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TIME'S UP: A CALL TO ERADICATE NCAA MONOPSONY THROUGH FEDERAL LEGISLATION

Ashley Jo Zaccagnini^{*}

Few traditions are as near and dear to the hearts of Americans as college athletics. The institution holds a special place in society because it reflects the ultimate convergence of those values that uniquely define the United States: loyalty, competitiveness, and pride. However, the notion of basic fairness seems to have been excluded along the way, as the commercialization of college athletics gave way to total dominance over the industry by the National Collegiate Athletic Association (NCAA). The NCAA promulgates sports rules and organizes collegiate-level championships, but its most influential role involves promoting “amateurism,” or the notion that student-athletes are not entitled to compensation because college athletics should be about the love of the game, not monetization. While amateurism may be touted as an honorable principle aimed at preserving the character of college athletics and its differences from professional sports, the principle is more difficult to justify at a time when the NCAA earns \$1.1 billion per year in revenue, none of which is shared among student-athletes who work full-time and typically live below the poverty line.

Last year, state legislators paused to consider whether any justification exists for continuing to adhere to the NCAA’s archaic system of denying compensation to student-athletes in light of the fact that “amateurism” holds no significance in a legal sense. Given the lack of any such justification, the California legislature became the first to explicitly defy the NCAA in passing the Fair Pay to Play Act in September of 2019. Since then, a number of states have followed suit by drafting nearly identical laws that would likewise have the effect of permitting student-athletes to earn compensation for use of their name, image, and likeness (NIL). Unsurprisingly, NCAA leadership vehemently condemned the movement at first, threatening to strip member institutions affected by the new legislation from the organization altogether. The NCAA has since reneged on its hostile position, making a public commitment to reform its policies so as to authorize paid endorsement opportunities for student-athletes on some level. However, the organization will undoubtedly attempt to minimize the impact of the Fair Pay to Play Act and its progeny whether through

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litigation or by crafting new restrictive policies ultimately aimed at nullifying the effects of new laws. Admittedly, the state-by-state approach to adopting a new stance on athlete compensation comes with a number of practical challenges, thereby providing fertile ground for the NCAA to launch powerful objections.

This Comment aims to present a workable solution in the form of a comprehensive federal law, which would secure the rights of student-athletes to earn compensation for use of their NILs before the NCAA is given the opportunity to preempt the significance of that right. While several congressmen have drafted federal laws related to the topic of NIL rights in this context, this Comment identifies particular issues that have been overlooked at the state level thus far, recommending specific provisions that would not only embrace student-athletes' rights in principle as a matter of basic fairness, but make those rights a practicable and economically feasible reality.

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I. INTRODUCTION

For nearly a century, the National Collegiate Athletic Association (NCAA) has monopolized the college-sports industry and persistently invoked the principle of “amateurism” as a justification for denying the right of college athletes to benefit financially from use of their name, image, and likeness (NIL).¹ Student-athletes have attempted to assert their right to compensation through litigation, primarily attacking the NCAA on both antitrust and labor and employment grounds.² While courts have traditionally deferred to amateurism as necessary to preserve the popularity of college athletics and the value of higher education,³ the Ninth Circuit’s recent *O’Bannon v. NCAA* decision called the NCAA’s model into question, reflecting public sentiment in asserting that no legal basis exists on which to deny the right of student-athletes to be compensated for use of their NILs.⁴ California legislators responded to the landmark decision by passing the Fair Pay to Play Act in September 2019,⁵ inspiring at least nine other states to draft or pass bills similarly aimed at granting student-athletes the ability to benefit financially from the use of their NILs.⁶ In response to the Fair Pay to Play Act, the

1. NCAA, 2020-21 NCAA DIVISION I MANUAL, art. 2.9 (2019) [hereinafter NCAA DIVISION I MANUAL].

2. Michael H. LeRoy, *Courts and the Future of “Athletic Labor” in College Sports*, 57 ARIZ. L. REV. 475, 495–97 (2015).

3. See, e.g., *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984).

4. See *O’Bannon v. NCAA*, 802 F.3d 1049, 1063–79 (9th Cir. 2015).

5. CAL. EDUC. CODE § 67456 (West 2019).

6. Charlotte Carroll, *Tracking NCAA Fair Play Legislation Across the Country*, SPORTS

NCAA threatened to expel California's colleges and universities from its league, but tempered that position within a month as the number of state legislatures signaling agreement with California's position increased.⁷ Rather than strip institutions of NCAA membership, the organization instead promised to consider adopting new bylaws that would permit athletes to be compensated for endorsements by January 2021.⁸

As of April 2021, the NCAA has avoided its commitment to reform by continuously delaying consideration of new bylaws despite its apparent willingness to concede.⁹ Unfortunately for the NCAA, however, the United States Supreme Court is not waiting around. On March 31, 2021, the Court expressed collective disdain toward "amateurism" during oral arguments in the case of *NCAA v. Alston*.¹⁰ Even March Madness could not distract sports commentators from realizing that with Justices on both ends of the ideological spectrum blasting criticisms against the NCAA, amateurism's days are likely numbered.¹¹ Yet, a win for student-athletes in *Alston*—which asks whether the NCAA can legally restrict the payment of modest, education-related sums to players—would not necessarily make the unqualified right to NIL compensation a reality.¹² Rather, as states continue adopting NIL statutes one-by-one, the NCAA's defense against compliance is strengthened based on its practical inability to comply with varying or even contradictory mandates. This Comment will analyze the numerous angles from which the NCAA could still prevent the Fair Pay to Play Act and its progeny from having any effect, highlighting the practical obstacles states failed to consider in drafting new laws that could drastically undermine the goal of achieving fair compensation for student-athletes. Ultimately, this Comment will argue that an innovative, yet logistically feasible solution in the form of a comprehensive federal law granting student-athletes the right to earn NIL compensation is necessary.

Part II of this Comment will describe the history of the NCAA and the organization's commitment to the principle of amateurism, which underlies the legal context to be discussed in Part III. Part IV will discuss the movement supporting expanded student-athlete compensation rights as spurred by

ILLUSTRATED (Oct. 2, 2019), <https://www.si.com/college/2019/10/02/tracking-ncaa-fair-play-image-likeness-laws> [https://perma.cc/PKZ9-T3X5].

7. See *Board of Governors Starts Process to Enhance Name, Image, and Likeness Opportunities*, NCAA (Oct. 29, 2019, 1:08 PM), <https://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities> [https://perma.cc/4U8Y-R5MM].

8. *Id.*

9. *Student-Athlete Committees Issue Joint Statement on Name, Image, Likeness Legislation Delay*, NCAA (Jan. 15, 2021 1:36 PM), <https://www.ncaa.org/about/resources/media-center/news/student-athlete-committees-issue-joint-statement-name-image-likeness-legislation-delay> [https://perma.cc/3EUP-EPKS].

10. Ross Dellenger, *Supreme Court Rips Into NCAA System, But a Win for Athletes' Rights is Far From Guaranteed*, SPORTS ILLUSTRATED (Mar. 31, 2021), <https://www.si.com/college/2021/03/31/supreme-court-alston-ncaa-athletes-rights> [https://perma.cc/7YMY-JHD3].

11. See *id.*

12. See *Alston v. NCAA*, 958 F.3d 1239, 1264 (9th Cir.) ("Contrary to Student-Athletes' understanding, this analysis reflects the judgment that limits on cash compensation unrelated to education do not, on this record, constitute anticompetitive conduct and, thus, may not be enjoined."), cert. granted, 141 S. Ct. 1231 (2020).

California's passage of the Fair Pay to Play Act, in addition to providing an overview of similar proposed legislation under consideration in a number of states. Part V will analyze potential legal challenges compromising the validity of the Fair Pay to Play Act and its progeny, questioning whether perpetuating the notion that student-athletes should be compensated for endorsements is worthwhile given the practical challenges and potential disadvantages associated with the policy. Ultimately, this Comment will conclude that (1) continuing the fight for student-athlete compensation rights is necessary given the advantages to be gained from such a policy; and (2) codifying that right in the form of a comprehensive federal law as set forth in Part VI will alleviate the complexities and practical challenges associated with the state-by-state approach to legislating college athletes' NIL rights.

II. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

The NCAA was born out of necessity during President Theodore Roosevelt's administration, primarily as a means for encouraging safer practices in men's college football.¹³ In the year 1905 alone, the sport caused eighteen deaths and hundreds of injuries.¹⁴ Consequently, the President facilitated the creation of the Intercollegiate Athletic Association (renamed the NCAA in 1910), charging its sixty-two original members with the task of formulating intercollegiate sports regulations.¹⁵ For most of the twentieth century, the NCAA's role was confined to rulemaking and tournament scheduling until profitability and heightened public interest in college sports materialized in accordance with the advent of television.¹⁶ NCAA executives capitalized on the opportunity to increase the organization's enforcement power in the 1940s and 1950s by establishing restrictive policies designed to alleviate exploitative recruitment practices, while at the same time securing television contracts valued in excess of one million dollars.¹⁷ Since that period, the NCAA's sophistication, scope, and revenue-generating capacity have increased even more substantially.¹⁸

Today, the NCAA defines itself as "an organization dedicated to providing a pathway to opportunity for college athletes," of which more than 1,100 colleges and universities are members.¹⁹ Together with athletics conferences spanning the country, the NCAA facilitates sports competitions involving 19,500 teams and nearly half a million students.²⁰ The NCAA conducts ninety national championships every year, providing college athletes the opportunity to compete at the highest level in a variety of college sports ranging from men's football to

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

14. *Id.*

15. *Id.*

16. *Id.* at 13-14.

17. *Id.* at 14-15.

18. *Id.* at 21.

19. NCAA, 2020-21 GUIDE FOR THE COLLEGE-BOUND STUDENT-ATHLETE 2 (2020), http://fs.ncaa.org/Docs/eligibility_center/Student_Resources/CBSA.pdf [<https://perma.cc/UP8W-VNES>].

20. *Id.*

women's equestrian.²¹ Member schools are organized into three NCAA divisions, with Division I schools offering the largest budgets, scholarship opportunities, and student bodies.²² Division I schools may award athletic scholarships covering tuition and fees, room and board, plus other school-related expenses.²³ However, fewer than 2% of high school athletes secure an NCAA sports scholarship in any division each year,²⁴ and those who do are only awarded an average of \$18,000.00.²⁵

A. NCAA REGULATIONS

The NCAA is widely perceived as one of the most important regulatory bodies in the sports industry, though its requirements for eligibility are often viewed as burdensome and even controversial due to their restrictiveness.²⁶ The organization's current Division I manual alone sets forth 408 pages of bylaws governing member institutions and their athletes.²⁷ The bylaws are promulgated at an annual convention by member representatives serving on committees that propose NCAA policies.²⁸ While member institutions thus decide which policies are to be adopted and implemented on campuses, NCAA employees ultimately interpret the organization's rules.²⁹ The NCAA's enforcement power also depends on the work of committees within the organization itself, beginning with enforcement investigations staff tasked with inspecting potential infractions.³⁰ Depending on the seriousness of a given violation, the enforcement process may proceed in the form of a negotiated resolution, summary disposition track, or hearing track, all of which the NCAA's Committee on Infractions (COI) oversees.³¹ The NCAA defines the COI as an "independent administrative body" consisting of volunteers from member institutions and their employees.³² In accordance with the bylaws, the COI is empowered to "conduct hearings or reviews, find facts, conclude violations of NCAA legislation, prescribe appropriate penalties and monitor institutions on probation to ensure compliance with penalties."³³

21. *Id.* at 3.

22. *Id.* at 2.

23. *Id.* at 3.

24. *Id.*

25. Mark J. Drozdowski, *Should College Athletes Be Paid?*, BEST COLLS. (Feb. 23, 2021), <https://www.bestcolleges.com/blog/should-college-athletes-be-paid/#:~:text=The%20average%20athletic%20scholarship%20is,athletes%20receive%20a%20full%20scholarship> [https://perma.cc/N8HS-5CCC].

26. WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW § 12:3 (2019).

27. NCAA DIVISION I MANUAL, *supra* note 1.

28. *Id.* art. 5.1.1.1; *What is the NCAA?*, NCAA, <https://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> [https://perma.cc/5UZQ-AQDS].

29. NCAA DIVISION I MANUAL, *supra* note 1, art. 5.4.1.2.1; *What is the NCAA?*, *supra* note 28.

30. *Division I Infractions Process*, NCAA, <https://www.ncaa.org/enforcement/division-i-infractions-process> [https://perma.cc/N8VN-W28Y].

31. *Id.*; *Division I Committee on Infractions*, NCAA, <https://www.ncaa.org/governance/committees/division-i-committee-infractions> [https://perma.cc/QHD4-4FX3].

32. *Division I Committee on Infractions*, *supra* note 31.

33. *Id.*

B. THE NCAA'S COMMITMENT TO AMATEURISM

The lengthy and complex nature of the NCAA's regulatory scheme may be explained by the organization's commitment to the principle of amateurism, which the NCAA cites as essential to maintaining "a clear line of demarcation between intercollegiate athletics and professional sports."³⁴ Amateur status depends on participation being "motivated primarily by education and by the physical, mental and social benefits to be derived" from college athletics as an "avocation," not an occupation.³⁵ According to the NCAA, amateurism also encompasses the notion that "student-athletes should be protected from exploitation by professional and commercial enterprises."³⁶

The NCAA's concern with preventing the professionalization of college athletics underlies all of its regulations. For instance, the recruitment process is heavily regulated, providing for short contact periods and limited opportunities during which member institutions may communicate with high school athletes, with different sets of rules applying to face-to-face introductions, telephone calls, and "official" visitation days.³⁷ Even after a student-athlete officially commits to a member institution, he or she must provide evidence of amateur status by obtaining an amateurism certificate prior to obtaining eligibility at a Division I or II school.³⁸ Further, participation in any of the following activities may compromise a student-athlete's amateur status: receiving payment from a sports team for participation; engaging a professional marketing or sports agent; accepting prize money; or promoting commercial products or services.³⁹ Moreover, the NCAA imposes strict academic policies, requiring its athletes to be enrolled in a full schedule of classes at all times during the academic year and to maintain a minimum grade point average based on the member institution's general requirements.⁴⁰ A violation of any of the aforementioned bylaws relating to recruitment, amateur status, or academics may result in immediate ineligibility for the member institution or student-athlete involved.⁴¹

III. LEGAL CONTEXT

A. EARLY LEGAL CHALLENGES TO NCAA REGULATIONS: AMATEURISM PREVAILS

While amateurism is not a legally binding principle, the NCAA's commitment to preserving the amateur status of college sports has allowed it to survive numerous legal challenges by student-athletes opposing its restrictive policies. For

34. NCAA DIVISION I MANUAL, *supra* note 1, art. 1.3.1.

35. *Id.* art. 2.9.

36. *Id.*

37. *Id.* arts. 13.02, 13.1.

38. *Amateurism*, NCAA, <https://www.ncaa.org/student-athletes/future/amateurism> [<https://perma.cc/65QS-KH8M>].

39. *Id.*

40. NCAA DIVISION I MANUAL, *supra* note 1, arts. 14.2.1, 14.4.3.3.

41. *Id.* arts. 3.2.5, 12.11.1.

instance, in the early 1990s, a running back for the University of Notre Dame sued the NCAA upon losing his collegiate eligibility by entering the NFL draft, even though he was not ultimately selected.⁴² The player invoked § 1 of the Sherman Act—which “makes it unlawful for anyone to contract, combine in the form of trust or otherwise, or conspire, in restraint of trade or commerce among the several states”⁴³—in challenging the NCAA’s “no-draft” rule on the grounds that the rule had an anticompetitive effect on the sports industry.⁴⁴ The NCAA argued the rule was necessary to ensure student-athletes’ profit-making objectives would not overshadow their educational goals, and that overturning the rule would “blur the line between college and professional football, and create a number of potential problems for the effective management of teams engaged in college football.”⁴⁵ The court agreed with the NCAA’s rationale, citing the “significant procompetitive effects” of the amateurism principle.⁴⁶

Also in 1990, a Vanderbilt University football player lost his suit against the NCAA in a nearly identical antitrust case challenging the NCAA’s “no-agent” rule.⁴⁷ The plaintiff relied on a landmark Supreme Court case from six years prior in arguing the NCAA’s regulations are commercial in nature and therefore subject to antitrust scrutiny.⁴⁸ However, the court turned to a Fifth Circuit case⁴⁹ to explain the “clear difference between the NCAA’s efforts to restrict the televising of college football games and the NCAA’s efforts to maintain a discernable line between amateurism and professionalism.”⁵⁰ Essentially, while the court recognized that the NCAA and its multimillion dollar annual budget were not *totally* exempt from antitrust regulation because its television contracts were clearly commercial in nature, it created a narrow exception for eligibility rules solely intended to preserve amateurism.⁵¹

While the courts in *Banks* and *Gaines* gave credence to amateurism where collegiate football players had engaged in activities unquestionably characteristic of professional football, the court in *Bloom v. NCAA* refused to permit a student-athlete to benefit financially from endorsement deals even though they were unrelated to his NCAA sport altogether.⁵² In compliance with NCAA regulations,⁵³ the plaintiff competed as a member of his university football team while simultaneously pursuing a career in professional skiing.⁵⁴ Prior to

42. *Banks v. NCAA*, 746 F. Supp. 850, 853–54 (N.D. Ind. 1990).

43. *Id.* at 857–58; *see also* 15 U.S.C. § 1.

44. *Banks*, 746 F. Supp. at 855, 860.

45. *Id.* at 860–61.

46. *Id.* at 862.

47. *See Gaines v. NCAA*, 746 F. Supp. 738, 740–41 (M.D. Tenn. 1990) (mem. op.).

48. *Id.* at 743 (citing *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1984) (holding that the NCAA’s television restrictions violated § 1 of the Sherman Act)).

49. *Id.* at 744 (citing *Hennessey v. NCAA*, 564 F.2d 1136, 1148–49 (5th Cir. 1977)).

50. *Id.* at 743.

51. *Id.* at 744 (citing *Hennessey*, 564 F.2d at 1148–49).

52. *See Bloom v. NCAA*, 93 P.3d 621, 626–27 (Colo. Ct. App. 2004).

53. *Id.* at 625. The athlete relied “on NCAA Bylaw 12.1.2, which states that “[a] professional athlete in one sport may represent a member institution in a different sport.” *Id.* (alteration in original).

54. *Id.* at 622.

enrollment, the athlete secured various paid opportunities involving modeling, television hosting, and product endorsements in the media, some of which were associated with his image as an Olympic skier.⁵⁵ When the NCAA refused to waive its rules prohibiting student-athletes from earning compensation for use of their NILs, the athlete sought an injunction on the grounds that such restrictions were inapplicable to his skiing-related opportunities.⁵⁶ Reading them as a whole, the court concluded that the NCAA bylaws “express[ed] a clear and unambiguous intent to prohibit student-athletes from engaging in [paid] endorsements.”⁵⁷ Ultimately, the court favored the NCAA despite the NCAA’s inability to interpret its own rules when asked to do so,⁵⁸ and despite evidence that the athlete’s endorsement opportunities were the product of his appearance and on-camera presence, not his athletic ability.⁵⁹

Considering student-athletes have traditionally been unsuccessful in challenging the legality of restrictive NCAA bylaws on antitrust grounds, some have attempted to argue they are entitled to compensation under labor and employment laws.⁶⁰ Regardless of the approach—whether suing under worker’s compensation laws, the National Labor Relations Act, or the Fair Labor Standards Act (FLSA)—a majority of courts have rejected this argument.⁶¹ For instance, in *Berger v. NCAA*, former competitors for the University of Pennsylvania’s women’s track and field team sued their school, the NCAA, and 120 other NCAA Division I universities and colleges, alleging that student-athletes are “employees” within the meaning of the FLSA and therefore entitled to minimum wage.⁶² In rejecting this claim, the Seventh Circuit declined to apply the multifactor test it cited as determinative in discerning the nature of employment relationships in previous cases.⁶³ According to the court, the established multifactor test failed to accommodate the longstanding tradition of amateurism that defined the economic reality of the relationship at issue, and thus was “not a ‘helpful guide.’”⁶⁴ Rather, the court reasoned that student-athletes have committed a “tremendous” amount of time to their respective NCAA sports for over a hundred years with no expectation of pay and for reasons wholly unrelated to compensation, ultimately holding that “play” therefore did not constitute “work” within the meaning of the FLSA.⁶⁵

Concurring, Circuit Judge David F. Hamilton emphasized that, while the amateurism principle pointed toward dismissal in *Berger* because the plaintiffs were not recipients of athletic scholarships and they competed in a non-revenue-

55. *Id.*

56. *Id.*

57. *Id.* at 626.

58. *Id.* at 627.

59. *Id.*

60. See Adam Epstein & Paul M. Anderson, *The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective*, 26 MARQ. SPORTS L. REV. 287, 294–97 (2016).

61. *Id.* at 297.

62. *Berger v. NCAA*, 843 F.3d 285, 288–89 (7th Cir. 2016).

63. *Id.* at 291.

64. *Id.* (quoting *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992)).

65. *Id.* at 293.

generating sport, “economic reality and the tradition of amateurism may not point in the same direction” with regard to scholarship athletes in Division I sports that generate billions of dollars in revenue.⁶⁶ Essentially, Judge Hamilton made clear that a different set of facts might require the court to afford “room for further debate” on the issue of whether student-athletes may be considered employees for FLSA purposes.⁶⁷

B. SHIFTING LEGAL LANDSCAPE: JUDICIAL SKEPTICISM TOWARD AMATEURISM

As the above cases demonstrate, courts have deferred to amateurism in a variety of legal contexts despite the fact that the principle does not actually carry the force of law.⁶⁸ However, a 2015 landmark case questioned the validity of the principle from both a legal and practical perspective,⁶⁹ ultimately finding the NCAA’s commitment to preserving the amateur nature of college sports an insufficient justification for prohibiting student-athletes from being compensated for use of their NILs.⁷⁰ The landmark case was filed by Ed O’Bannon, a former All-American basketball player from the University of California Los Angeles (UCLA), who served as lead plaintiff in the class-action suit after realizing he had been depicted in a college basketball video game produced by Electronic Arts without his consent.⁷¹ Though a character in the video game resembled O’Bannon in every detailed aspect down to the number on his UCLA jersey, the player never authorized the use of his likeness nor was he ever compensated for it.⁷² O’Bannon sued the NCAA and the Collegiate Licensing Company, which licenses the trademarks of the NCAA and its member schools, on the grounds that amateurism rules preventing student-athletes from being compensated for use of their NILs placed an illegal restraint on trade in violation of the Sherman Act.⁷³

Judge Claudia Wilken of the Northern District of California agreed with O’Bannon, ultimately concluding the NCAA’s prohibition on compensation constituted a “price-fixing agreement” in which member colleges collectively agreed to value their athletes’ likenesses at zero.⁷⁴ In dismissing amateurism and consumer demand as insufficient justifications for barring student-athletes from receiving monetary compensation for NIL rights, Judge Wilken noted the NCAA had altered its definition of amateurism over time in order to suit its own interests,⁷⁵ and that other factors, including “school loyalty and geography,” were more determinative of consumer demand for college sports than the fact that players are not compensated.⁷⁶ To the extent that a total ban on student-athlete

66. *Id.* at 294 (Hamilton, J., concurring).

67. *Id.*

68. *See* O’Bannon v. NCAA, 802 F.3d 1049, 1063–64 (9th Cir. 2015).

69. *Id.*

70. *Id.* at 1079.

71. *Id.* at 1055.

72. *Id.*

73. *Id.*

74. O’Bannon v. NCAA, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014).

75. *Id.* at 1000.

76. *Id.* at 1001; *see also* John Niemeier, *The End of an Era: The Mounting Challenges to the NCAA’s Model of Amateurism*, 42 PEPP. L. REV. 883, 916–17 (2015) (summarizing the O’Bannon litigation).

compensation may breed certain procompetitive effects such as academic integration, Judge Wilken concluded the NCAA's procompetitive objectives could be preserved equally as well by less-restrictive alternatives, such as allowing athletes to receive deferred stipends through a trust system.⁷⁷

On appeal, the Ninth Circuit agreed with the district court that NCAA rules prohibiting student-athlete compensation for use of NIL are anticompetitive in effect and that the organization's objectives could be accomplished by less restrictive means.⁷⁸ The NCAA attempted to rebut this conclusion by arguing that amateurism has a procompetitive effect in broadening student-athletes' options, giving them the only opportunity they will have to play competitive sports while earning an education.⁷⁹ The Ninth Circuit disposed of this counterargument, concluding that whether NCAA restrictions broadened educational opportunities was irrelevant to the issue at bar.⁸⁰ If anything, the court noted, loosening or abandoning compensation rules might actually be the *best* way to accomplish the goal of broadening student-athletes' choices, considering "athletes might well be more likely to attend college, and stay there longer, if they knew that they were earning some amount of NIL income while they were in school."⁸¹

At the same time, the Ninth Circuit affirmed the district court's acknowledgment that amateurism breeds procompetitive effects to the extent it preserves the popularity of the NCAA's product and integrates academics with athletics.⁸² Yet, the Ninth Circuit deviated from the lower court's understanding of how these objectives might be accomplished through "less restrictive means," holding that allowing member institutions to offer student-athletes cash payments "untethered to educational expenses" would go too far.⁸³ "[I]n finding that paying students cash compensation would promote amateurism as well as not paying them," the court stated, "the district court ignored that not paying student-athletes is *precisely what makes them amateurs*."⁸⁴ To preserve the line between amateur sports and minor league status that allows the college athletics industry to survive, the Ninth Circuit vacated the district court's decision only to the extent it required the NCAA to allow member institutions to compensate their athletes directly through deferred cash payments unrelated to educational expenses.⁸⁵ Therefore, under *O'Bannon*, the NCAA's bylaws violate antitrust principles insofar as they prohibit athletes from earning NIL compensation altogether, but the NCAA is still authorized to prohibit member institutions from paying athletes beyond the cost of attendance.⁸⁶

The *O'Bannon* decision is not only remarkable due to its authorization of student-athlete NIL compensation, but also for its skeptical discussion as to

77. *O'Bannon*, 7 F. Supp. 3d at 1005-06.

78. *O'Bannon*, 802 F.3d at 1074, 1079.

79. *Id.* at 1072.

80. *Id.* at 1072-73.

81. *Id.* at 1073.

82. *Id.* at 1076.

83. *Id.* at 1076-79.

84. *Id.* at 1076.

85. *Id.* at 1078.

86. *Id.* at 1079.

whether amateurism should carry weight in a legal sense.⁸⁷ For example, one of the NCAA's primary defenses in the *O'Bannon* litigation was based on the Supreme Court's ruling in *NCAA v. Board of Regents of the University of Oklahoma*.⁸⁸ In that case, the Court struck down the NCAA's then-prevailing rules governing television broadcasting of college football games, but it also noted that with respect to the organization's "critical role in the maintenance of a revered tradition of amateurism in college sports," the NCAA was deserving of "ample latitude to play that role" because the tradition might die otherwise.⁸⁹ The NCAA relied heavily on this language in defending its restrictive bylaws prohibiting student-athlete compensation in *O'Bannon*, arguing the Court's directive in *Board of Regents* had the effect of declaring amateurism rules "valid as a matter of law."⁹⁰ The Ninth Circuit disagreed, pointing out that the Supreme Court had merely deemed NCAA rules not illegal per se and, thus, deserving of the somewhat scrutinizing Rule of Reason standard of review where price-fixing is at issue.⁹¹ If anything, according to the *O'Bannon* court, the *Board of Regents* decision demonstrates that "not every rule adopted by the NCAA that restricts the market is necessary to preserving the 'character' of college sports,"⁹² thereby undermining the deferential perspective from which courts have traditionally assessed NCAA bylaws.⁹³

Sensing the favorable legal climate in the Ninth Circuit in light of *O'Bannon*, student-athletes again tested the theory that they were entitled to compensation as employees in accordance with the definitions provided by state and federal labor laws. In 2017, a football player from the University of Southern California (USC) represented NCAA Division I football players in a class-action suit against the NCAA and the PAC-12 athletic conference of which USC is a member.⁹⁴ The player alleged that he was entitled to minimum wage as an employee of the NCAA and PAC-12, yet was denied pay for all hours worked plus overtime.⁹⁵ While the player attempted to invoke the *Berger* concurrence⁹⁶ to argue that the status of Division I football players was distinguishable from that of student-athletes competing in non-revenue-generating sports, the court ultimately found that the weight of both case law and administrative interpretation supported the opposite conclusion.⁹⁷ Citing the Department of Labor's handbook, the court explained that collegiate sports do not constitute "work" under the FLSA because such activities are tied to education, and therefore primarily intended to benefit the

87. See *id.* at 1061–64.

88. See *id.* at 1061.

89. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984).

90. See *O'Bannon*, 802 F.3d at 1061–63.

91. *Id.* at 1063.

92. *Id.* at 1074.

93. See, e.g., *Agnew v. NCAA*, 683 F.3d 328, 342–43 (7th Cir. 2012) ("[W]hen an NCAA bylaw is clearly meant to help maintain the 'revered tradition of amateurism in college sports' or the 'preservation of the student-athlete in higher education,' the bylaw will be presumed procompetitive . . .").

94. *Dawson v. NCAA*, 250 F. Supp. 3d 401, 402–03 (N.D. Cal. 2017).

95. *Id.* at 403.

96. See *Berger v. NCAA*, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring).

97. *Dawson*, 250 F. Supp. 3d at 406.

participant.⁹⁸ Holding that no employment relationship exists between student-athletes and the NCAA—regardless of whether the player participates in a revenue-generating or non-revenue-generating sport—the court concluded that the “plaintiff [was] looking for O’Bannon to carry a weight it cannot shoulder,” because there is simply no legal basis for defining student-athletes as employees under the FLSA.⁹⁹

Despite the limited reach of O’Bannon in the context of employment law, however, student-athletes have made significant progress towards securing academic benefits beyond the cost of attendance. As of April 2021, the NCAA v. Alston plaintiffs currently await decision by the United States Supreme Court on the issue of whether NCAA restrictions on the receipt of “non-cash education-related benefits,” violate the Sherman Act.¹⁰⁰ Whereas O’Bannon established the right of member institutions to offer full cost-of-attendance scholarships to student-athletes, the “benefits” at issue in Alston consist of items including “computers, science equipment, musical instruments and other items not included in the cost of attendance calculation but nonetheless related to the pursuit of various academic studies.”¹⁰¹ Judge Claudia Wilken once again ruled against the NCAA at the district court level¹⁰² and the Ninth Circuit affirmed in May 2020, agreeing that “caps on non-cash, education-related benefits have no demand-preserving effect and, therefore, lack a procompetitive justification.”¹⁰³ While the Alston case is not directly related to the debate surrounding athletes’ NIL rights, the Supreme Court’s possible rejection of amateurism as a legitimate claim for denying compensation threatens to upend the NCAA’s enforcement power, not to mention its business model.

IV. THE AFTERMATH OF O’BANNON: NEW LEGISLATION PERMITTING STUDENT-ATHLETE COMPENSATION

In scrutinizing the NCAA’s motivations for perpetuating its restrictive bylaws—and questioning the validity of the amateurism principle overall—the Ninth Circuit paved the way for dramatic measures favoring the rights of student-athletes to be introduced through the legislature. O’Bannon also worked to generate public support for the notion that athletes deserve compensation for use of their NIL,¹⁰⁴ with celebrities at the forefront of the case bringing attention to the issue in public interviews. For instance, along with Ed O’Bannon himself, LeBron James, DeMaurice Smith, and Bernie Sanders enthusiastically advocated for the passage

98. *Id.* at 406–07.

99. *Id.* at 408.

100. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1104 (N.D. Cal. 2019), *aff’d*, 958 F.3d 1239 (9th Cir.), *cert. granted sub nom.* NCAA v. Alston, 141 S. Ct. 1231 (2020).

101. *Id.* at 1088.

102. *Id.* at 1110.

103. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d at 1257–58.

104. See Hillary Hughes & Erika Johnson, *Fair Pay to Play Act: Legislation Allowing NCAA Athlete Compensation Signed into Law by California Gov. Gavin Newsom*, JD SUPRA (Oct. 14, 2019), <https://www.jdsupra.com/legalnews/fair-pay-to-play-act-legislation-17188/> [https://perma.cc/GJG8-W98B].

of legislation permitting student-athletes to be compensated for use of their NIL in the wake of *O'Bannon*.¹⁰⁵

A. CALIFORNIA'S FAIR PAY TO PLAY ACT

The California legislature quickly took advantage of the momentum surrounding the issue of student-athlete compensation, passing Senate Bill 206, otherwise known as the Fair Pay to Play Act, in September 2019.¹⁰⁶ The Fair Pay to Play Act extends the *O'Bannon* ruling to its logical end, establishing the right of student-athletes to earn compensation from commercial use of their names, images, and likenesses, as well as the right to hire licensed agents and other athlete representatives for assistance in securing and negotiating endorsement opportunities.¹⁰⁷ While the Act directly defies the amateurism principle to which the NCAA remains committed,¹⁰⁸ it does not go so far as to allow colleges and universities to pay their athletes directly¹⁰⁹ and thus reflects current labor and employment jurisprudence.¹¹⁰ Rather, the law prohibits universities from interfering with commercial opportunities that enable athletes to profit from use of their NILs, except where such endorsements would conflict with preexisting school sponsorships.¹¹¹

The Fair Pay to Play Act received overwhelming bipartisan support from lawmakers, with the California Senate voting in favor of the bill 31 to 5 and the Assembly unanimously favoring the bill 73 to 0.¹¹² On September 30, 2019, California Governor Gavin Newsom signed Senate Bill 206 into law during an appearance on HBO's "The Shop" hosted by LeBron James.¹¹³ The Fair Pay to Play Act will not take effect until January 1, 2023,¹¹⁴ providing ample time for more legal developments on the issue of student-athlete compensation, which may include the passage of similar laws in other states, litigation initiated by the NCAA or colleges and universities in states declining to adopt such legislation, or even preemption in the form of a comprehensive federal law.

B. CALIFORNIA SPARKS A TREND: PROPOSED LEGISLATION IN OTHER STATES

Immediately following the passage of California's Act, legislators across the country garnered support for the passage of similar laws in a number of other

105. *Id.*

106. See CAL. EDUC. CODE § 67456(a), (c) (West 2019).

107. See *id.*

108. *Amateurism*, *supra* note 38.

109. CAL. EDUC. CODE § 67456(b).

110. See, e.g., *Dawson v. NCAA*, 250 F. Supp. 3d 401, 406 (N.D. Cal. 2017).

111. CAL. EDUC. CODE § 67456(e).

112. Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12> [<https://perma.cc/H55B-HJVH>].

113. Erik Garcia Gundersen, *California Governor Gavin Newsom Signs Fair Pay to Play Act Alongside LeBron on 'The Shop'*, USA TODAY (Sept. 30, 2019, 11:12 AM), <https://lebronwire.usatoday.com/2019/09/30/california-governor-gavin-newsom-signs-fair-pay-to-play-act-alongside-lebron-on-the-shop/> [<https://perma.cc/5TB4-A3R7>].

114. See CAL. EDUC. CODE § 67456(h).

states.¹¹⁵ Already, state representatives from Georgia, Illinois, Kentucky, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, South Carolina, and Tennessee have begun advocating for, drafting, and proposing bills that would allow student-athletes to be compensated for use of their NILs.¹¹⁶ Legislators in Colorado and Florida acted with even greater urgency, successfully passing new state laws mirroring California's during their 2020 sessions.¹¹⁷

While the inspiration for proposed NIL legislation in a number of states originated with the Fair Pay to Play Act, certain bills contain unique components providing solutions to anticipated problems not addressed in California's law. For instance, like the California Act, a proposed bill in New Jersey purports to allow student-athletes to earn compensation for use of their NILs without impacting scholarship eligibility, though it would also place limitations on athletes' ability to partake in endorsements to the extent their NIL is used in connection with "adult entertainment, alcohol, gambling, tobacco and electronic smoking, pharmaceuticals, controlled dangerous substances or firearms."¹¹⁸ A Florida state representative proposed a similar bill, though added a provision for the creation of a "Florida College System Athlete Name, Image, & Likeness Task Force" to oversee athletes' endorsements.¹¹⁹ Interestingly, the Florida bill has since been signed into law and will take effect during the summer of 2021,¹²⁰ meaning the NCAA's timeline for preempting a state-by-state movement—and the window for constructing an effective solution at the federal level—has been dramatically condensed despite California's law remaining dormant until 2023.

At least two states are attempting to extend athletes' compensation rights beyond NIL, introducing legislation that would require colleges to pay their athletes directly for participation. New York's bill proposes dividing 15% of the revenue generated from athletic ticket sales at all NCAA schools in New York among student-athletes.¹²¹ Further, the bill contains a provision compelling

115. Carroll, *supra* note 6.

116. *Id.*; Nicole Berkowitz, Susan Russell, Samuel Strantz & Baker Donelson, *More States Step Up to the Plate with New Legislation to Address Student Athlete Compensation and the NCAA Passes the Ball to Congress*, JD SUPRA (Jan. 24, 2020), <https://www.jdsupra.com/legalnews/more-states-step-up-to-the-plate-with-96795/> [<https://perma.cc/78RT-TR7T>]; Kevin Harden, *Pay College Athletes? Oregon's Taking up the Issue Again*, E. OREGONIAN (Apr. 2, 2021), https://www.eastoregonian.com/townnews/law/pay-college-athletes-oregons-taking-up-the-issue-again/article_2868ed0a-926b-11eb-b7ad-4bfa3ae4e9c0.html [<https://perma.cc/VY4B-CE2W>].

117. Dan Murphy, *Florida Name, Image, Likeness Bill Now a Law; State Athletes Can Profit from Endorsements Next Summer*, ESPN (June 12, 2020), https://www.espn.com/college-sports/story/_/id/29302748/florida-name-image-likeness-bill-now-law-meaning-state-athletes-profit-endorsements-next-summer [<https://perma.cc/WA25-2WHZ>].

118. Gregg Clifton, *New Jersey Joins the Growing Number of States Seeking to Create Name, Image and Likeness Rights for Student Athletes in Direct Defiance of Current NCAA Bylaws*, JD SUPRA (Oct. 28, 2019), <https://www.jdsupra.com/legalnews/new-jersey-joins-the-growing-number-of-34464/> [<https://perma.cc/3U57-JFQ3>].

119. Charlotte Carroll, *Florida Rep Proposes Bill Compensating College Athletes for Names, Likeness*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://www.si.com/college/2019/10/01/florida-state-representative-proposed-legislation-pay-student-athletes> [<https://perma.cc/V4VU-GK25>].

120. Murphy, *supra* note 117.

121. Jabari Young, *Florida and NY Push Bills to Compete with California's NCAA 'Pay to Play' Law*, CNBC (Oct. 24, 2019, 5:19 PM), <https://www.cnn.com/2019/10/24/florida-and-ny-push-bills-to>

colleges to create and fund “injured athlete” accounts that would financially compensate athletes who suffer career-ending or long-term injuries.¹²² In South Carolina, lawmakers have proposed legislation that would require the state’s colleges and universities to pay student-athletes participating in revenue-generating sports a \$5,000 annual stipend.¹²³

C. THE NCAA’S REACTION TO NEW LEGISLATION

In the immediate wake of the Fair Pay to Play Act’s passage, the collegiate sports industry did not jump on board with the notion that student-athletes deserve compensation for use of their NILs. Larry Scott, the head commissioner for the PAC-12 athletic conference, commented that he believed the Act would “lead to the professionalization of college sports and many unintended consequences.”¹²⁴ Gene Smith, Ohio State University’s athletic director, threatened that he would refuse to schedule games against any California schools should the California law remain unchanged by the date of its implementation in 2023.¹²⁵ Even Mark Emmert, the president of the NCAA, argued the law would devastate the college sports industry by giving certain schools a distinct advantage in attracting talent, drawing attention away from non-revenue-generating sports, and rendering athletes employees.¹²⁶ Given these potential consequences and their negative impact on the principle of amateurism, Mark Emmert threatened to exclude colleges and universities in California from competing in the NCAA championships altogether.¹²⁷

However, the speed and enthusiasm with which proposals for state laws mimicking California’s Fair Pay to Play Act materialized undoubtedly put pressure on the NCAA to adjust its position. In fact, the NCAA was forced to accept reality toward the end of October 2019, at which point the organization’s top governing board unanimously voted to permit student-athletes to benefit from the use of their NILs, though “in a manner consistent with the collegiate model.”¹²⁸ Following the vote, the NCAA publicized its new stance in a post to its website

compete-with-californias-ncaa-pay-to-play-law.html [https://perma.cc/TS5F-DFTN]; Gregg Clifton, *New York Senate Bill to Require Student Athletes to Share in University Ticket Revenue*, JD SUPRA (Sept. 23, 2019), <https://www.jdsupra.com/legalnews/new-york-senate-bill-to-require-student-76744/> [https://perma.cc/FY6E-JUWU].

122. Clifton, *supra* note 121.

123. Jenna West, *South Carolina Lawmakers to File Proposal Similar to California’s Fair Pay to Play Act*, SPORTS ILLUSTRATED (Sept. 13, 2019), <https://www.si.com/college/2019/09/13/south-carolina-proposal-pay-college-athletes-fair-pay-play-act> [https://perma.cc/KS6Q-U9YM].

124. Tyler Tynes, *The Ripple Effects of California’s ‘Fair Pay to Play’ Act*, THE RINGER (Oct. 11, 2019, 6:55 AM), <https://www.theringer.com/2019/10/11/20909171/california-sb-206-ncaa-pay-college-players> [https://perma.cc/35VT-VSRB].

125. *Id.*

126. Jack Kelly, *Newly Passed California Fair Pay to Play Act Will Allow Student Athletes to Receive Compensation*, FORBES (Oct. 1, 2019, 12:36 PM), <https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-receive-compensation/#7d58834257d0> [https://perma.cc/4UXF-4UWR].

127. *Id.*

128. *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, *supra* note 7.

that vaguely summarized the Board's decision.¹²⁹ Board member Michael V. Drake is quoted, ambiguously remarking that the NCAA "must embrace change to provide the best possible experience for college athletes."¹³⁰ The NCAA stated its intent to continue gathering feedback on "how best to respond to the state and federal legislative environment" through April 2020, and asked each of its divisions to create any new rules by January 2021.¹³¹ However, the NCAA indefinitely halted consideration of all proposed rules in January 2021 in response to a letter from the Department of Justice warning of potential antitrust violations.¹³² Thus, even if the NCAA's shift in tone since the introduction of the Fair Pay to Play Act signifies a willingness to cooperate, it remains unclear whether the organization will fulfill its promise to bolster the rights of student-athletes through permissive NIL policies.

V. ANALYZING THE POTENTIAL IMPACT OF NEW STATE LEGISLATION

Moving forward, implementing a workable student-athlete compensation policy that colleges and universities, the NCAA, and student-athletes themselves are willing to comply with presents a formidable task. With only a few months left to contemplate its new regulatory scheme before numerous state laws take effect, the possibility that the NCAA will place major restrictions on the rights articulated in the Fair Pay to Play Act, or even mount a legal challenge against any or all of the new state laws, remains conceivable. Moreover, colleges and universities in states without Fair Pay to Play legislation may have legitimate grievances worthy of judicial intervention that could halt efforts to improve the rights of student-athletes to earn compensation for use of their NILs. Irrespective of potential roadblocks, the advantages to be gained from revolutionizing the college sports industry so as to prioritize the rights of hardworking student-athletes over those of wealthy corporations far outweighs the practical and legal challenges that inevitably accompany this lofty goal. Therefore, a comprehensive solution in the form of federal legislation, which accounts for the nuances and questions left unanswered by state legislation, must prevail.

A. LEGAL CHALLENGES THREATEN TO FORESTALL THE EXPANSION OF STUDENT-ATHLETES' COMPENSATION RIGHTS

As with any controversial new law, the possibility that legal challenges will subdue or eliminate the effects of California's Fair Pay to Play Act and affiliated legislation remains possible. The media has long suspected that the NCAA plans

129. *Id.*

130. *Id.*

131. *Id.*

132. *Student-Athlete Committees Issue Joint Statement on Name, Image, Likeness Legislation Delay*, *supra* note 9; Sarah Polus, *NCAA Tables Name, Image and Likeness Vote After DOJ Warns of Potential Antitrust Violations*, THE HILL (Jan. 12, 2021, 1:30 PM), <https://thehill.com/business-a-lobbying/533830-ncaa-suspends-name-image-and-likeness-vote-after-doj-warns-of-potential#:~:text=In%20the%20original%20DOJ%20letter,trademarks%20and%20logos%20and%20more> [https://perma.cc/W6JF-LE3B].

to launch some sort of judicial attack aimed at preserving amateurism in college sports, given the fury with which Mark Emmert promptly responded to the announcement of California's Act.¹³³ While it is true the organization has publicly adjusted its stance with regard to student-athlete compensation for endorsements, there is no updated timeline for when the NCAA will adopt official regulations governing the matter.¹³⁴ Discrepancies between the NCAA's understanding of appropriate NIL rights compared to the potentially broader rights provided by states may give rise to not only litigation, but unworkable conflict.¹³⁵ In addition, colleges and universities—and potentially the regional athletic conferences of which they are members—not benefitting from the passage of legislation similar to the Fair Pay to Play Act will likely be inclined to sue in light of the distinct recruiting advantages colleges in states adopting such legislation will gain. While a number of actors may likewise attempt to challenge the legality of the Fair Pay to Play Act and other laws, potential suits initiated by the NCAA or colleges and universities in the majority of states without such legislation are the most threatening.

1. *Diminishment of Student-Athletes' Monetization Opportunities by the NCAA Itself*

Since the passage of the Fair Pay to Play Act, the NCAA has publicly expressed a willingness to adjust its bylaws so as to accommodate new policies permitting student-athletes to earn NIL compensation.¹³⁶ Yet, it remains unclear whether the organization is serious about this commitment, considering NCAA leadership continues to describe its new strategy in ambiguous terms that could be interpreted as merely rebranding amateurism. For instance, the NCAA's Board of Governors established "guiding principles" at the start of its discussions regarding new policies in October 2019, which include the following: "maintain[ing] the priorities of education and the collegiate experience"; making a "clear distinction between collegiate and professional opportunities"; making clear that "compensation for athletics performance or participation is impermissible"; reaffirming that "student-athletes are students first and not employees of the university"; enhancing "diversity, inclusion and gender equity"; and protecting the recruiting process.¹³⁷ Given the NCAA's persistent emphasis on these same tenets of amateurism throughout history, it is unclear whether the organization will enact regulations permitting student-athletes to engage in activities

133. See Elliott C. McLaughlin, *California Wants its College Athletes to Get Paid, but the NCAA is Likely to Put Up Hurdles*, CNN (Oct. 2, 2019, 9:00 AM), <https://www.cnn.com/2019/10/01/us/california-sb206-ncaa-fair-pay-to-play-act/index.html> [<https://perma.cc/WC8N-R27E>].

134. See *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, *supra* note 7; *Student-Athlete Committees Issue Joint Statement on Name, Image, Likeness Legislation Delay*, *supra* note 9.

135. Dan Murphy, *Everything You Need to Know About the NCAA's NIL Debate*, ESPN (Apr. 8, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate [<https://perma.cc/T8XE-B642>].

136. See, e.g., *Taking Action: Name, Image, and Likeness*, NCAA, <https://www.ncaa.org/about/taking-action> [<https://perma.cc/JT35-QHL2>].

137. *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, *supra* note 7.

traditionally reserved for professional sports, such as hiring agents as allowed under the Fair Pay to Play Act.¹³⁸ At least in theory, permitting such activities would seem to directly contradict the principle of amateurism or—as the NCAA now calls it—maintaining a “clear distinction between collegiate and professional opportunities.”¹³⁹

Further, statements by NCAA leadership reflect hesitation toward permissive bylaws. For instance, NCAA board member Michael V. Drake claims that “modernization” is workable as a “natural extension of the numerous steps NCAA members have taken in recent years to improve support for student-athletes, including full cost of attendance and guaranteed scholarships.”¹⁴⁰ While the statement signals an awareness on the part of NCAA leadership that some level of modernization is unavoidable, permitting athletes to be paid for endorsement opportunities completely unrelated to their education represents a drastic leap from a policy guaranteeing scholarships. This stark reality is reflected in a second quote by Mr. Drake from the NCAA website, stating that “[a]llowing promotions and third-party endorsements is uncharted territory.”¹⁴¹ Taken as a whole, these statements suggest not that the NCAA has “bowed down under pressure” as some believe,¹⁴² but rather that the organization is appeasing lawmakers and the public, while in the meantime formulating next steps that will effectively undermine new legislation perceived as violating its time-honored amateurism principles. Especially now that voting sessions on proposed bylaws are halted indefinitely,¹⁴³ the NCAA’s strategy is more ambiguous than ever.

If the NCAA opts to challenge the legality of the Fair Pay to Play Act and similar legislation in court, it is likely to do so on interstate commerce grounds, arguing that compliance will be made burdensome or impossible because the state laws at issue contain a number of unique and conflicting provisions. In one statement following the passage of California’s law, the NCAA hinted at this possibility by stating that “a patchwork of different laws from different states will make unattainable the goal of providing a fair and level playing field for 1,100 campuses and nearly half a million student-athletes nationwide.”¹⁴⁴ Thus, even though the NCAA has signaled its willingness to comply with state laws permitting athletes to receive compensation for endorsement deals on some level, the fact that certain states may enact legislation authorizing compensation beyond the realm of NIL may be problematic from a compliance standpoint. For instance, proposed legislation in both New York and South Carolina purports to require colleges

138. CAL. EDUC. CODE § 67456(c) (West 2019).

139. *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, *supra* note 7.

140. *Id.*

141. *Taking Action: Name, Image, and Likeness*, *supra* note 136.

142. Roxanne Jones, *The NCAA Blinked, and It’s About Time*, CNN (Oct. 30, 2019, 10:44 AM), <https://www.cnn.com/2019/10/30/opinions/ncaa-athlete-compensation-fair-pay-to-play-act-jones/index.html> [<https://perma.cc/N8UU-TJ25>].

143. *Student-Athlete Committees Issue Joint Statement on Name, Image, Likeness Legislation Delay*, *supra* note 9.

144. *NCAA Statement on Gov. Newsom Signing SB 206*, NCAA (Sept. 30, 2019, 10:44 AM), <https://www.ncaa.org/about/resources/media-center/news/ncaa-statement-gov-newsom-signing-sb-206> [<https://perma.cc/WFK3-CPFR>].

themselves to pay student-athletes directly for their performances under certain circumstances, which obviously violates the NCAA's current policy on amateurism¹⁴⁵ and may even constitute a legal employment relationship. Even if the NCAA were forced to accept the notion that some student-athletes will technically be made employees under new state laws, the organization would struggle to create a comprehensive set of rules that accommodate such variances while maintaining a level playing field for its member institutions in the context of recruiting.¹⁴⁶ The NCAA can only fulfill its mission of facilitating fair competition when all of its member institutions are governed by the same set of regulations, otherwise certain schools will gain distinct advantages over others.

2. *Lawsuits by Colleges and Universities Not Benefitting from New State Laws*

The inevitable discriminatory effect the Fair Pay to Play Act and similar legislation will have on the collegiate recruiting process likewise presents fertile ground for potential legal challenges. While legislation permitting college athletes to receive compensation for NIL is already under consideration in a number of states, the majority of states have yet to initiate similar proposals.¹⁴⁷ Thus, once the Fair Pay to Play Act and similar laws go into effect, only athletes in those respective states will be able to profit from lending their images to video game publishers, serving as instructors at sponsored summer camps, and negotiating endorsement deals with an array of commercial entities ranging from sports beverage companies to car dealerships.¹⁴⁸ Colleges and universities in states that have adopted these laws will undoubtedly gain a leg up in attracting high school athletes with the ability to promise not only athletic scholarships, but also compensation from lucrative identity-rights deals.¹⁴⁹ While that competitive advantage is one reason several states have already followed California's lead, passing similar legislation may come with more obstacles in certain states whose legislatures are less progressive in this context.¹⁵⁰

In order to circumvent potential discrimination in the recruiting process, colleges and universities in states without legislation permitting student-athlete compensation may launch a legal attack against existing state laws having that effect. The dormant commerce clause provides an attractive theory under which these institutions may succeed.¹⁵¹ Generally, the dormant commerce clause prohibits state legislatures from passing laws which have a discriminatory effect on the economies of other states.¹⁵² By invoking this principle, colleges and

145. See NCAA DIVISION I MANUAL, *supra* note 1, art. 12.1.2.

146. McCann, *supra* note 112.

147. See Carroll, *supra* note 6.

148. McCann, *supra* note 112.

149. Michael McCann, *California's New Law Worries the NCAA, but a Federal Law is What They Should Fear*, SPORTS ILLUSTRATED (Oct. 4, 2019), <https://www.si.com/college/2019/10/04/ncaa-fair-pay-to-play-act-name-likeness-image-laws> [<https://perma.cc/YV26-SHRQ>].

150. *Id.*

151. McCann, *supra* note 112; see also David Cruikshank, *The Fair Pay to Play Act: Likely Unconstitutional, Yet Necessary to Protect Athletes*, 81 OHIO ST. L.J. ONLINE 253, 261-64 (2020).

152. See, e.g., *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978)).

universities may be successful in arguing that state laws like the Fair Pay to Play Act aim to provide their own states' schools a competitive advantage over those in other states and therefore should be invalidated.¹⁵³ Whether states elect to challenge these new laws likely depends on the NCAA's ultimate stance on permitting compensation for endorsements, but as the NCAA struggles to adopt updated policies and more states begin drafting and considering new bills, the dormant commerce clause may be an effective tool for alleviating competitive imbalances in recruiting in the meantime.

B. OVERCOMING POTENTIAL LEGAL CHALLENGES AND PRACTICAL CONSIDERATIONS

In light of the legal mechanisms by which the NCAA and collegiate institutions may successfully defeat a state-by-state approach to expanding the rights of student-athletes, a comprehensive federal law may be the only viable method for accomplishing such an objective.¹⁵⁴ However, the passage of a federal law permitting student-athletes to be compensated for endorsements could transform the entire college athletics industry in a way that a majority of states have not yet expressed a willingness to support. Therefore, greater consideration for the overall effects of passing a law similar to the Fair Pay to Play Act on a national scale is warranted. In balancing the advantages and drawbacks of allowing student-athletes to financially benefit from their NIL, this Comment aims to demonstrate that the social and economic benefits to result from such a policy far outweigh the potential negative consequences. Because the movement in favor of a federal solution is justifiable, Congress should seriously consider the passage of a federal law that echoes the general principles the Fair Pay to Play Act encompasses, while addressing certain practical issues state legislators overlooked.

1. *Social and Economic Benefits to be Gained from Expanding the Rights of Student-Athletes*

a. *Providing Monetization Opportunities as a Matter of Basic Fairness*

The primary argument driving the rapid passage of the Fair Pay to Play Act, and perhaps the reason state legislators intuitively supported the bill, was that of basic economic fairness.¹⁵⁵ State representatives in California pointed to the fact that every other college student with a talent or skill has the right to earn compensation from marketing themselves through social media and endorsement deals.¹⁵⁶ For example, collegiate musicians may benefit financially from selling their music on streaming platforms such as Spotify and iTunes, playing concerts, and selling their own merchandise, regardless of whether they also receive scholarship money to

153. See *id.* at 477.

154. See Note, Benjamin Feiner, *Setting the Edge: How the NCAA Can Defend Amateurism by Allowing Third-Party Compensation*, 44 COLUM. J.L. & ARTS 93, 113 (2020).

155. Lee Green, *Impact of California's 'Fair Pay to Play Act' on High School Athletes*, NAT'L FED'N OF ST. HIGH SCH. ASS'NS (Nov. 13, 2019), <https://www.nfhs.org/articles/impact-of-california-s-fair-pay-to-play-act-on-high-school-athletes/> [https://perma.cc/DK3D-SBW8].

156. *Id.*

perform with their school's marching band, orchestra, or theater department.¹⁵⁷ Moreover, within the college sports industry itself, athletes are grossly undercompensated compared to those who manage and regulate sporting competitions and ultimately profit from the labor of student-athletes. The University of Alabama's head football coach, Nick Saban, earned a whopping \$8.8 million in 2019 alone, with most SEC football coaches earning upwards of \$3 million as well.¹⁵⁸ Executives for athletic conferences and the NCAA are even more well-paid than coaches in some instances; the NCAA's Mark Emmert made \$3.9 million in 2018.¹⁵⁹ From a fairness perspective, the notion that corporate leaders and coaches—none of whom actually compete in the sports from which they profit—are earning millions of dollars while the athletes whose labor generates that profit are limited to scholarship funding, seems inherently problematic.

The argument that athletes deserve to be paid as a matter of basic fairness is even more compelling given the statistics on student-athlete poverty. According to a study conducted by the National College Players Association, 85% of student-athletes, including those receiving scholarship money, live below the poverty line.¹⁶⁰ Yet, given the astronomical cost of college tuition, it may seem counterintuitive to argue that student-athletes are taken advantage of in *only* receiving a scholarship.¹⁶¹ Critics who oppose compensating student-athletes claim not only that scholarships are extremely valuable in their own right, but also that permitting a student to be compensated solely for athletic prowess “undermin[es] the value of . . . a highly discounted education.”¹⁶² However, these criticisms overlook reality and the obvious need for a more permissive policy on student-athlete compensation.

Realistically, athletic scholarships do little to assist impoverished student-athletes during their college years or once they graduate. Some athletes in the NCAA's Divisions I and II do receive full scholarships, but the average NCAA athletic scholarship only provides \$10,409 to \$14,270 annually,¹⁶³ and Division

157. *Id.*

158. David Ching, *SEC Stands out in Conference-by-Conference FBS Salary Comparison*, FORBES (Oct. 23, 2019, 8:00 AM), <https://www.forbes.com/sites/davidching/2019/10/23/sec-stands-out-in-conference-by-conference-fbs-salary-comparison/?sh=7744494b2b03> [https://perma.cc/BC9R-QAA9].

159. Jeff Farauo, *Cal Athletics: It's Time for the NCAA to Check the Calendar - It's the 21st Century*, SPORTS ILLUSTRATED (Oct. 5, 2019), <https://www.si.com/college/cal/news/cal-athletics-its-time-for-the-ncaa-to-check-the-calendar-its-the-21st-century> [https://perma.cc/T8JS-CRTJ].

160. Study: “*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> [https://perma.cc/JDZ8-EBAK].

161. Rodger Sherman, *The Fair Pay to Play Act Has Been Signed. Now the NCAA Must Address a Question to Which It's Never Had a Good Answer*, THE RINGER (Oct. 1, 2019, 8:38 AM), <https://www.theringer.com/2019/10/1/20892842/fair-pay-to-play-act-college-sports-california-law-gavin-newsom> [https://perma.cc/L44X-WAAP].

162. Adam H. Koblenz, *The Whole Nine Yards: Should Student-Athletes Score an Education and Compensation?*, 13 J. BUS. & TECH. L. 37, 50 (2017).

163. Wes Gerrie, *More Than Just the Game: How Colleges and the NCAA Are Violating Their Student-Athletes' Rights of Publicity*, 18 TEX. REV. ENT. & SPORTS L. 111, 117 (2018).

III athletes are ineligible for athletic scholarships in any amount.¹⁶⁴ The 53% of student-athletes who are able to receive some level of financial aid from athletics are required to dedicate that funding toward the cost of tuition, room and board, books, and transportation to class.¹⁶⁵ As a result, athletes are commonly unable to afford out-of-pocket expenses, especially in light of the fact that their weekly schedules would not accommodate a part-time job even if NCAA rules permitted it.¹⁶⁶ Also, athletes who suffer career-ending injuries not only struggle to pay medical bills, but also are often forced to drop out of their college or university because they are no longer able to cover tuition without the assistance of an athletic scholarship.¹⁶⁷ Of those athletes who avoid an injury and happen to compete in one of the six NCAA sports for which a professional league exists, only 2% are able to monetize their talent by playing professionally after college.¹⁶⁸ As for the other 98%, they graduate without a future in the field they have dedicated endless time and effort to during their college years, without having ever been compensated for a single practice, game, or endorsement, and without the benefit of having properly focused on academic progress and career development. Ultimately, the Fair Pay to Play Act and similar laws represent a positive societal shift toward recognizing student-athletes as uniquely talented individuals who not only deserve to profit from use of their likeness as a marketing tool, but also to excel as athletes without the brunt of poverty impacting their experience during college.

b. Equalizing Opportunity for Athletes Competing in Sports Without Professional Leagues

Legislation permitting student-athletes to benefit financially from use of their NILs will breed greater equality in college sports by allowing athletes who compete in non-revenue-generating sports to earn compensation, where doing so would otherwise be impossible at any point in their athletic careers. Whereas NCAA regulations have prohibited all student-athletes—including men's football and basketball players, whose programs generate the most revenue—from earning NIL compensation in the past, the possibility that valuable training in college athletics will translate into multi-million dollar professional contracts has been available only to a limited class of athletes competing in one of the six sports for which a professional league exists.¹⁶⁹ Some argue that permitting student-athletes to be compensated for NIL through a policy similar to the Fair Pay to Play Act will only

164. *List of NCAA Division 3 Schools*, ATHNET, <https://www.athleticscholarships.net/division-3-colleges-schools.htm> [https://perma.cc/53FE-X6Y6].

165. Gerrie, *supra* note 163, at 117.

166. See *id.*; *How Student-Athletes Feel About Time Demands*, NCAA, https://www.ncaa.org/sites/default/files/2017GOALS_Time_demands_20170628.pdf [https://perma.cc/A6BL-ZRX2].

167. Nicole Kline, Note, *Bridging the NCAA's Accident Insurance Coverage Gaps? A Deep Dive Into the Uncertainties of Injury Coverage in College Contact Sports, and the Impact That Has on Athlete's Future Physical and Financial Comforts*, 31 J.L. & HEALTH 55, 59 (2018).

168. NCAA *Recruiting Facts*, NCAA (Aug. 2020), https://ncaaorg.s3.amazonaws.com/compliance/recruiting/NCAA_RecruitingFactSheet.pdf [https://perma.cc/8GY9-ZMGC].

169. See *id.*

perpetuate this inequity, because men's football and women's volleyball players, for example, will earn disproportionate income from paid endorsement deals.¹⁷⁰ However, this argument, albeit probably correct, fails to provide a justification for continuing to deny the right of compensation to athletes who compete in sports that traditionally fail to generate revenue and lack lucrative post-graduate opportunities.

The first-hand experiences of student-athletes forced to turn down an array of opportunities for personal and career development demonstrate the need for federal legislation permitting athlete compensation for use of NIL, even if its effects ultimately do financially benefit some more than others. For instance, UCLA gymnast Katelyn Ohashi passionately served as a co-sponsor on the Fair Pay to Play Act after calling out the NCAA for her inability to profit from a video of her record-breaking, perfect-ten floor routine that went viral following a collegiate gymnastics meet.¹⁷¹ In addition to being denied the right to profit from the video of her routine that was viewed over 100 million times online, Ohashi was forced to turn down book deals and speaking engagements in order to "preserve the amateur status that allowed her to stay on scholarship."¹⁷² In light of her obligation to reject these opportunities, Ohashi spoke out about feeling "handcuffed" by restrictive policies that prevented her from deriving any financial benefit from her own name and likeness, regardless of the fact that she had zero opportunity to join a professional league following graduation.¹⁷³ Ohashi's story demonstrates the positive impact federal legislation stripping the NCAA's to restrict student-athlete NIL compensation will have on athletes whose only opportunities to earn money in recognition of extraordinary talent and work ethic arise during their college years. The possibility that some athletes may not benefit from such legislation at all, while others will benefit ten-fold compared to others, is undeniable. Yet, the existence of such disparities is not a justification for continuing to deny student-athletes the right to benefit from their NIL, especially those whose individual marketability is inherently short-lived due to factors outside their control.

c. Avoiding the Imposition of Affirmative Obligations on the Part of Colleges and Universities

Another benefit of legislation permitting student-athletes to profit from NIL is that such a policy leaves colleges and universities out of the controversy, allowing them to dedicate revenue across athletic programs as needed while avoiding violations of Title IX or the FLSA that may be implicated where schools are

170. Sherman, *supra* note 161.

171. Michelle R. Martinelli, *Viral Former UCLA Gymnast Katelyn Ohashi Slams NCAA, Felt 'Handcuffed' by Profit Rules*, USA TODAY (Oct. 9, 2019, 9:25 AM), <https://ftw.usatoday.com/2019/10/katelyn-ohashi-ucla-viral-gymnast-slams-ncaa-fair-pay-to-play> [<https://perma.cc/4L64-M8AJ>].

172. Andy Uhler, *NCAA Getting Closer to Letting Student Athletes Cash in on Names and Likenesses*, MARKETPLACE (Nov. 1, 2019), <https://www.marketplace.org/2019/11/01/ncaa-getting-closer-to-letting-student-athletes-cash-in-on-names-and-likenesses/> [<https://perma.cc/YJ5B-KUCW>].

173. *Id.*

required to pay their athletes directly.¹⁷⁴ Some criticize the Fair Pay to Play Act and similar proposed legislation as undermining the purpose of Title IX by facilitating unequal compensation as previously discussed, but Title IX would only be implicated in a scenario where colleges were providing unequal funding to athletes directly.¹⁷⁵

By limiting the expansion of students' rights to the realm of NIL, any legal implications concerning misuse of federal funding will be avoided. Colleges and universities, athletic conferences, and the NCAA will avoid legal challenges arguing that this form of compensation renders student-athletes "employees" of such institutions, given that any compensation the athletes earn will be the product of negotiations with brands and sponsors not associated with the college sports industry itself.¹⁷⁶ Certain provisions in some proposed laws, such as the New York bill requiring colleges to divide 15% of revenue from ticket sales among student-athletes,¹⁷⁷ may be viewed in a different light, however. Instead of litigating whether such provisions violate federal requirements in a lengthy, state-by-state judicial process, the passage of a comprehensive federal law provides a more effective means for delineating the outer limit of a workable policy on student-athletes' rights to compensation for use of their NILs.

d. Circumventing the "Amateurism" Excuse

The NCAA's reliance on the principle of amateurism as a justification for refusing to share its astronomical profits with those who generate them no longer suffices to prevent student-athletes from earning compensation for use of their NILs. For decades, courts blindly deferred to the NCAA's assertion that the very existence of collegiate athletics depended on the preservation of amateurism, allowing the organization's restrictive bylaws governing compensation to endure without scrutiny.¹⁷⁸ However, viewing amateurism as a veil behind which the NCAA knowingly exploits student-athletes, student athletes and sports industry critics alike have generated overwhelming opposition to those bylaws in light of the Ninth Circuit's refusal to defer to the principle in *O'Bannon*.¹⁷⁹ Surely, the NCAA's recognition of shifting societal views regarding amateurism was a primary

174. See *Berger v. NCAA*, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring); Jayma Meyer & Andrew Zimbalist, *A Win Win: College Athletes Get Paid for Their Names, Images, and Likenesses and Colleges Maintain the Primacy of Academics*, 11 HARV. J. SPORTS & ENT. L. 247, 263-64 (2020).

175. Meyer & Zimbalist, *supra* note 174, at 264-65, 287; Michael McCann, *Key Questions, Takeaways from the NCAA's NIL Announcement*, SPORTS ILLUSTRATED (Oct. 29, 2019), <https://www.si.com/college/2019/10/30/ncaa-name-image-likeness-announcement-takeaways-questions> [<https://perma.cc/L2QD-QEBG>].

176. McCann, *supra* note 175.

177. Young, *supra* note 121.

178. See, e.g., *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 102 (1984) ("[A]thletes must not be paid, must be required to attend class, and the like."); *Agnew v. NCAA*, 683 F.3d 328, 342-43 (7th Cir. 2012) ("[W]hen an NCAA bylaw is clearly meant to help maintain the 'revered tradition of amateurism in college sports' or the 'preservation of the student-athlete in higher education,' the bylaw will be presumed procompetitive . . .").

179. See John Feinstein, *California Did the Right Thing. Don't Buy into the NCAA's Propaganda*, WASH. POST (Oct. 2, 2019, 5:07 PM), https://www.washingtonpost.com/opinions/california-did-the-right-thing-dont-buy-into-the-ncaas-propaganda/2019/10/02/21ed7b14-e531-11e9-a331-2df12d56a80b_story.html [<https://perma.cc/F7TM-3XWZ>].

driver in its decision to consider adjusting its policies on compensation for endorsements as discussed, but the possibility that the NCAA finds support in amateurism remains to some extent, especially if *NCAA v. Alston* is decided in its favor.

Even amidst an outpouring of criticism over the NCAA's practices, some athletes and scholars argue that quashing amateurism will result in the destruction of a time-honored tradition that offers innumerable benefits to society.¹⁸⁰ For instance, former University of Florida college football player and Heisman Trophy recipient Tim Tebow expressed his dissatisfaction with the Fair Pay to Play Act in an interview, remarking that compensating players would change what makes college football special and would effectively transform the sport into the NFL.¹⁸¹ Tebow further defended his belief on the grounds that sports should be about following your dreams and supporting your teammates and institution without concern for which team is willing to offer the most money.¹⁸²

While Tebow's commentary reflects the positive sentiments associated with amateurism that enabled restrictive NCAA bylaws to circumvent scrutiny for decades, his position fails to account for the majority of students whose dreams do not pan out quite as planned. Tebow is a statistical oddity as one of the 2% of college athletes who go on to play for a professional league¹⁸³ and the first sophomore in NCAA history to become a Heisman winner.¹⁸⁴ Given his extraordinary talents and likelihood of earning a draft spot in the NFL, it makes sense that Tebow maintained the conviction to focus on high-level athletic performance in exchange for other aspects of the college experience during his undergraduate years. However, the "dream" is not what it seems for many college athletes, especially those who are not standout talents viewed as eligible for a professional league or those who compete in a non-revenue-generating sport that may not even offer professional opportunities.

One example of an athlete whose experiences demonstrate the perils of amateurism is Stephanie Campbell, a Villanova University graduate who played women's field hockey throughout all four of her undergraduate years and even served as team captain.¹⁸⁵ Upon graduating high school and accepting a \$19,000 athletic scholarship, Stephanie genuinely believed she was headed toward her dream.¹⁸⁶ Almost immediately, however, she realized her experience would be nothing of the sort—balancing academics and athletics would be impossible given her rigorous practice schedule and staying on the team would require sacrificing

180. See, e.g., Katherine Kargl, Note, *Is Amateurism Really Necessary or Is It an Illusion Supporting the NCAA's Anticompetitive Behaviors?: The Need for Preserving Amateurism in College Athletics*, 2017 U. ILL. L. REV. 379, 410 (2017).

181. See Kelly, *supra* note 126.

182. *Id.*

183. NCAA Recruiting Facts, *supra* note 168.

184. Tim Tebow, HEISMAN TROPHY, <https://www.heisman.com/heisman-winners/tim-tebow/> [<https://perma.cc/LP4C-YFHE>].

185. Bill Pennington, *It's Not an Adventure, It's a Job*, N.Y. TIMES (Mar. 12, 2008), <https://www.nytimes.com/2008/03/12/sports/12lifestyles.html> [<https://perma.cc/7ZLH-B872>].

186. *Id.*

any semblance of a personal life.¹⁸⁷ In spite of feeling completely overwhelmed and unmotivated, Stephanie's parents made clear that staying on scholarship needed to be her first priority, and that she needed to start viewing her athletic commitments as a job because no other institution would provide comparable financial support.¹⁸⁸ Unfortunately, this type of experience reflects the norm, not the exception, in college athletics.¹⁸⁹ Many athletes from Division I universities report upholding their commitment to participate in college athletics solely for the benefit of receiving their scholarship money each semester,¹⁹⁰ which completely undermines the presumption on which the NCAA's amateurism theory depends—that college athletes play for the love of the game and not for compensation.¹⁹¹

Opponents may argue that permitting student-athletes to earn compensation for use of NIL will only perpetuate the issue by incentivizing athletes to pursue collegiate opportunities solely for the sake of making money from sports-related endorsements.¹⁹² However, anecdotal data from college athletes suggests financial hardships and a general lack of resources for non-revenue sports—which in turn impart a fundraising responsibility on student-athletes to secure necessities like sweatpants or batting gloves—impose a great deal of stress on student-athletes that is not alleviated by receipt of a partial scholarship and may even contribute to their loss of love for the sport.¹⁹³ Perhaps if student-athletes were empowered to remedy those monetary burdens through endorsement opportunities, fewer stressors would impede their enjoyment of athletics. Moreover, student-athletes would be highly motivated to improve their skills and share that expertise with aspiring college athletes, if unrestrained from capitalizing on their ability to instruct others.

The notion that self-interest will breed a more motivated generation of college athletes may be off-putting, but it simply encompasses the “deeply American concept” of engaging in hard work in order to earn something valuable, which proponents for amateurism cannot deny underlies the collegiate system and American society more broadly.¹⁹⁴ Thus, while the principle of amateurism is honorable in some respects due its encouragement of love for the sport, deference to the tradition is neither owed in a legal sense, nor does it fairly accommodate the hardships associated with modern collegiate athletics.

2. *Practical Concerns Associated with Athletes' NIL Rights*

On its face, a policy granting student-athletes the right to monetize their NILs

187. *Id.*

188. *Id.*

189. *Id.*

190. *See id.*

191. *See* Tristan Griffin, *Payment of College Student-Athletes at Center of Legal Battles*, 75 TEX. BAR J. 850, 852 (2012).

192. *See, e.g.,* Ben Sutton, *A Case for Amateurism in College Sports*, SPORTS BUS. J. (Apr. 21, 2014), <https://www.sportsbusinessdaily.com/Journal/Issues/2014/04/21/Opinion/Ben-Sutton.aspx> [<https://perma.cc/6RNE-P3PZ>].

193. Pennington, *supra* note 185.

194. *See* Sutton, *supra* note 192.

appears to constitute a moral victory in terms of shifting wealth and power away from the NCAA and into the hands of the student-athletes themselves.¹⁹⁵ However, critics suggest that in shrouding new student-athlete compensation policies in principled language, state legislators including Nancy Skinner of the California Senate—who spearheaded the passage of the Fair Pay to Play Act—have completely overlooked certain practical considerations that will make such policies logistically unworkable, irrespective of noble intent.¹⁹⁶ Criticisms of the Fair Pay to Play Act and its progeny are generally concerned with preventing the exploitation of high school student-athletes,¹⁹⁷ correcting misconceptions about the financial state of the NCAA and college athletics programs more generally,¹⁹⁸ and drawing attention to the potential for broad-based NIL legislation to facilitate corruption in college sports.¹⁹⁹ While each of these issues poses a logistical hurdle, they are not so problematic as to render student-athlete compensation for use of NIL an unworkable task. Rather, these issues only underscore the need for a solution at the federal level in the form of comprehensive legislation that accounts for these practical challenges.

a. Potential Exploitation of High School Athletes and Overall Impact on Recruiting

The passage of the Fair Pay to Play Act was immediately met with pushback from those advocating on behalf of high school athletes, who argue the California statute and its progeny will devastate the college recruiting process. For instance, the National Federation of State High School Associations—the high school equivalent of the NCAA—published an article in November 2019 that criticizes the inaugural statute’s provisions and its potential impact on the recruiting process at the lower education level.²⁰⁰ While the Fair Pay to Play Act does not extend NIL rights to high school student-athletes,²⁰¹ it is possible that companies seeking high-profile athletes for future endorsement deals will succumb to competition and begin recruiting endorsers prematurely, potentially before they even reach high school.²⁰² Specifically, companies may pursue athletes either by directly reaching out to students and their families, or “through the wide variety of ‘handlers’ who for decades have created havoc in the sports world by often acting in their own self-interest as opposed to the best interests of young student-

195. See Kristi Dosh, *Is the Fair Pay to Play Act More Moral Victory than Jackpot for Student Athletes?*, FORBES (Oct. 3, 2019, 11:07 AM), <https://www.forbes.com/sites/kristidosh/2019/10/03/is-the-fair-pay-to-play-act-more-moral-victory-than-jackpot-for-student-athletes/#111a41f57a57> [https://perma.cc/DM7K-2CQ8].

196. See, e.g., Mark Zeigler, *Fair Pay for College Athletes? Be Careful What You Wish for*, SAN DIEGO UNION-TRIB. (Sept. 30, 2019, 5:54 PM), <https://www.sandiegouniontribune.com/sports/aztecs/story/2019-09-30/fair-pay-to-play-california-ncaa-gavin-newsom-name-image-likeness-college-sports-student-athletes> [https://perma.cc/W75R-KYDX].

197. Green, *supra* note 155.

198. Zeigler, *supra* note 196.

199. See *id.*

200. Green, *supra* note 155.

201. See CAL. EDUC. CODE § 67456(g) (West 2019).

202. Green, *supra* note 155.

athletes.”²⁰³ Even with the barrier of high school athletic directors and coaches who will presumably act in student-athletes’ best interests, critics are anxious that protecting young athletes from exploitation will be made difficult or impossible once companies view athletes as marketing tools with monetary value.²⁰⁴

b. Misconceptions About the Financial Position of the NCAA and College Athletics Departments

Some critics oppose the Fair Pay to Play Act and its progeny on grounds that perceptions about the financial position of the NCAA and college athletics programs more broadly are misinformed, and that state legislators lack the necessary expertise to reform the sports industry in an economically feasible manner.²⁰⁵ For instance, while the general public assumes university athletics programs are “rolling in the dough,” the NCAA reports that only twenty-four athletic departments in the country turned a profit in 2015, and that “the median loss among 129 schools in the Football Bowl Subdivision—the sport’s highest college level with the highest revenue streams—was \$18 million” that year.²⁰⁶ Given these statistics, some are concerned that athletic departments will suffer further financial distress once brands realize they can pay individual athletes directly, and at a lower cost, as opposed to negotiating with university athletic programs for the participation of entire sports teams in marketing campaigns.²⁰⁷ The fact that supporters of the Fair Pay to Play Act and its progeny have placed emphasis on remedying a system that unfairly restrains the rights of student-athletes as individuals²⁰⁸ without fully contemplating the potential economic implications for third-parties suggests that more attention should be paid to the financial logistics of NIL rights prior to the implementation of new policies.

c. Risks Inherent in Opening Pandora’s Box

In addition to the practical challenges associated with transforming the college sports industry through legislation, the notion that a law permitting student-athletes to benefit from use of their NIL will open “Pandora’s Box” is a genuine concern shared by many.²⁰⁹ Larry Scott, the commissioner of the PAC-12 Conference, expressed this sentiment in an interview, arguing the Fair Pay to Play Act would “effectively create a free-for-all in which large payments to a relative handful of star athletes from boosters and others could be thinly disguised as payment for the use of their name, image and likeness.”²¹⁰ Essentially, critics fear

203. *Id.*

204. *Id.*

205. Zeigler, *supra* note 196.

206. *Id.*

207. *Id.*

208. *Id.*

209. See Joan Niesen, *What College Football Coaches Are Saying About the Fair Pay to Play Act*, SPORTS ILLUSTRATED (Oct. 2, 2019), <https://www.si.com/college/2019/10/02/coaches-fair-pay-play-act> [<https://perma.cc/K8ZE-872G>]; Matthew Bain, *How Athlete Endorsements Will Change College Sports Recruiting Forever: ‘It Opens Pandora’s Box’*, USA TODAY (Oct. 10, 2019, 2:40 PM), <https://www.usatoday.com/story/sports/ncaab/2019/10/09/college-recruiting-faces-seismic-change-if-ncaa-allows-endorsements/3908164002/> [<https://perma.cc/U4MS-3JPW>].

210. Michael Long, *Fair Pay to Play: Is the NCAA Learning an Expensive Lesson?*, SPORTSPRO (Oct.

the Fair Pay to Play Act and its progeny will make it impossible to restrict wealthy alumni from paying student-athletes directly because such transfers will be deemed legal so long as some service or commodity, such as an autographed jersey, is exchanged under the guise of an “endorsement.”²¹¹ While the aforementioned practical oversights represent legitimate concerns, they may be effectively solved by the implementation of a comprehensive federal law addressing such issues.

VI. THE SOLUTION: A COMPREHENSIVE FEDERAL LAW PERMITTING STUDENT-ATHLETES TO EARN COMPENSATION FOR USE OF THEIR NILS

Considering the social and economic advantages to be gained from legislation authorizing student-athlete compensation for NIL, the implementation of a federal law represents the most efficient and equitable method for establishing a more evenhanded dynamic between college athletes and the all-powerful NCAA, as envisioned by California legislators in passing the Fair Pay to Play Act. While critics eagerly point to several practical considerations state legislators have overlooked thus far,²¹² their concerns—which are admittedly valid—could be wholly alleviated by a comprehensive federal law. In fact, several members of Congress have already introduced bills addressing NIL rights in collegiate sports. Representative Mark Walker led the way by proposing a bill in March 2019 that would alter the tax code so as to “force the NCAA to allow players to make money from endorsements or risk losing their nonprofit tax exemptions.”²¹³ While this effort contributed to the pressure mounting against the NCAA’s amateurism policy in 2019, the NCAA’s recent declaration that it will give student-athletes a right to earn compensation from endorsements on some level suggests Walker’s proposal may be redundant to the extent it merely establishes the same right.

Building on the momentum from Walker’s bill, several congressmen introduced more thorough proposals in 2020 meant to expand protections for college athletes beyond merely establishing NIL rights, though some afford undue deference to the NCAA. For instance, Representative Anthony Gonzalez—a former Ohio State University football star—introduced the Gonzalez-Cleaver bill in September 2020 together with Representative Emmanuel Cleaver.²¹⁴ While the proposal would allow student-athletes to earn compensation through endorsements, it also “satisfies several NCAA requests” such as preempting state NIL laws and prohibiting athletes from working with companies associated with

18, 2019), <https://www.sportspromedia.com/analysis/ncaa-fair-pay-to-play-act-california-college-sports-larry-scott-newsom> [<https://perma.cc/85YS-GF5J>].

211. Green, *supra* note 155.

212. See Zeigler, *supra* note 196.

213. Dan Murphy, *Congressman to Propose Federal Legislation for Paying College Athletes*, ESPN (Oct. 3, 2019, 10:35 AM), https://www.espn.com/college-sports/story/_/id/27751454/congressman-propose-federal-legislation-paying-college-athletes [<https://perma.cc/N7FV-M9RZ>]; see H.R. 1804, 116th Cong. (2019).

214. Ross Dellenger, *Bipartisan Name, Image, Likeness Bill Focused on Endorsements Introduced to Congress*, SPORTS ILLUSTRATED (Sept. 24, 2020), <https://www.si.com/college/2020/09/24/name-image-likeness-bill-congress-endorsements> [<https://perma.cc/5KYJ-HBSH>]; see H.R. 8382, 116th Cong. (2020).

drugs, alcohol, gambling, or adult entertainment.²¹⁵ Senator Marco Rubio's bill likewise preempts state NIL laws and also blatantly panders to the NCAA by exempting the organization from antitrust scrutiny.²¹⁶ At the other end of the spectrum, however, more player-friendly proposals may struggle to garner bipartisan support because of their broad scope. For instance, Senator Cory Booker introduced the "College Athletes Bill of Rights" in December 2020, which would guarantee NCAA athletes "monetary compensation, long-term health care, lifetime educational scholarships and even revenue sharing."²¹⁷

While the above proposals expired at the end of the 2019–2020 congressional session, they laid the foundation for key legislative debates and may be reintroduced in 2021. Yet, each fails to adequately balance the rights of student-athletes against the business interests of the NCAA in a manner that would not only pass bipartisan scrutiny, but also be workable in a practical sense. Thus, the remainder of this Comment outlines a framework for a comprehensive federal law authorizing student-athletes to earn compensation for use of their NILs, with a focus on protecting athletes' rights from being compromised by the NCAA while providing innovative solutions to the practical concerns identified in the previous section.

A. ESTABLISHMENT OF AN ENFORCEMENT BODY TO INVESTIGATE CORRUPTION AND RESOLVE DISPUTES OVER STUDENT-ATHLETES' NIL RIGHTS

The establishment of an enforcement body to monitor compliance with a new federal law will be essential to effective implementation and continued oversight of rules governing student-athlete compensation. The Fair Pay to Play Act noticeably lacks any type of enforcement mechanism, leaving universities and athletes in the dark as to how potential violations will be reported and resolved.²¹⁸ On the same token, the Act fails to provide any information about the consequences of a violation, in terms of whether civil or criminal liability will attach and who is subject to liability in the first place.²¹⁹ In crafting a new federal law, Congress should preempt litigation on the subject of how to adjudicate disputes in this area by identifying the appropriate enforcement agents.

Currently, the NCAA's own legislative bodies oversee and manage all topics "affecting sports rules, championships, health and safety, matters impacting women in athletics and opportunities for minorities."²²⁰ Considering the NCAA

215. Dellenger, *supra* note 214.

216. Steve Berkowitz, *Sen. Rubio Introduces Bill Allowing NCAA Athletes to Cash in on Name, Image, Likeness*, USA TODAY (June 18, 2020, 8:18 PM), <https://www.usatoday.com/story/sports/ncaaf/2020/06/18/sen-marco-rubio-introduce-bill-addressing-name-image-likeness/3210488001/> [<https://perma.cc/775P-AHFK>]; see S. 4.004, 116th Cong. (2020).

217. Ross Dellenger, *Inside the Landmark College Athletes Bill of Rights Being Introduced in Congress*, SPORTS ILLUSTRATED (Dec. 17, 2020), <https://www.si.com/college/2020/12/17/athlete-bill-of-rights-congress-ncaa-football> [<https://perma.cc/VU32-GPNT>]; see S. 5062, 116th Cong. (2020).

218. Mike Pudlow, *Fair Pay to Play Act: What's Inside California's Bill That Targets the NCAA?*, INDIANAHQ (Nov. 22, 2019), <https://indianahq.com/fair-pay-to-play-act-whats-inside-californias-bill-that-targets-the-ncaa/> [<https://perma.cc/U55F-847G>].

219. *Id.*

220. *Governance*, NCAA, <https://www.ncaa.org/about/what-we-do/governance>

is currently developing policies on compensation for student-athlete endorsement opportunities, the organization would presumably assert jurisdiction over such policies as falling within the definition of “sports rules.” However, the NCAA’s governance structure consists of volunteers from member schools for each of the three NCAA divisions, plus a Board of Governors which consists of presidents and chancellors from all divisions.²²¹ In light of the extremely negative initial reaction by NCAA leaders regarding state legislation permitting paid student-athlete endorsements,²²² it seems unlikely the organization would be inclined to regulate compensation-related issues evenhandedly, without attempting to slowly undermine the impact of NIL rights. Moreover, the fact that a majority of individuals involved in NCAA governance work for universities suggests the financial interests of the enforcement body would be unlikely to align with those of student-athletes if the organization were authorized to enforce NIL rules.²²³ Thus, Congress should consider granting authority to an independent regulatory body as it crafts a new federal law, to minimize the possibility that conflicts of interest will interfere with just enforcement.

The notion that an independent enforcement body should be implemented is not entirely novel, considering a failed bill in Florida sought to establish a government-run task force to oversee student-athletes’ NIL rights in the state.²²⁴ Still, a creative solution is necessary to facilitate enforcement at the federal level. State-by-state enforcement would be ineffective in the sense that each state’s “task force” would be incentivized to design an enforcement scheme that favors its own athletes if comprised of university-affiliated officials, and different states might interpret uniform standards inconsistently. In addition, attempting to enforce policies and adjudicate violations involving multiple schools in different states could create confusion over jurisdiction and yield varying outcomes. Thus, a more sensible solution would involve delegating enforcement power to a task force within the Federal Trade Commission (FTC) as proposed by the Gonzalez-Cleaver bill,²²⁵ which could appropriately promulgate endorsement policies, adjudicate unfair competition disputes, and work in connection with law enforcement agencies to promote fair competition and the protection of consumers.²²⁶

The FTC’s goals already directly parallel those underlying the movement to grant NIL rights to student-athletes,²²⁷ and its clear-cut adjudicatory proceedings

[<https://perma.cc/QV4P-UY6G>].

221. *Id.*

222. See, e.g., John Feinstein, *The NCAA Is Still Whining About Pay to Play. It’s Too Late for That*, WASH. POST (Oct. 16, 2019, 11:57 AM), https://www.washingtonpost.com/sports/colleges/the-ncaa-is-still-whining-about-pay-to-play-its-too-late-for-that/2019/10/16/d128a2c8-f01e-11e9-8693-f487e46784aa_story.html [<https://perma.cc/H5RP-7FQ4>].

223. See *Governance*, *supra* note 220.

224. See Carroll, *supra* note 119; *HB 251* (2020), FLA. H.R. (Mar. 14, 2020), <https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=66760> [<https://perma.cc/U5KV-RUTK>].

225. Dan Murphy, *Bipartisan Federal NIL Bill Introduced for College Sports*, ESPN (Sept. 24, 2020), https://www.espn.com/college-sports/story/_/id/29961059/bipartisan-federal-nil-bill-introduced-college-sports [<https://perma.cc/92JR-YBH5>].

226. See *What We Do*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/what-we-do> [<https://perma.cc/M7BF-4WNH>].

227. See *id.*

would serve as the ideal mechanism for resolving endorsement-related disputes without unnecessarily involving courts in matters that likely do not warrant the imposition of civil or criminal liability. Additionally, granting the FTC—a well-established entity that has famously cracked down on unfair methods of competition since 1915²²⁸—the responsibility to oversee new student-athlete compensation regulations will provide a sense of stability and predictability in a rapidly changing industry, whereas the uncertainties associated with introducing a new enforcement mechanism would only put Fair Pay legislation on even shakier grounds.

Moreover, empowering the FTC to investigate corruption in this realm would effectively address concerns about the opening of “Pandora’s Box,” considering alumni and boosters may in fact be tempted to camouflage direct payments as endorsement opportunities.²²⁹ Perhaps an FTC task force could promulgate standardized valuations for various endorsement opportunities based on the market value of such endorsements at the professional level, adjusting for college athletes’ geographic location and skill level. Then, when an individual or commercial entity pays an athlete directly in exchange for their endorsement, the federal task force will be responsible for investigating such payments to the extent they unreasonably exceed the standardized valuation.

B. IMPLEMENTATION OF WORKABLE AND FAIR RECRUITING REGULATIONS

Effectively implementing federal legislation that authorizes student-athlete compensation also depends on the law’s inclusion of workable high school recruitment guidelines. The risk that colleges will be capable of poaching already-young athletes earlier and earlier in their sports careers by luring them in with the promise of lucrative endorsements is viewed as threatening the integrity of athletics altogether.²³⁰ The task of drafting guidelines for high school recruitment is complicated by the variable timing of athletes’ decisions to commit to college sports teams. In general, NCAA regulations currently restrict colleges from contacting athletes about collegiate opportunities until June fifteenth following a high school student’s sophomore year, or September first of the student’s junior year, depending on the sport, division level, and type of communication.²³¹ Codifying the NCAA’s rules regarding initial outreach would actually be an effective solution to concerns regarding extremely young athletes being subjected to recruitment efforts, as the law would require colleges to hold off on contacting athletes until the summer before their junior year at the earliest.²³² Under the current NCAA framework, many athletes commit to colleges as early as eighth grade through informal “verbal commitments” because the NCAA turns a blind

228. *Our History*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/our-history> [<https://perma.cc/X658-RFFW>].

229. See Green, *supra* note 155.

230. *Id.*

231. *NCAA Recruiting Rules: When Can College Coaches Contact High School Athletes*, NEXT COLL. STUDENT ATHLETE, <https://www.ncsasports.org/ncaa-eligibility-center/recruiting-rules> [<https://perma.cc/8ABZ-Z8YK>].

232. See *id.*

eye to violations of its self-imposed deadlines.²³³ In elevating the NCAA's restrictions on timing to the status of federal law and tasking an enforcement body to investigate and punish violations of such restrictions, colleges would be forced to comply with a system that more fairly allocates opportunity for schools by ensuring all are prohibited from gaining a "leg up" in recruiting. At the same time, athletes would be encouraged to spend more time exploring their options instead of committing prematurely.

In addition to guidelines surrounding the timing of initial outreach by collegiate recruiters, provisions governing the ability of colleges to offer endorsement opportunities as a recruiting tool are necessary to preserve fair competition among schools. Proposing endorsement opportunities during recruiting would not only give certain colleges an unfair advantage but also put undue pressure on high school student-athletes to sacrifice college experiences that may best suit them in order to pursue promises of monetary gain. While those potential consequences are undoubtedly problematic, one solution could involve a statutory provision imposing exorbitant fines—and even personal liability—against collegiate representatives who broach the subject of endorsement opportunities with high school athletes not officially committed to the college's athletic program. Colleges should be given discretion to inform their student-athletes about endorsement opportunities only after athletes have officially ended their recruitment by signing a legally binding National Letter of Intent (NLI) committing to a school during their senior year of high school.²³⁴

As for when athletes become eligible to receive compensation for participating in endorsement opportunities, the NLI provisions suggest restricting athletes from receiving payments until at least the first day of college classes in the fall would be prudent.²³⁵ For instance, a student-athlete's NLI, though legally binding, becomes null and void if it turns out he or she is denied admission to the college, fails to meet NCAA eligibility requirements, fails to graduate from their two-year college if transferring, or violates recruiting rules before opening day in the fall.²³⁶ Based on the number of contingencies that may dissolve the relationship between a student-athlete and the college they have made an official commitment to, restricting compensation until the first day of school protects both parties to the NLI by ensuring student-athletes are actually eligible to compete during the year. Some may argue that certain collegiate sports, including football, would be disadvantaged by such a policy given that their seasons begin in the summer and, therefore, depend on marketing strategies rolled out in the spring. One workable solution would be to allow high school athletes to participate in endorsements any time after they sign an NLI, yet remain ineligible to receive compensation for such work until opening day, in the form of a deferred payment.

233. See Joe Leccesi, *Five Most Common Questions About Verbal Commitments*, USA TODAY (Apr. 27, 2017, 9:59 AM), <https://usatodayhss.com/2017/five-most-common-questions-about-verbal-commitments> [<https://perma.cc/G9GH-ASTX>].

234. See *Recruiting*, NCAA, <https://www.ncaa.org/student-athletes/future/recruiting> [<https://perma.cc/UP73-YTLT>].

235. See *NLI Provisions, NAT'L LETTER OF INTENT*, <http://www.nationalletter.org/nliProvisions/index.html> [<https://perma.cc/MH5G-NUYG>].

236. *Id.*

C. MANDATING FINANCIAL LITERACY AMONG STUDENT-ATHLETES

In addition to protecting high school athletes by imposing stringent regulations on the recruiting front, federal legislators should consider mandating some form of educational program aimed at supporting collegiate student-athletes as they attempt to manage finances related to compensation for the use of NIL rights. Student-athletes should be allowed to embrace their full monetization potential by contracting with licensed sports agents as permitted under the Fair Pay to Play Act,²³⁷ considering professional agents are best-equipped to negotiate on behalf of athletes and to ensure marketing deals involve reputable brands that will benefit their clients.²³⁸ While the opportunity to seek out endorsements through an agent will increase the likelihood of student-athletes profiting from use of their NILs, athletes as young as seventeen or eighteen years likely have minimal to no experience managing finances or properly filing taxes.²³⁹ Yet, the tax code requires individuals receiving compensation for use of NIL to report such income on their federal tax returns.²⁴⁰ Further, the majority of states impose a state income tax, which incites confusion for athletes whose residency and in-state activities vary depending on where opportunities arise.²⁴¹ Because student-athletes may be ill-equipped to realize the financial responsibilities associated with collecting NIL payments, Congress should strongly consider implementing a provision that mandates colleges and universities to provide financial literacy courses to their athletes. Perhaps federal funding could even be directed toward assigning CPAs and attorneys specializing in tax issues to guide college athletes through the filing process.

D. IMPOSITION OF LIMITS ON STUDENT-ATHLETE COMPENSATION FOR THE BENEFIT OF COLLEGIATE ATHLETICS PROGRAMS

Lastly, as a practical matter, successfully implementing a federal student-athlete compensation law requires understanding the financial state of college athletics programs overall and designing systems that are economically feasible for colleges. As discussed, while men's football and basketball programs within a specific subset of elite athletic departments do generate considerable revenue, the majority of athletic programs in the United States, and dozens of teams even at top-earning schools, lose millions of dollars every year.²⁴² Thus, while a bill like New York's, which proposes dividing 15% of revenue generated from athletic ticket sales to be

237. See CAL. EDUC. CODE § 67456 (West 2019).

238. See Jason Belzer, *The World's Most Powerful Sports Agents 2018*, FORBES (Sept. 25, 2018, 9:45 AM), <https://www.forbes.com/sites/jasonbelzer/2018/09/25/the-worlds-most-powerful-sports-agents-2018/#2517295a536d> [<https://perma.cc/RF9S-CXGL>].

239. Katie Davis, *How Taxes Could Disrupt the Gameplan of Paying Student-Athletes*, JAMES MOORE, <https://www.jmco.com/student-athlete-tax-issues/> [<https://perma.cc/44JM-E8SX>].

240. *Id.*

241. *Id.*; see also Jacob Feldman, *The Taxing World of NFL Players' Finances*, SPORTS ILLUSTRATED (Apr. 17, 2018), <https://www.si.com/nfl/2018/04/17/nfl-players-tax-filings-athletes-salaries> [<https://perma.cc/J6VF-EMKC>].

242. Eben Novy-Williams, *College Sports*, BLOOMBERG (Sept. 27, 2017, 10:11 AM), <https://www.bloomberg.com/quicktake/college-sports-ncaa> [<https://perma.cc/T3YG-DL5B>].

shared among student-athletes,²⁴³ may be feasible for a few schools, the reality is that most college athletics programs are already struggling to stay afloat as the industry becomes increasingly commercialized.²⁴⁴ The COVID-19 pandemic has only made matters worse, as the effective cancellation of sporting events for the larger part of 2020 caused severe losses in ticket sales and other revenue streams for university sports.²⁴⁵ For example, the University of Michigan lost almost half of its \$200 million athletic budget due to COVID-19.²⁴⁶ Several colleges were forced to eradicate sports teams altogether during 2020 if they did not generate sufficient revenue.²⁴⁷ Given that ticket sales are a vital source of income for athletic departments in combination with alumni donations and TV rights,²⁴⁸ requiring schools to redirect that portion of their revenue to student-athletes would only worsen the economic state of collegiate athletics overall.

In order to protect athletic programs from descending further into debt, Congress should consider alternative provisions that aim to compensate schools in the event sponsors begin focusing their monetary contributions on individual athletes instead of contributing to athletic programs as a whole. Perhaps, Congress could impose an additional tax on businesses that hire student-athletes for product endorsements, then use the revenue to establish a federal program aimed at supporting collegiate athletic teams. In this way, student-athletes could still retain their full NIL compensations and schools would ultimately benefit from allowing their student-athletes to engage with paid opportunities. Overall, while it is true certain practical considerations were overlooked in the drafting of the Fair Pay to Play Act and its progeny, a federal law represents the best avenue through which to resolve complex legal and financial issues through creative solutions.

VII. CONCLUSION

No longer does amateurism suffice to justify the NCAA's immunity from scrutiny in society at large or within the court system. No longer should student-athletes be forced to sacrifice their bodies, academic potential, and futures for the sake of generating revenue for a corporation that brings in \$1 billion a year, which it is too greedy to share. While these principles are agreeable in theory, the difficulty and complexity of constructing a workable legislative solution on a state-by-state basis threatens to undermine efforts to grant athletes NIL rights. Thus, in order to constrain the NCAA's dominance in the face of practical challenges associated with an entirely new athlete compensation system, Congress should take preemptive action to ensure the NIL rights of college athletes are respected.

Thankfully, members of Congress on both sides of the aisle are demonstrating

243. Carroll, *supra* note 6.

244. See Novy-Williams, *supra* note 242.

245. Andrew Lisa, *The Financial Impact of COVID-19 on College Athletics*, YAHOO! FINANCE (Apr. 4, 2021), <https://finance.yahoo.com/news/financial-impact-covid-19-college-120033347.html> [<https://perma.cc/AD62-PRLQ>].

246. *Id.*

247. *Id.*

248. *Id.*

support for a federal solution resembling the Fair Pay to Play Act, suggesting that the rights of student-athletes are being taken seriously. As of April 2021, at least seven congressional bills addressing collegiate NIL compensation have been introduced and two are currently under consideration. The “College Athlete Economic Freedom Act,” proposed by Senator Chris Murphy and Representative Lori Trahan, would secure athletes a virtually unrestrained right to earn NIL income and even to organize trade unions.²⁴⁹ Perhaps more likely to garner bipartisan support, Senator Jerry Moran’s “Amateur Athletes Protection and Compensation Act of 2021” takes a middle ground approach—more in alignment with the framework this Comment recommends—by placing reasonable limitations on endorsement opportunities without pandering to the NCAA through safe harbor provisions as in Senator Rubio’s bill.²⁵⁰ In any event, immediate congressional action is necessary to preclude the NCAA from raising practical objections to the several state laws going into effect this year. Thus, instead of continuing to introduce multiple variations on the same right through numerous legislative proposals, Congress should focus on joining forces to finally overthrow the NCAA’s archaic and injurious regime as soon as possible.

249. See S. 238, 117th Cong. (2021).

250. See S. 414, 117th Cong. (2021).