

FINDING ANOTHER WAY: THE NCAA’S REGULATION OF NIL AND RECRUITING

ALFRED C. YEN*

Introduction

This Article suggests that the National Collegiate Athletic Association (“NCAA”)¹ should rethink its regulatory approach to the use of name, image, and likeness (“NIL”) deals² in the context of athlete recruitment. In particular, this Article contends that the NCAA should allow universities to present binding deals about scholarships and NIL opportunities to athletes during the recruiting process. This implies that universities will act as formal intermediaries between athletes and those who wish to do NIL business with athletes.

The NCAA is presently reluctant to allow universities to play an intermediary role. In fact, NCAA Bylaws prohibit such behavior on the ground that NIL deals bring universities and amateur athletes too close to the supposed taboo of open professionalism.³ The Article argues, however,

© 2022 Alfred C. Yen

* Professor of Law and Dean’s Distinguished Scholar, Boston College Law School. The author would like to thank the University of Oklahoma College of Law and the *Oklahoma Law Review* for hosting the symposium for which this Article has been prepared. The author would also like to thank Dionne Koller for comments on an earlier draft, and Caleb Doyle and Gwendolyn Ljung-Baruth for their research assistance.

1. The NCAA is a “member-led organization” that regulates how its members conduct and participate in college sports. *See Overview*, NCAA, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> (last visited June 24, 2023). As such, the NCAA does not control the behavior of institutions who are not NCAA members. Nevertheless, the NCAA is the institution with the greatest effective practical control over college sports because state and federal lawmakers have chosen not to pass comprehensive regulation and because the most prominent and profitable college programs belong to NCAA member schools.

2. In the context of NCAA sports, “NIL deals” encompass commercial exploitation of an athlete’s personal services and rights of publicity. In some cases, an athlete gets paid for putting their name on merchandise or endorsing commercial products. These arrangements probably implicate the athlete’s right of publicity. In other cases, the athlete gets paid to perform services like sign autographs, make public appearances, or interact with fans online. *See infra* notes 68-72 and accompanying text.

3. *See* NCAA, 2022-23 NCAA DIVISION I MANUAL art. 12.1.2, at 42–47 (2021) [hereinafter 2022-23 NCAA DIVISION I MANUAL], <https://www.ncaapublications.com/productdownloads/D123.pdf> (noting restrictions on school involvement in direct payment of amateur athletes).

that the NCAA's current regulatory approach is unfair to athletes and that the suggested changes will help create a fairer recruiting market.

As things now stand, the NCAA's efforts to keep monetary considerations out of recruiting have largely failed. Recruits clearly know that their choice of school could significantly affect their financial prospects.⁴ The pretense that NCAA rules prevent finances from influencing recruits increases the already-existing perception that the NCAA is hypocritical and cavalier about its supposedly fundamental principles.⁵ Moreover, the NCAA's explicit (but effectively unenforced) prohibitions against binding NIL deals in recruitment mean that institutions use informal, unwritten, and unenforceable proposals to entice recruits.⁶ This unregulated process creates conditions in which recruits can easily be

4. For news articles reporting the effect of NIL on recruiting, see, for example, Manny Navarro, *All-America Recruiting Confidential: Elite '23 Prospects NIL Deals, Photo Shoots, Best Visits*, ATHLETIC (Jan. 3, 2023), <https://theathletic.com/4044579/2023/01/03/college-football-recruiting-nil-2/> (reporting conversations with elite football recruits who recounted NIL offers made as part of the recruiting process); Jeremy Crabtree, *Reported Multimillion NIL Deal Rocks College Football Recruiting World*, ON3 (Mar. 11, 2022), <https://www.on3.com/nil/news/reported-multimillion-nil-deal-rocks-college-football-recruiting-world/>; Jeremy Crabtree, *The NIL Lawyer: Meet the Man Orchestrating Deals Reshaping Recruiting*, ON3 (May 19, 2022), <https://www.on3.com/nil/news/michael-caspino-nil-lawyer-orchestrating-deals-reshaping-recruiting/>; Dennis Dodd, *Boosters, Collectives in NCAA's Crosshairs, but Will New NIL Policy Be Able to Navigate Choppy Waters?*, CBS SPORTS (May 10, 2022, 11:32 AM ET), <https://www.cbssports.com/college-football/news/boosters-collectives-in-ncaas-crosshairs-but-will-new-nil-policy-be-able-to-navigate-choppy-waters/>.

5. See Nathaniel Grow & Todd Haugh, *Assessing the NCAA as a Compliance Organization*, 2021 WISC. L. REV. 787, 815 (reporting widespread belief that rule-breaking is common in NCAA sports and suggesting that the NCAA does not truly care to prevent rule-breaking); Christopher L. Chin, Comment, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1242–44 (1993) (arguing that the NCAA deliberately underenforces its rules in order to facilitate commercial objectives); Bradley David Ridpath et al., *NCAA Academic Fraud Cases and Historical Consistency: A Comparative Content Analysis*, 25 J. LEGAL ASPECTS SPORT 75, 95–99 (2015), <https://journals.iupui.edu/index.php/jlas/article/view/22209/21356> (comparing NCAA handling of academic fraud cases, noting inconsistencies, and suggesting commercial motivation for the NCAA's apparent "situational ethics"); Robert John Givens, Comment, *"Capitamateurism": An Examination of the Economic Exploitation of Student-Athletes by the National Collegiate Athletic Association*, 82 UMKC L. REV. 205, 224 (2013) (describing NCAA actions towards amateurism as "hypocritical"); Kelly Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 STAN. L. & POL'Y REV. 181, 214 (2017) (criticizing existing NCAA traditions about amateurism as "hypocritical").

6. See *infra* Part I.

misled or misunderstand what they are being offered. Accordingly, athletes who participate in the NCAA's recruiting market face not only the stress of deciding where they will enroll, but also the risk that financial arrangements they relied upon will not actually be delivered.⁷ Indeed, sooner or later, recruits will enroll, only to find out that money they thought they would earn will not be available. When one considers that this disappointment and harm originates from representations made to minors, it is hard to fairly defend the resulting consequences.

Allowing institutions to offer recruits formal, binding scholarship and NIL deals would alleviate much of this unfairness. Most obviously, binding deals would mean that disappointed recruits would have legal recourse. Other benefits would quickly arise. Institutions and others making proposals to recruits would communicate clearly, presumably in writing, which gives recruits clear signals about how much an institution values them. Recruits would become able to distinguish recruiting pitches that signifying real commitment from those embodying hypothetical and tentative proposals that might not be honored. Athletes accepting offers would no longer have to worry that a rude surprise might be waiting. Finally, the NCAA and its members may discover that "legalizing" the use of NIL in recruiting will bring the practice into the sunshine where it can be better regulated.⁸ For example, allowing formal, institutional involvement in the presentation of NIL deals will create opportunities for both institutions and the NCAA to ensure that athletes focus on doing business with reputable parties.

The Article proceeds in four parts. Part I briefly describes the recruiting market before the advent of NIL, exposing how NCAA rules create a recruiting market that places considerable pressure and risk on recruits even without NIL. Part II describes how the NCAA has responded to the enactment of numerous state statutes that forced the NCAA to accept the commercial exploitation of NIL by athletes. Part III evaluates that response, concluding that the NCAA's regulatory strategy for NIL is likely to fail and exacerbate problems that already exist in athlete recruiting markets. Finally, Part IV proposes to allow binding NIL deals in recruitment and demonstrates how the change would increase fairness for athletes.⁹ The

7. *See infra* Part II.

8. *See infra* Part III.

9. *See infra* Part IV.

Article concludes with some thoughts about challenges that will remain in the regulation of NIL.

I. The NCAA, Amateurism, and Recruiting Before NIL

The NCAA has long adopted and enforced the principle that NCAA athletes must be amateurs focused primarily on education, with sports as an avocation. According to the NCAA Constitution in effect before the advent of NIL,¹⁰ the first purpose of the NCAA was “[t]o initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation *as a recreational pursuit*.”¹¹ Accordingly, NCAA member institutions professed a commitment to amateurism as expressed in article 2.9:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.¹²

The NCAA’s primary method for ensuring the amateur characteristics of college sports was (and remains) an extensive collection of rules reflected in the NCAA Constitution and Bylaws prohibiting institutions and athletes from engaging in pay-for-play or other practices that would undermine amateurism.¹³ Institutions, therefore, cannot pay athletes for participating in

10. The NCAA adopted a new constitution that took effect on August 1, 2022. *See* NCAA CONSTITUTION (effective Aug. 1, 2022), *in* NCAA, 2022-23 NCAA DIVISION I MANUAL at 1; Corbin McGuire, *NCAA Members Approve New Constitution*, NCAA (Jan. 20, 2022, 6:12 PM), <https://www.ncaa.org/news/2022/1/20/media-center-ncaa-members-approve-new-constitution.aspx> (reporting effective date of new constitution as August 1). The new constitution made room for changes in NCAA rules associated with NIL. *See id.* However, NCAA rules have not undergone significant amendment since the adoption of the new constitution.

11. NCAA CONSTITUTION art. 1.2 (repealed 2022), *in* 2021-22 NCAA DIVISION I MANUAL at 1 (2022), <https://www.ncaapublications.com/productdownloads/D122.pdf> (emphasis added).

12. *Id.* art. 2.9, at 2.

13. *See* NCAA CONSTITUTION art. 1(B) (effective Aug. 1, 2022), *in* 2022-23 NCAA DIVISION I MANUAL, *supra* note 10, at 2 (“Student-athletes may not be compensated by a member institution for participating in a sport . . .”).

sports¹⁴ and athletes who violate amateurism rules lose their eligibility to play NCAA sports.¹⁵

Not surprisingly, the NCAA Bylaws devote many pages to distinguishing amateurism from professionalism.¹⁶ As expected, student-athletes lose their amateur status if they accept actual or promised payment based on their athletic skill or their participation in college sports.¹⁷ If construed narrowly, this sanction applies only if the athlete were paid for playing their sport. Athletes paid for endorsing products or otherwise exploiting their fame as athletes (as opposed to skill) could, under this interpretation, remain amateurs.

The NCAA, however, rejects this approach, preferring instead to prohibit athletes from receiving payment in any way related to their identity as athletes. Thus, athletes can accept employment unrelated to sports if paid “[a]t a rate commensurate with the going rate in that locality for similar services.”¹⁸ Such compensation, however, does not include “remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following obtained because of athletics ability.”¹⁹ Thus, athletes cannot pursue NIL deals because the NCAA considered such deals inconsistent with its broad conception of amateurism.²⁰

Importantly, however, the NCAA’s broad definition of amateurism did not remove money entirely from the recruitment tools available. The Association’s rules have long allowed institutions to offer scholarships in exchange for an athlete’s enrollment and participation in sport.²¹ This raises the stakes in recruiting because recruits must now compete for both limited spots on college teams and even more limited scholarship dollars. Given the

14. *Id.*

15. 2022-23 NCAA DIVISION I MANUAL, *supra* note 3, art. 12.01.1, at 39 (“Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.”); *id.* art. 12.1.2(a)-(b), at 42 (noting that an individual loses amateur status and eligibility if she or he receives pay for play).

16. *Id.* art. 12, at 60–94.

17. *Id.* art. 12.1.2, at 63.

18. *Id.* art. 12.4.1, at 73.

19. *Id.* art. 12.4.1.1, at 73.

20. *Cf.* Bloom v. NCAA, 93 P.3d 621, 625 (2004) (permitting NCAA to enforce Bylaw 12.5.2.1 prohibiting a college football player from pursuing paid endorsement work related to his professional skiing career).

21. *See* 2022-23 NCAA DIVISION I MANUAL, *supra* note 3, art. 15.01.1, at 185 (permitting a student-athlete to receive scholarships).

high cost of college attendance, athletes rationally prefer to secure athletic scholarships promptly, lest schools commit their available scholarships before a deal can be secured.

The NCAA tries to shield recruits from the pressure of recruiting by preventing institutions from approaching prospective athletes until the junior year of high school or later. NCAA Bylaw 13.4.1 provides:

An institution shall not provide recruiting materials, including general correspondence related to athletics, or send electronic correspondence to an individual (or the individual's family members) until June 15 at the conclusion of the individual's sophomore year in high school.²²

Additional rules prohibit coaches from contacting, visiting, or making phone calls to recruits before the recruit's junior year or, for certain recruitment activities, even later.²³ These rules are further supported by the National Letter of Intent process, which specifies the times at which a prospective athlete may sign a binding commitment to attend a school in return for a scholarship.²⁴ All of the relevant dates fall within the senior year of high school.²⁵

Despite the NCAA's apparent desire to protect recruits, the recruiting market places a lot of pressure on athlete. Formal, binding commitments may not be prohibited until the senior year, but communication between coaches and recruits before the senior year creates the opportunity for parties to make early informal agreements instead. Indeed, NCAA rules

22. *Id.* art. 13.4.1, at 120.

23. *Id.* art. 13.1.1, at 99 (generally prohibiting off-campus recruiting contacts before August 1 during the junior year of high school); *Id.* art. 13.1.1.1, at 99 (prohibiting off-campus recruiting contacts for baseball and football before July 1 of the athlete's senior year of high school); *Id.* art. 13.1.3.1, at 103 (prohibiting telephone calls to recruits before June 15 after the sophomore year of high school).

24. See *About the National Letter of Intent*, NAT'L LETTER OF INTENT, <http://www.nationalletter.org/aboutTheNli/index.html> (last visited June 24, 2023) (describing the NLI process as one governing the time at which binding commitments for enrollment and scholarships may be made).

25. See *NLI Signing Dates*, NAT'L LETTER OF INTENT, <http://www.nationalletter.org/signingDates/index.html> [<https://perma.cc/2SMV-FPRG>] (last visited June 24, 2023) (noting applicable signing dates for students enrolling in 2023-24).

have loopholes that make such informal commitments possible long before the senior year.²⁶

Most obviously, informal offers are possible in every sport beginning on June 15 after the sophomore year because coaches can call recruits from that date onward.²⁷ For football, basketball, and baseball, informal offers are possible even earlier because NCAA Bylaw 13.1.3.2.2 permits coaches to receive telephone calls from athletes or their family members at any time.²⁸ This explicitly opens the possibility of conversations in which informal offers could be made and accepted for these sports long before the June 15 date,²⁹ and indeed, such early recruiting occurs.³⁰

Long periods of time between an informal commitment and its formalization place pressure on athletes by forcing young people to make potentially premature and uncertain decisions about college. Recruiters may identify talented athletes when they are young, but high school students may not be ready to make firm decisions about where they will go to college. They may not know their academic preferences, may not have

26. See generally Alfred C. Yen, *Early Scholarship Offers and the NCAA*, 52 B.C. L. REV. 585 (2011) (describing how early recruiting occurs and making many of the observations described below).

27. See 2022-23 NCAA DIVISION I MANUAL, *supra* note 3, art. 13.1.3.1, at 103.

28. See *id.* art. 13.1.3.2.2, at 104.

29. For sports other than baseball, basketball, football lacrosse, men's ice hockey, and softball, coaches may not accept telephone calls from recruits before June 15 after the sophomore year. *Id.* art. 13.1.3.2.3, at 84.

30. Although NCAA Bylaws apparently intend to prohibit informal offers in most sports before June 15 after the sophomore year, a small loophole seems to exist around so-called unofficial visits to a college campus. Under Bylaw 13.7.2, an athlete may visit a school's campus at his or her own expense "an unlimited number of times." *Id.* art. 13.1.3.3.2, at 105. The Bylaws provide that institutional staff may make "unlimited telephone calls" to recruits immediately before and during an unofficial visit. *Id.* This apparently allows a coach who wants to make an early offer to send word to a recruit through an intermediary, asking the recruit to arrange an unofficial visit. Once the arrangements have been made, either a phone call or face-to-face meeting during the unofficial visit would create the opportunity for an informal offer to be made. For news stories about early recruiting, see Chris Ruhl, *Early Recruiting: What Do the Student-Athletes Have to Say?*, SPORTS RECRUITS BLOG (Oct. 18, 2017), <https://blog.sportsrecruits.com/2017/10/18/early-recruiting-what-do-the-student-athletes-have-to-say/>; Evan Hilbert, *Nevada Offers 9-Year-Old Football Star, Trainer Says*, USA TODAY HIGH SCHOOL SPORTS (June 23, 2017, 8:47 AM ET), <https://usatodayhss.com/2017/havonfinney-jr-nine-year-old-nevada-football>; Wendy LeBolt, *How Young Is Too Young to Recruit for College Soccer?*, FIT2FINISH (Apr. 18, 2014), <https://fit2finish.com/how-young-is-too-young-to-recruit-for-college-soccer/>.

taken a college admission test, and may not yet know what kind of athlete they will become. All of this makes the prospect of committing to a university stressful and fraught.

It is, of course, flattering and exciting to learn that a prominent college wants an athlete to compete for its team. But should an athlete accept an offer when they are fifteen or even younger? Perhaps it would be wise to wait and see if other schools might be interested later. On the other hand, waiting might have dire consequences if other schools are presently committing their scholarships to other recruits. This is a lot to expect a teenager to navigate, even with the help of parents. After all, they probably have not been through college recruiting before, and recruiting pitches can be impressive to the point of excess.³¹

On top of this, a recruit who decides to make an informal commitment faces uncertainty and stress about whether the deal will come to fruition. By definition, informal commitments are not enforceable agreements. Yet recruits and institutions apparently rely on their mutual promises. This raises the possibility that one party will be disappointed if the other reneges on the deal. And indeed, recruits and institutions both occasionally “decommit.”³²

31. See, e.g., Sam Khan Jr., *Inside the Texas Spending Blitz That Hooked Arch Manning and a No. 2 Recruiting Class*, ATHLETIC (Sept. 16, 2022), https://theathletic.com/3598484/2022/09/16/texas-football-recruiting-weekend-arch-manning/?source=user_shared_article (reporting that the University of Texas housed recruits at the Four Season Austin, spending about \$630,000 over two weekends of official visits); Matt Baker, *What's It Like When a College Coach Helicopters to Your School?*, TAMPA BAY TIMES (Feb. 5, 2018), <https://www.tampabay.com/blogs/gators/2018/02/05/whats-it-like-when-a-college-coach-helicopters-to-your-school/> (reporting use of helicopters by college football coaches to make an impression during recruiting); Chris Hays, *Georgia Coach Kirby Smart Helicopters in to Recruit Orlando Players*, ORLANDO SENTINEL (Jan. 21, 2022), <https://www.orlandosentinel.com/sports/florida-recruiting/os-sp-kirby-smart-georgia-recruiting-helicopter-orlando-20220121-urrux5mgrvfpzbvpmub67firi-story.html> (reporting impression made by use of helicopter by football coach).

32. See Dave Telep, *How to Spot the Signs*, ESPN (Oct. 26, 2010), <https://www.espn.com/college-sports/recruiting/basketball/mens/news/story?id=5729730> (describing some of the reasons that decommitments happen); Chad Wilson, *How Much Have Recruiting Decommits Risen in Recent Years?*, GRIDIRON STUDS BLOG, <https://www.gridironstuds.com/blog/how-much-have-recruiting-decommits-risen-in-recent-years/> (last visited June 23, 2023) (describing rise in decommitments as connected to increases in early offers to freshmen, sophomores, and even middle schoolers); Andy Staples, *Going to Court over Commitment*, SPORTS ILLUSTRATED (Feb. 29, 2008), <https://www.si.com/more-sports/2008/02/29/hawaii-recruit> (detailing the decommitment stories of Daniel Smith and Corbin Brown); Danny Shapiro, *Early Recruiting Popular but Risky for Young Baseball Players*,

One might consider the decommitment risk inconsequential because both recruits and schools face the risk that an opposite party will not live up to a deal. Closer analysis, however, reveals that the risks in question cause more harm to athletes than institutions. Athletes are more easily surprised by non-performance and the consequences of non-performance are more severe for athletes.

From a recruit's perspective, the possibility of an institution's decommitment creates a risk that the recruit's plans will fall apart. A teen who receives an informal scholarship commitment to play football at Oklahoma could make firm plans, only to discover in his senior year that he has no scholarship from the university.³³

Athletes face greater risks of surprise because NCAA rules have created an asymmetric market. Recruits are typically inexperienced first-time players, who enter the market knowing they can accept only one deal because an athlete can attend only one school. By contrast, institutions are repeat players with years (if not decades) of experience. They enter the market with the intention of making multiple deals because sports teams need both starters and reserves.³⁴ These distinctions matter because they

BEAUMONT ENTER. (Apr. 23, 2018, 12:17 PM), <https://www.beaumontenterprise.com/sports/hs/article/Early-recruiting-popular-but-risky-for-young-12856595.php> (reporting the decommitment story of Tanner Driskill); Michael Castillo, *2017 USC Decommits: Where Did They Sign on Signing Day?*, REIGN OF TROY (Feb. 1, 2017), <https://reignoftroy.com/2017/02/01/2017-usc-decommit-where-did-they-sign-on-signing-day/> (reporting the decommitment stories of James Lynch, CJ Miller, Wylan Free, Daniel Green, and Marlon Williams); Pat Forde, *It's a Scary Thought, but Middle Schoolers Are Now Recruitable Players*, ESPN (July 11, 2007), https://www.espn.com/espn/columns/story?columnist=forde_pat&sportCat=ncb&id=2930720 (describing Maryland's rescission of an early offer made to Tamir Goodman because player did not develop as anticipated); Andy Staples, *Oregon Pulls Written Offer, an Unsavory Move That's Common*, SPORTS ILLUSTRATED (June 23, 2008), <https://www.si.com/more-sports/2008/06/23/notebook-0620> [hereinafter Staples, *Oregon Pulls Offer*] (reporting that the University of Oregon rescinded a scholarship offer to a recruit because the school made more offers than could be accepted); Grace Raynor & Manny Navarro, *Deion Sanders' Unwanted Colorado Commits Searching for a New Home*, ATHLETIC (Dec. 19, 2022), <https://theathletic.com/4005958/2022/12/19/deion-sanders-colorado-commitments/> (reporting that the University of Colorado withdrew scholarship offers to thirteen football players after the hiring of new head coach Deion Sanders).

33. See Forde, *supra* note 32 (detailing stories of decommitments by universities and associated problems for athletes).

34. Staples, *Oregon Pulls Offer*, *supra* note 32 (explaining how Oregon overextended offers).

affect the respective parties' ability to detect and mitigate possible non-performance.

Any party to a negotiation, including one about athletic recruitment, will wonder if the opposite party is serious. In a normal market with binding commitments, one party can make (or request) a written offer to signal seriousness.³⁵ A counterpart providing a written agreement is probably sincere because acceptance creates binding legal obligations. A counterpart that postpones or withholds a written offer is obviously less serious, because delay is a method for keeping options open.

This method for testing seriousness does not exist in the NCAA recruiting market because athletes and institutions understand that they cannot formally bind the other party to perform until the senior year arrives. Both parties do not, however, remain equally uninformed about the strength of other side's commitment.

Consider first that an athlete genuinely committed to a school will cease recruiting activity for two reasons. First, it makes little sense to cultivate new opportunities if their mind is truly made up. Second, continuing any recruiting activity jeopardizes the security of the deal that the athlete has already made. The college sports world is surprisingly small and news travels fast. Accordingly, an athlete who has made a verbal scholarship deal risks appearing insincere if the athlete continues recruiting activity. A coach who learned of an athlete's continued recruitment would be well-advised to consider finding other players.³⁶ This shows that institutions can often discern how committed an athlete is by observing the athlete's behavior after a scholarship deal has been made.

By contrast, an athlete cannot learn the same lessons from an institution's behavior. Institutions normally recruit many players each year,

35. See David B. Falk, *The Art of Contract Negotiation*, 3 MARQ. SPORTS L.J. 1, 20 (1992) (discussing whether making a written offer is advisable and noting that a written offer has the practical effect of committing the offeror to that position); Darby Dickerson, *Finding the Goldilocks Zone: Negotiating Your First Employment Offer in Legal Academia*, 69 J. LEGAL EDUC. 48, 93 (2019) (advising those negotiating terms of employment not to do so until receiving offer in writing).

36. See Cameron Moon, *How Prevalent Are Decommitments in College Football Recruiting, Is It Acceptable?*, CLEVELAND.COM (Jan. 28, 2015, 10:31 AM), <https://www.cleveland.com/highschoolsports/article/does-it-bother-you-when-high-school-athletes-decommit-from-a-school-poll/> (reporting that at the time of the article in 2015 Michigan and Northwestern had policies against committed players visiting other schools, and that these policies interpret visits to other schools as constructive de-commitments).

even at the same position.³⁷ Thus, the fact that an institution continues recruiting other players after making an informal scholarship commitment reveals little about how serious the institution is about honoring its commitments to any given athlete. This means that an athlete is more likely to be surprised if a school withdraws from an informal commitment.

Moreover, athletes are more likely than institutions to suffer severe consequences in the event of a surprise withdrawal. An athlete who suffers decommitment will quite possibly have no equivalent opportunity to turn to, primarily because other programs have already made commitments.³⁸ This risk gets particularly severe if the decommitment happens late in the recruiting timeline.³⁹

By contrast, an institution that learns a previously committed recruit will enroll elsewhere is far less likely to be meaningfully damaged because institutions have ample opportunity to diversify the risk of decommitment. As an initial matter, schools have rosters with multiple players at each position, so substitutes for the lost recruit are readily available. Furthermore, because schools recruit more than one player at a time, they can plan to cover areas of particular need with more than one recruit. For example, a school that needs quarterbacks for its football team would likely recruit more than one quarterback.⁴⁰ Thus, if one committed quarterback

37. See Robert Turick & Amanda L. Paule-Koba, *Over-Signing in College Football: Why Does It Occur?*, J. HIGHER ED. ATHLETICS & INNOVATION, Sept. 29, 2017, at 1, 13, <https://perma.cc/A3GE-XKV9>.

38. Matthew Stanmyre, *UConn Reneges on Scholarship Offer, Ditches N.J. Football Recruit in 11th Hour*, NJ.COM (Jan. 17, 2017, 2:50 AM), <https://www.nj.com/highschool-sports/article/uconn-reneges-on-scholarship-offer-ditches-jersey-football-recruit-in-eleventh-hour/>.

39. See *id.*; Forde, *supra* note 32 (reporting that recruit Tamir Goodman played at Towson State after Maryland withdrew commitment); Staples, *Oregon Pulls Offer*, *supra* note 32 (reporting Oregon's de-commitment from Xavier Ramos); *2013 Football: [No.] 14 Xavier Ramos*, CAL POLY FOOTBALL, <https://gopoly.com/sports/football/roster/xavier-ramos/772> (last visited July 9, 2023) (showing Xavier Ramos playing on the Cal Poly, San Luis Obispo football team); STEVE GANS, WIN THE COLLEGE SOCCER RECRUITING GAME: THE GUIDE FOR PARENTS AND PLAYERS 10 (2023) ("When a player commits to a D1 school the other D1 schools who recruited the player generally move on for that year, and so if things don't work out with the school to which the player committed, the player is in a type of limbo.").

40. See Zachary Neel, *Breaking Down Oregon's History of Taking 2 QB Recruits in a Single Cycle*, DUCKSWIRE: USA TODAY SPORTS (May 22, 2023, 6:34 AM PT), <https://duckswire.usatoday.com/lists/breaking-down-oregons-history-of-taking-2-qb-recruits-in-a-single-cycle/>.

recruit were to decommit, the remaining committed recruits would still be available to cover the need.

The foregoing shows that the NCAA rules intended to protect athletes from recruiting pressure offer little help. The rules do not relieve pressure on athletes by preventing early recruitment. Instead, NCAA rules create a market that relies on unenforceable commitments that pull recruits into the market, only to suffer more than institutions when deals fall apart. Given its supposed commitment to treating athletes fairly, the NCAA should be troubled by this state of affairs.⁴¹ Indeed, the problems only increase with the addition of NIL deals.

II. The NCAA's Response to State Law Permitting NIL Deals

The NCAA's conception of amateurism adopts a rose-colored view of college sports, viewing the NCAA and its members as shielding genuine amateurs from pressures associated with professionalism. While this may have once been true, this view has not been true for some time.

Modern NCAA Division I sports have become heavily professionalized. College athletes now spend more time on their sports than they do on academics. Although the NCAA ostensibly limits athletes to twenty hours of sports per week,⁴² college athletes routinely spend thirty to forty hours on their sport; nearly the equivalent of full-time employment.⁴³ Moreover,

41. The University of Colorado offers a recent, and perhaps egregious, example of an institution treating recruits unfairly. In October, the university fired Karl Dorrell, its head football coach. Pete Thamel, *Winless Colorado Buffaloes Fire Coach Karl Dorrell, DC Chris Wilson*, ESPN (Oct. 2, 2022, 3:26 PM), https://www.espn.com/college-football/story/_/id/34712151/sources-winless-colorado-buffaloes-fire-hc-karl-dorrell-dc-chris-wilson. Such an event creates the obvious risk that recruits will lose commitments because a new coach will want his own players. Nevertheless, according to the Athletic, the university's athletic director contacted recruits and told them that their scholarship offers would be honored. See Raynor & Navarro, *supra* note 32. Then, after the university hired Deion Sanders as its new coach, the university withdrew its commitments. *Id.*

42. See 2022-23 NCAA DIVISION I MANUAL, *supra* note 3, art. 17.1.7.1, at 232 (limiting athlete's participation in sports during playing season to "maximum of four hours per day and 20 hours per week"); *Id.* art. 17.1.7.2(a), at 232 (limiting out-of-season participation to "a maximum of eight hours per week" for sports other than football); *Id.* art. 17.1.7.2(b)-(c), at 232-33 (limiting football players to eight hours per week, including up to two hours per week on film viewing and walk-throughs).

43. See Peter Jacobs, *Here's the Insane Amount of Time Student-Athletes Spend on Practice*, BUS. INSIDER (Jan. 27, 2015, 10:44 AM), [businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1](https://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1) (reporting that NCAA athletes often spend over forty hours per week on their sport); NCAA ELIGIBILITY CTR., NCAA GUIDE FOR

NCAA-member institutions earn large amounts of money by selling tickets and television rights for college sports. For example, the most recent Big 10 television package will exceed \$1 billion per year.⁴⁴

The revenue associated with college sports places a premium on winning which, in turn, creates pressure to attract top athletes and coaches. Accordingly, NCAA institutions pay their revenue-producing coaches handsomely, with top football compensation packages in the neighborhood of \$10 million per year.⁴⁵ At the same time, NCAA rules prohibit paying the players whose skills audiences want to see.⁴⁶

This state of affairs creates the perception (if not reality) that the NCAA does not protect amateur student-athletes from exploitation. To the contrary, the NCAA and its institutions appear to be commercial interests which exploit laborers that they have agreed not to pay.⁴⁷ The NCAA has

THE COLLEGE-BOUND STUDENT-ATHLETE 2022-2023, at 8 (2023), http://fs.ncaa.org/Docs/eligibility_center/Student_Resources/CBSA.pdf (“DI Time Management” chart) (indicating that athletes spend thirty-three hours per week on sports, and that 67% of Division I athletes “spend as much or more time on athletics during the offseason as during their competitive season”).

44. See Alan Blinder & Kevin Draper, *Topping \$1 Billion a Year, Big Ten Signs Record TV Deal for College Conference*, N.Y. TIMES (Aug. 18, 2022), <https://www.nytimes.com/2022/08/18/sports/ncaafotball/big-ten-deal-tv.html>.

45. See Cam Mellor, *Nick Saban Salary and Net Worth: Saban's Incentives Are Rich*, PRO FOOTBALL NETWORK (Jan. 10, 2022), <https://www.profootballnetwork.com/nick-saban-salary-and-net-worth/> (reporting that the compensation package for Alabama's Nick Saban is near \$10 million per year and more with incentives, and packages of at least \$9.5 million for other coaches); Chris Low, *Jimbo Fisher's Four-Year Contract Extension at Texas A&M Worth More than \$9M Annually*, ESPN (Aug. 31, 2021), https://www.espn.com/college-football/story/_/id/32122972/sources-texas-jimbo-fisher-finalizing-extension-2030-worth-more-9m-annually.

46. See *supra* note 12 and accompanying text.

47. See *NCAA v. Alston*, 141 S. Ct. 2141, 2166–68 (2021) (Kavanaugh, J. dissenting) (criticizing the NCAA's business model as “flatly illegal in almost any other industry in America,” in part because the NCAA and its members make billions of dollars while refusing to pay NCAA athletes); see also John T. Holden et al., *Reimagining the Governance of College Sports After Alston*, 74 FLA. L. REV. 427, 481 (2022) (referencing the “historical exploitation of college athletes”); Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 848 (2014) (noting that the current economic structure of NCAA sports, particularly in Division I football and men's basketball, “results in significant economic exploitation”); David J. Berri, *Paying NCAA Athletes*, 26 MARQ. SPORTS L. REV. 479, 490 (2016) (“[I]t seems clear that college athletes are frequently exploited by the NCAA.”); Robert A. McCormick & Amy Christian McCormick, *A Trail of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL

already lost antitrust litigation over limits on scholarship and other academic assistance,⁴⁸ but no court has yet decided whether NCAA members may agree to limit non-academic payments to players. The NCAA's critics have therefore long urged that student-athletes at least be allowed to exploit their NIL rights as a way of gaining some compensation when direct payments remain unpermitted.⁴⁹

Perhaps because of its commitment to a broad conception of amateurism, or perhaps because the NCAA and its members feared that allowing NIL deals would disrupt a profitable status quo, the NCAA has not voluntarily agreed to allow NIL deals for student-athletes. Instead, change came only when a number of individual states passed laws forbidding the NCAA from enforcing rules against NIL deals.

As noted in the Introduction, California led the charge by enacting Senate Bill 206.⁵⁰ That bill became law on September 30, 2019, although its

L. REV. 639, 639–40 (2010) (describing how the authors' have reached the "unavoidable conclusion that many college athletes are, indeed, very much exploited"). Conventional media also has made similar observations. See Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <http://www.theatlantic.com/magazine/print/2011/10/the-shame-of-college-sports/8643/> (noting prevalence of scandals about amateurism and recruitment, and characterizing the NCAA's use of "amateurism" and "student-athlete" as "cynical hoaxes, legalistic confections propagated by the universities so they can exploit the skills and fame of young athletes").

48. See *Alston*, 141 S. Ct. at 2147 (affirming district court ruling that NCAA restrictions on education-related compensation violated antitrust law).

49. See GABE FELDMAN, KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, THE NCAA AND "NON-GAME RELATED" STUDENT-ATHLETE NAME, IMAGE, AND LIKENESS RESTRICTIONS 1 (2016), https://www.knightcommission.org/wpcontent/uploads/2008/10/feldman_nil_white_paper_may_2016.pdf (white paper prepared for Knight Commission on Intercollegiate Athletics) (advocating amendment of NCAA rules to allow athlete exploitation of NIL rights); David G. Bayard, *After Further Review: How the N.C.A.A.'s Division I Should Implement Name, Image, and Likeness Rights to Save Themselves and Best Preserve the Integrity of College Athletics*, 47 S.U. L. REV. 229 (2020) (urging the NCAA not to challenge state laws protecting athlete exploitation of NIL rights); James Landry & Thomas A. Baker III, *Change or Be Changed: A Proposal for the NCAA to Combat Corruption and Unfairness by Proactively Reforming Its Regulation of Athlete Publicity Rights*, 9 NYU J. INTELL. PROP. & ENT. L. 1, 4 (2019) (identifying the black market for college athletes that results from NCAA restrictions on athlete compensation and arguing that the NCAA should permit athlete exploitation of NIL rights); Crabb, *supra* note 5, at 204–09 (arguing that NCAA athletes should have the right to exploit their NIL rights commercially).

50. CAL. EDUC. CODE § 67456 (2023).

operative provisions did not take effect until January 1, 2021.⁵¹ Senate Bill 206 prevented any college or university from enforcing a rule that bars a student from participating in intercollegiate athletics because they earn money through an NIL deal.⁵² The bill further prevented any “athletic association, conference, or other group or organization with authority over intercollegiate athletics, including . . . the National Collegiate Athletic Association,” from barring a student from intercollegiate sports competition by reason of receiving compensation through an NIL deal.⁵³

Senate Bill 206 turned the college sports world upside down by creating a competitive advantage for NCAA-member institutions located in California. As long as the usual NCAA rules remained in place, athletes enrolled in non-California schools would lose their ability to play if they pursued NIL compensation, but those enrolled in California schools would not. Athletes would therefore generally prefer playing for California schools. Not surprisingly, other states moved to equalize the playing field by passing laws designed to eliminate California’s competitive advantage. Although the various statutes differ in potentially important ways, all take away the NCAA’s ability to prevent college athletes from exploiting their NIL rights.⁵⁴

Statutes like Senate Bill 206 effectively tied the NCAA’s hands. If the NCAA insisted on enforcing its then-existing rules against the exploitation of NIL rights, schools in states with pro-NIL legislation would enjoy advantages in recruiting. Thus, as a practical matter, the NCAA could

51. *Id.* § 67456(H).

52. *Id.* § 67456(A)(1).

53. *Id.* § 67456(A)(2).

54. Statutes supporting the commercial exploitation of NIL rights by athletes include the following as of 2022: ARIZ. REV. STAT. ANN. § 15-1892 (2022); ARK CODE ANN. § 4-75-1303 (2022); CAL. EDUC. CODE § 67456; COLO. REV. STAT. § 23-16-301 (2022); CONN. GEN. STAT. § 10a-56 (2022); FLA. STAT. § 1006.74 (2022); GA. CODE ANN. § 20-3-681 (2022); 110 ILL. COMP. STAT. 190/10 (2022); KY. REV. STAT. ANN. § 164.6945 (2022); 2022 LA. ACTS 307; MD. CODE ANN., EDUC. § 15-131 (2022); MICH. COMP. LAWS § 390.1733 (2022); MISS. CODE ANN. § 37-97-107 (2022); MO. REV. STAT. § 173.280 (2022); MONT. CODE ANN. § 20-1-232 (2022); NEB. REV. STAT. § 48-3605 (2022); NEV. REV. STAT. § 398.300 (2022); N.J. STAT. ANN. § 18A:3B-87 (2022); N.M. STAT. ANN. § 21-31-3 (2022); OHIO REV. CODE ANN. § 3376.06 (2022); 70 OKLA. STAT. § 820.23 (2022); OR. REV. STAT. § 702.200 (2022); 24 PA. CONS. STAT. § 20-2003-K (2022); S.C. CODE ANN. § 59-158-20 (2022); TENN. CODE ANN. § 49-7-2802 (2022); TEX. EDUC. CODE ANN. § 51-9246 (2022). Additionally, North Carolina has achieved the same result through an executive order. *See* N.C. Exec. Order No. 223 (2021), <https://governor.nc.gov/documents/files/executive-order-no-223/open>.

eliminate these advantages only by allowing college athletes to exploit their NIL rights.

The NCAA did this in a rather curious way. Instead of amending its rules to accommodate NIL deals, the NCAA simply suspended enforcement. In July 2021, the NCAA issued an interim policy that allowed athletes to pursue NIL deals while a working group studied possible responses.⁵⁵ The NCAA explicitly acknowledged that it would not enforce rules prohibiting NIL deals while affirming the NCAA's existing rules against pay-for-play and monetary recruiting inducements.⁵⁶ It is this response that now governs the ability of college athletes to pursue NIL deals.

III. Evaluating the NCAA Response to NIL

It is difficult to characterize the NCAA's above-described response as a well-considered reaction to the challenges of NIL. Despite the fact that state law now grants athletes the right to do something directly prohibited by existing NCAA rules, the NCAA's relevant rules remain on the books.⁵⁷ Instead of comprehensively amending its rules to manage NIL and its associated challenges, the NCAA has effectively thrown its hands up and stated it will not act against NIL deals as long as the deals do not serve as pay-for-play or improper recruiting inducements. The NCAA apparently hopes that reminding institutions, athletes, and boosters about basic Bylaw principles will influence all concerned parties into foregoing competitive advantages they could gain by making NIL deals that induce recruits by approximating pay-for-play.

55. *See Interim NIL Policy*, NCAA (July 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf. The NCAA also adopted a new constitution that softened the association's hardline stance against professionalism. Article 1A of the new NCAA Constitution provides:

Intercollegiate student-athletes are matriculated, degree-seeking students in good standing with their institutions who choose voluntarily to participate in NCAA sports. It is the responsibility of each member institution to establish and maintain an environment in which a student-athlete's activities are conducted with the appropriate primary emphasis on the student-athlete's academic experience.

NCAA CONSTITUTION art. 1(A) (effective Aug. 1, 2022), *in* 2022-23 NCAA DIVISION I MANUAL, *supra* note 10, at 2. This constitutional change did not, however, lead to changes in the NCAA's Bylaws prohibiting pay-for-play and improper recruiting inducements.

56. *See Interim NIL Policy*, *supra* note 55 (providing guidance that NCAA Bylaws against pay-for-play and improper recruiting inducements remain in effect).

57. *See id.*

With due respect for the NCAA and the challenges it faces, this regulatory response seems unrealistic and naive. Legal and practical problems will most likely prevent the NCAA from reaching its desired outcomes. At the very least, the NCAA should already be well aware that its efforts to protect athletes from the excesses of recruiting have failed. Institutions will almost certainly try to push the envelope with NIL deals that attract recruits. This stretch may create a proverbial race to the bottom that imposes competitive disadvantages on those who most scrupulously follow the rules, while actors who aggressively skirt the rules gain advantages by exploiting the inexperience and naivete of prospective college athletes.

A. Legal and Practical Obstacles to Success

1. The Language of State Statutes Governing NIL Deals

The NCAA's regulatory stance on NIL deals makes sense only if state law permits the NCAA to limit the types of NIL deals that athletes may strike. Indeed, the NCAA decided not to enforce some of its existing rules when states passed laws prohibiting the NCAA from enforcing those rules. The NCAA's guidance against pay-for-play and monetary recruiting inducements, however, implies that the NCAA thinks it has the legal authority to prohibit at least some NIL deals.⁵⁸ Considerable reason exists to doubt the truth of this claim.

Doubt arises because, although state statutes about NIL vary in their specifics, many prohibit without exception institutions and athletic organizations from enforcing any rules that sanction athletes who pursue NIL compensation.⁵⁹ Consider the operative language of California's Senate Bill 206:

An athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, shall not prevent a student of a postsecondary educational institution participating in intercollegiate athletics from earning

58. *See id.*

59. *See, e.g.*, CAL. EDUC. CODE § 67456(a)(2) (2023); CONN. GEN. STAT. § 10a-56(e) (2023).

compensation as a result of the use of the student's name, image, likeness, or athletic reputation.⁶⁰

Similarly, Connecticut law provides:

No athletic association or conference, including, but not limited to, the NCAA, on the basis of a student athlete's endorsement contract . . . shall (1) prohibit or prevent an institution of higher education or its intercollegiate athletic program from participating in intercollegiate sports, (2) restrict or revoke a student athlete's eligibility to participate in an intercollegiate athletic program, (3) prohibit or prevent a student athlete from earning compensation from such endorsement contract or employment activity, or (4) prohibit or prevent a student athlete from representation by a duly licensed attorney or sports agent.⁶¹

Note that statutes like California's and Connecticut's appear to strip the NCAA of its ability to penalize athletes for pursuing commercial NIL activity.⁶² By the plain language of these statutes, the NCAA may be able to enforce rules against pay-for-play or monetary recruiting inducements generally, but it cannot do so if those arrangements involve NIL deals. Of course, courts have not yet interpreted these laws. It is easy to imagine, though, courts will adopt this interpretation given state legislatures surely knew that NIL deals could be used to lure recruits and function as pay-for-play.⁶³ Indeed, other states explicitly deny athletes protection for pay-for-play and recruiting inducement NIL deals,⁶⁴ making it appear that states

60. CAL. EDUC. CODE § 67456(a)(2).

61. CONN. GEN. STAT. § 10a-56(e).

62. For other examples of state statutes capable of similar interpretation, see ARK. CODE ANN. § 4-75-1303 (2022); OR. REV. STAT. § 702.200 (2022); MD. CODE ANN., EDUC. § 15-131 (2022); MICH. COMP. LAWS § 390.1733 (2022); MO. REV. STAT. § 173.280 (2022); MONT. CODE ANN. § 20-1-232 (2022); NEB. REV. STAT. § 48-3605 (2022); N.J. STAT. ANN. § 18A:3B-87 (2022); OHIO REV. CODE ANN. § 3376.06 (2022).

63. See Ross Dellenger, *With Recruiting in Mind, States Jockey to One-Up Each Other in Chaotic Race for NIL Laws*, SPORTS ILLUSTRATED (Mar. 4, 2021), <https://www.si.com/college/2021/03/04/name-image-likeness-state-laws-congress-ncaa>.

64. See, e.g., GA. CODE ANN. § 20-3-681(a) (2022) (prohibiting NIL compensation provided in exchange for enrollment or play at a particular institution); 110 ILL. COMP. STAT. 190/10 (2022) (same); KY. REV. STAT. ANN. § 164.6945(2) (2022) (same); MISS. CODE ANN. § 37-97-107(12) (same); N.M. STAT. ANN. § 21-31-3 (2022) (same); 70 OKLA. STAT. § 820.23(B) (2022) (same); 5 PA. C.S.A. § 3703(a) (2022) (same); S.C. CODE ANN. § 59-158-

like California and Connecticut have made deliberate choices to permit this potentially advantageous behavior.

If the NCAA lacks the authority to enforce its NIL regulatory scheme in some states, the entire effort is likely to fail. Institutions in states like California and Connecticut will have a competitive advantage over those in states that allow the NCAA to act against pay-for-play and recruiting inducement NIL deals. For example, the University of California would be able to field athletes whose NIL deals induced them to enroll, while the University of Texas could not. This imbalance would create a problem analogous to the initial competitive problem that arose when states began passing NIL laws. More and more states would protect their home institutions by denying the NCAA the authority to prevent pay-for-play and recruiting NIL deals, making enforcement legally impossible in some states and merely impractical in others.

2. Races to the Bottom

Even if courts eventually rule that the NCAA has legal authority to prevent pay-for-play and recruiting inducement NIL deals, it is doubtful that the NCAA will genuinely succeed in preventing these supposed evils from occurring. Many institutions have already created NIL opportunities that approximate pay-for-play,⁶⁵ and those opportunities surely affect enrollment decisions by prospective athletes. Indeed, there is every reason to believe that NIL inducements will come to dominate the supposedly non-existent early recruiting market, even if prohibited by NCAA rules. Surely recruits will know that NIL opportunities vary from school to school. If an institution can convince recruits that they will earn richer NIL deals by enrolling, it will want to somehow convey that opportunity. Institutions and their supporters appear to have already identified the basic strategy for achieving this effect.⁶⁶

The foundation for this strategy is the so-called NIL collective. These entities act as nominally independent enterprises that collect money for distribution to athletes in the form of NIL deals.⁶⁷ NIL collectives can pay

20(A) (2022) (same); TENN. CODE ANN. § 49-7-2802(A) (2022) (same); TEX. EDUC. CODE ANN. § 51.9246(g) (2022) (same).

65. See *infra* notes 70–73 and accompanying text.

66. See John E. Hoover, *Oklahoma Announces \$50k NIL Collective for Oklahoma Student-Athletes*, FAN NATION: ALL SOONERS (Apr. 22, 2022), <https://www.si.com/college/oklahoma/football/oklahoma-announces-nil-collective-for-oklahoma-student-athletes>.

67. See *id.*

athletes directly for making public appearances on behalf of selected charities or businesses, interacting with contributors to the collective, or creating customized content for contributors.⁶⁸ Additionally, some NIL collectives facilitate NIL deals between those types of contributors and student-athletes.⁶⁹

NIL collectives skirt NCAA rules against direct pay from universities to athletes by acting as third parties that happen to pursue NIL deals with a particular university's athletes. For example, the Horns With Heart collective states on its website that it will offer \$50,000 to each "scholarship eligible" offensive lineman at the University of Texas.⁷⁰ Not to be outdone, the 1Oklahoma Collective promises to pay \$40-50,000 per year to every player on the University of Oklahoma football team.⁷¹ This would look a lot like pay-for-play and an inducement to enroll, but for the stipulation that the athletes who accept these offers will make public appearances on behalf of charities chosen by the collective.⁷² This shift

68. See, e.g., HORNS WITH HEART, <https://hornswithheart.org/#about-us> (last visited Mar. 20, 2023) (paying athletes to appear on behalf of selected charities); 1OKLAHOMA COLLECTIVE, <https://www.1oklahoma.com/> (last visited Mar. 20, 2023) (same); MATADOR CLUB, <https://www.matadorclub.org/about> (last visited Mar. 20, 2023) (same); CAL. LEGENDS COLLECTIVE, <https://calegends.com/> (last visited Mar. 20, 2023) (offering a one-on-one video chat for payment to collective); NORMAN NIL CLUB, <https://www.normannilclub.com/> (last visited Mar. 20, 2023) (facilitating meet-and-greets between players and contributors to collective); FRIENDS OF WILBUR & WILMA, <https://www.friendsofwilburandwilma.com/donor/memberships> (last visited Mar. 20, 2023) (offering digital access for collective members to exclusive content, live events, photo opportunities, and "autographed swag").

69. See generally *The On3 Guide to NIL Collectives Around the Nation*, ON3 (Aug. 25, 2022), <https://www.on3.com/nil/news/on3-guide-to-nil-collectives-around-the-nation/> (providing several examples of collectives and how they can facilitate opportunities for athlete to represent businesses).

70. See *Horns with Heart Announces \$800,000 Sponsorship for Texas Longhorn Offensive Line Beginning in 2022*, HORNS WITH HEART, <https://hornswithheart.org/press-release.html> [hereinafter *Horns with Heart Scholarship*] (last visited Mar. 20, 2023).

71. See Hoover, *supra* note 66 (quoting OU collective founder Barry Switzer) ("[E]very OU football player will have the opportunity to earn between \$40,000-\$50,000 each year from 1Oklahoma NIL deals.").

72. See, e.g., HORNS WITH HEART, *supra* note 68 ("It is important for us to get the money we raise into the hands of those making an active difference. Our governing board and their involvement is pro-bono. Our goal is to maximize the amount of exposure we can create for our selected charities and student-athletes who promote them."); 1OKLAHOMA, *supra* note 68 ("We are a non-profit organization committed to serving some of the most

allows those involved to assert that the NIL arrangement is not for playing, but for the services athletes provide.⁷³

Moreover, despite the nominal independence of NIL collectives, institutions consider them necessary components of a successful athletic program. Practically every Power Five school has at least one NIL collective supporting its athletes,⁷⁴ and institutions appear ready to use NIL deals as inducements to enroll.⁷⁵

The NCAA is well aware of NIL collectives and their potential for introducing quasi pay-for-play inducements to recruiting. The NCAA's May 2022 guidance clarifies that the rules prohibit pay-for-play and improper recruiting inducements.⁷⁶ The NCAA also reminded institutions that NIL collectives could be considered boosters that may not recruit or offer NIL deals on behalf of a school.⁷⁷ Additionally, the NCAA's guidance

impactful charities in the state of Oklahoma through the Name, Image, and Likeness (NIL) of OU student athletes.”).

73. It remains to be seen if the NCAA will meaningfully question arrangements where the agreed upon services seem minor in relation to the size of payments given, and whether the arrangements in question withstand such scrutiny.

74. For lists of collectives and the universities they support, see *NIL Collectives*, ON3, <https://www.on3.com/nil/collectives/> (last visited Mar. 20, 2023); *Tracker: University-Specific NIL Collectives*, BUS. OF COLLEGE SPORTS, <https://businessofcollegesports.com/tracker-university-specific-nil-collectives/#list-of-nil-collectives-by-school> (last visited Mar. 20, 2023).

75. See, e.g., Brett Greenberg, *Alabama's Nick Saban Sounds Off on Texas A&M, Jackson State Buying Players with NIL Money*, USA TODAY (May 19, 2022, 6:37 PM ET), <https://www.usatoday.com/story/sports/ncaaf/2022/05/19/alabama-nick-saban-says-texas-am-jacson-state-bought-players/9834392002/> (quoting accusation by Alabama football coach Nick Saban) (“A&M bought every player on their team. Made a deal for name, image, and likeness.”); Nick Kelly, *Jimbo Fisher Blasts Nick Saban over NIL Allegations: 'Some People Think They're God,'* USA TODAY (May 19, 2022, 6:39 PM ET), <https://www.usatoday.com/story/sports/ncaaf/sec/2022/05/19/jimbo-fisher-blasts-nick-saban-over-nil-recruiting-allegations/9837704002/> (reporting that Texas A&M football coach, Jimbo Fisher, criticized Saban's allegations as “despicable”); Sam Murphy, *Video Appears to Show Texas A&M Staff Discussing NIL Opportunities with Recruits*, YAHOO SPORTS (June 30, 2022), <https://sports.yahoo.com/video-appears-show-texas-m-171129116.html> (including embedded video of apparent reference to NIL money in recruiting by Texas A&M staff); Ewers Barber (@EwersBarber), TWITTER (June 30, 2022, 7:29 AM), <https://twitter.com/EwersBarber/status/1542485479102324740> (providing original source for video).

76. NCAA, Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement 1 (effective July 1, 2022), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf.

77. See *id.*

outlines institutional staff cannot be involved, “directly or indirectly,” with providing NIL benefits to recruits.⁷⁸

This appears to force NIL collectives to stay away from recruitment and make deals with athletes only after they enroll. Unfortunately, as with scholarships and recruiting, the NCAA has once again prohibited certain behaviors while leaving loopholes that effectively allow the behaviors. Once again, the result is a recruiting market that risks unfairly disappointing recruits who either misunderstand or have been misled about offers they receive.

To see this, consider the specifics of the NCAA’s guidance about NIL collectives. In a nutshell, collectives may not have conversations or other communications with recruits nor make NIL deals contingent upon enrollment at a particular institution.⁷⁹ Additionally, institutional coaches and staff may not facilitate meetings between NIL collectives and recruits, nor may they communicate with a recruit on behalf of NIL collectives.⁸⁰ This means that, in theory, recruits will not get NIL offers from collectives, either directly or through coaches.

At the same time, however, the NCAA does not truly ensure that NIL collectives will avoid influencing recruits or operating independently of the universities whose programs they support. On October 26, 2022, the NCAA Division I Board of Directors clarified its interim NIL policy.⁸¹ That clarification ostensibly applied only to NIL activity of already-enrolled athletes, but its provisions created a new opportunity for communication or coordination between NIL collectives and schools that would likely spill over into recruiting. For example, the clarification explicitly permits institutions to conduct educational sessions for NIL collectives, engage NIL collectives to inform athletes of NIL opportunities, and engage NIL collectives to administer marketplaces to match athletes to NIL opportunities.⁸²

78. *Id.*

79. *Id.* at 2.

80. *Id.*

81. *See* NCAA, NCAA Division I Institutional Involvement in a Student-Athlete’s Name, Image and Likeness Activities 1 (Oct. 26, 2022) [hereinafter NCAA NIL Involvement], https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf; *see also* Meghan Durham, *DI Board Approves Clarifications for Interim NIL Policy*, NCAA (Oct. 26, 2022), <https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx>.

82. NCAA NIL Involvement, *supra* note 81, at 3.

This information sharing allows NIL collectives to learn an enormous amount about the kinds of NIL arrangements necessary to recruit top players. If nothing else, educational sessions will place NIL collective leaders directly in touch with university staff who can tell the leaders what the general NIL market requires. Granted, the clarification also directly prohibits communication with NIL collectives about specific athlete demands for money,⁸³ but this kind of information is not necessary for NIL collectives to learn about the amounts of money the institution needs to recruit. General knowledge about the recruiting market would be enough.

Once NIL collectives learn what the recruiting market requires, it is easy for them to influence recruits without openly violating NCAA rules. Nothing stops NIL collectives from making their existence and operations known. For example, an NIL collective could operate a web page that explicitly states what it will offer to athletes.⁸⁴ Recruits will further learn about possible NIL payments by talking with coaches, acquaintances, and other athletes who know what enrolled athletes have gotten. NIL collectives are highly likely to indirectly inform recruits of possible NIL deals by the time they have a recruiting conversation with a coach.

Once basic information about collectives and NIL deals is known, behaviors already associated with recruiting practically guarantee that more information about possible NIL deals will be given to recruits. Recruits meeting face-to-face or by phone with a coach will reasonably want to know whether they will have similar opportunities as players already on the roster. It is highly unlikely that a coach who gets such an inquiry will refuse to answer, especially when the opportunities are already public and known to be available. There appears to be nothing in NCAA rules that prohibits a coach from truthfully answering these questions as long as the coach and potential recruit reach no formal NIL arrangement. Recruits may be left with a (perhaps correct) impression that money will come if they enroll, but, as with scholarship offers, recruits reach only informal understandings.⁸⁵ It appears that informal understandings are already

83. *Id.*

84. *See Horns with Heart Scholarship*, *supra* note 70 (stating that each member of the Texas offensive line will receive \$50,000 per year for participation in the Pancake Factory Initiative).

85. *See, e.g.,* Stewart Mandel & Andy Staples, *Jaden Rashada's Unprecedented Recruitment: How a 4-Star QB Went from \$13.85 Million to No NIL Deal*, *ATHLETIC* (Feb. 6, 2023), https://theathletic.com/4149181/2023/02/06/jaden-rashada-nil/?source=emp_shared_article (documenting Florida's failed NIL deal for quarterback Jaden Rashada);

happening, considering coaches promote the existence of NIL payments to athletes⁸⁶ while arguing about excessive spending and competition.⁸⁷

In short, despite the NCAA's rules and guidance, recruits will make decisions about schools based on scholarship and NIL information. It seems highly unlikely that the NCAA will be able to prevent this. It is simply too difficult for the NCAA to monitor private conversations that both parties would prefer to remain confidential, let alone act against many—if not all—of the NCAA's most prominent and influential institutions. The result will be an NIL recruiting market in which the problems of the scholarships-only market are exacerbated by the presence of NIL deals.

A scholarship-only deal is a simple agreement between an athlete and a school, one that is fairly easily understood by all involved. Adding NIL deals to this framework means adding third parties and far more complex terms. Two sorts of problems immediately come to mind. First, recruits must now face the prospect that NIL deals could be withdrawn, regardless of whether scholarship deals are honored. Second, recruits must worry about whether they truly comprehend the deals being proposed.

NIL deals are often complicated commercial transactions documented by long written contracts.⁸⁸ It stretches belief to think that high school athletes and their families can work through these nuances without writings of the sort used by professional athletes in their endorsement deals. Nevertheless, the NCAA's regulatory approach to NIL leaves athletes to do exactly that.

The lack of expertise and formalized writing creates an environment in which surprises and disappointments can easily occur.⁸⁹ At best, some athletes will simply misunderstand proposed NIL deals and suffer when

Navarro, *supra* note 4 (reporting conversations with football recruits about the NIL money they would earn upon enrollment).

86. *See supra* note 75 and accompanying text.

87. *See supra* note 75 and accompanying text; Shehan Jeyarajah, *Lane Kiffin Downplays Big Ten Realignment, Likens NIL to Baseball Payrolls in 2022 SED Media Days Appearance*, CBS SPORTS (July 18, 2022, 4:57 ET), <https://www.cbssports.com/college-football/news/lane-kiffin-downplays-big-ten-realignment-likens-nil-to-baseball-payrolls-in-2022-sec-media-days-appearance/> (reporting that Mississippi football coach Lane Kiffin joked that Texas A&M and Texas deserved a “luxury tax” for their NIL activities).

88. *See, e.g.*, Sharleen Nelson, *Law School Program Offers Advice to Students on NIL Deals*, UNIV. OF OREGON: AROUND THE O (May 12, 2023, 5:00 AM), <https://around.uoregon.edu/content/law-school-program-offers-advice-students-nil-deals> (recognizing complexities of NIL contracts and need for independent advice for athletes),

89. *See, e.g.*, Mandel & Staples, *supra* note 85.

their expectations are not met.⁹⁰ At worst, unscrupulous individuals will exploit the inexperience of recruits to coax them into overreaching deals that inflict long-lasting damage. For example, an athlete could convey a ten-year exclusive license for use of his NIL rights in exchange for a modest sum. If this athlete became marketable after graduating, such an agreement could meaningfully impede his future commercial opportunities.

The foregoing shows that the NCAA's current regulatory approach to NIL creates an early recruiting market with even more problems than the scholarship-driven one that already exists. Recruits will feel even more pressure to participate in early recruiting when scholarships and additional money are in play, and they will experience more difficulty navigating the complexities of NIL deals. Worst of all, the consequences for recruits will become more serious when things go wrong. Losing a scholarship is bad enough but losing NIL deals might be even worse. Recruits may choose to attend a school because they badly need \$50,000 per year to support family.⁹¹ Losing such a deal would be potentially catastrophic.

IV. A Better Way?

So, what might happen if the NCAA acknowledged that its current regulatory strategy is deeply flawed and proceeded accordingly? As an initial matter, it would accept the inevitability of NIL deals as part of recruitment. From the current perspective of the NCAA, this option might look disastrous. Closer reflection, however, reveals that "legalizing" existing recruitment practices creates the opportunity to better protect athletes from the problems of recruitment.

Consider what would happen if the NCAA permitted institutions and NIL collectives to cooperate in the presentation of binding scholarship and NIL deals to athletes at any time. The NCAA could allow coaches to present NIL offers from third parties during recruitment and expand the National Letter of Intent process so that athletes of any age could sign binding scholarship and NIL deals. This change would shorten the time between informal commitment and signing, thereby alleviating many of the problems created by existing NCAA rules.

90. *See id.*

91. *See The Price of Poverty in Big Time College Sport*, NAT'L COLL. PLAYERS ASS'N (Sept. 13, 2011), <https://www.ncpanow.org/research/study-the-price-of-poverty-in-big-time-college-sport> (describing a study finding that 85% of athletes living on campus live below the federal poverty line, with 86% of those living off campus below the federal poverty line).

Under the current system, the most that any institution can offer before the student's junior year of high school is a non-binding promise to sign a binding deal at a future date.⁹² The NCAA may prefer this approach because it supposedly lessens the pressure on recruits by ensuring that recruitment remains informal. This instead places great pressure on recruits who find themselves under duress to make deals while deprived of crucial information about the specific terms and reliability of proposals.

Imagine the following scenario that takes place under the NCAA's existing rules. A coach arranges a conversation with a recruit in his sophomore year of high school. The coach tells the recruit that the university will offer him a scholarship to play football and gives the recruit information suggesting that the school's supporting NIL collective will offer him a lucrative NIL deal.⁹³ The recruit will naturally wonder how serious this offer is and exactly what the terms of the NIL deal are.

In a market with binding commitments, the recruit could learn a lot by asking for a written offer that would bind the relevant parties. A serious coach would produce the written offer for both the scholarship and NIL deal, while a less serious one would tell the recruit that he will offer only a verbal commitment for now. By contrast, in the existing market encumbered by NCAA rules, the serious coach must give the recruit the same response as that given by the less serious coach, making it difficult for the recruit to know the precise terms of the NIL deal and the seriousness of the offer. Recruits must essentially take a leap of faith and trust that institutions and NIL collectives will perform. Indeed most will. There will surely be, however, a certain number of disappointed recruits who either misunderstood what a school offered or were misled.

Allowing binding NIL and scholarship deals at any time fixes this problem. A sincere coach with a solid offer can "put his money where his mouth is" by giving the recruit a binding written offer. Less serious coaches will demur, giving recruits far better information about where they truly stand. This change will significantly reduce the likelihood that recruits will be misinformed or misled. Additionally, and perhaps more importantly, "legalizing" binding NIL and scholarship deals in recruitment would create opportunities for regulation that might effectively smooth over some of the rough edges the open use of NIL may have.

92. 2022-23 NCAA DIVISION I MANUAL, *supra* note 10, art 13.9.3.2, at 115.

93. *See supra* note 26 and accompanying text (explaining how coaches can have recruiting conversations with athletes despite NCAA rules discouraging or prohibiting them).

Allowing institutions to be openly involved with NIL deals would also create opportunities for institutions (or perhaps the NCAA) to develop roles as gatekeepers that ensure the entities offering a deal to recruits are ethical. For example, the NCAA could require institutions to submit the documentation for all NIL deals used in recruitment and review their substantive terms to ensure that pay-for-play arrangements do not get made. It does not take much imagination to think of ways that unscrupulous actors could sign athletes to unfair and overreaching deals. Ideally, athletes would protect themselves by employing counsel, but the cost of counsel makes such hope a bit unrealistic. Institutions or the NCAA may not be in a position to directly represent the interests of athletes, but both are in a position to give athletes comfort that they are dealing with legitimate parties. Indeed, doing less would seem counter to the professed importance that the NCAA gives to protecting athletes.

V. Conclusion

The NCAA currently uses rules and punishment to regulate NIL and recruiting. Unfortunately, institutions easily skirt these rules, creating a market dominated by informal deal making in which recruits suffer unfairly when institutions do not honor informal commitments. This Article suggests that the NCAA should abandon the effort to address NIL by punishing those who violate loophole-ridden rules. Instead, the NCAA should allow institutions to act on behalf of NIL collectives to offer binding scholarship and NIL deals to athletes during recruitment. Doing so will make recruiting fairer to athletes by giving athletes better information about what they are agreeing to and reducing the harms that arise when informal obligations are not honored.

Of course, there will be wrinkles. If universities present offers to athletes on behalf of NIL collectives or others, universities may become responsible to recruits if the deals do not go through. Perhaps conflicts of interest will arise if universities begin picking and choosing the NIL offers presented to athletes. For example, perhaps the university would not present a good offer to a recruit because the university itself hoped to pursue a deal with a sponsor. Universities directly involved with NIL deals may also find themselves subject to Title IX regulation over such activity.⁹⁴ Finally, it must be remembered that in many cases, the athlete making binding

94. Yen, *supra* note 26, at 599–600, 608.

commitments will be a minor. This raises the possibility that athletes will be able to disavow commitments they made upon becoming adults.⁹⁵

It is beyond the scope of this Article to address these complications, although it would be unfortunate if these challenges prevented the NCAA from changing the way it regulates NIL and recruiting. These problems do not seem any more daunting than the ones confronting the NCAA's present approach to NIL regulation. The NCAA may be worried about the dreaded taboo of open professionalism, but preserving the NCAA's broad vision of amateurism seems difficult to square with the amounts of money currently running through college sports.⁹⁶ If anything, the NCAA should strongly consider allowing institutions to pay their athletes salaries as employees. Barring this, there is no reason to shy away from asking whether the NCAA's existing regulation of NIL and recruiting is effective or fair to athletes. If the answer is not clearly "yes," changes should be made.

95. RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. L. INST, May 2023 update) ("Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday.").

96. See Khan Jr., *supra* note 31 (documenting massive NIL opportunities for Arch Manning, a highly coveted recruit in the most recent cycle).