revenues . . .").

200. VOLTAIRE, *CANDIDE* 4 (Theo Cuffe trans., Penguin Books 2005) (1759) ("[I]n this best of all possible worlds . . . all is for the best.").