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Blood, Sweat, Tears: A Re-Examination of the Exploitation of College Athletes

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Abstract

The unrest revolving around compensation for college athletes is not a new concept. However, public attitudes are shifting. With spirited arguments on both sides, and the recent Supreme Court decision of National Collegiate Athletic Association v. Alston *regarding antitrust exemptions, the issue has been placed in a spotlight. This Note examines the buildup of discontentment through the history of the NCAA and amateurism, specifically how the term "student-athlete" became coined. It will then move to litigation efforts by athletes in an attempt to gain employment status, and an alternative route of unionization. Models that examine the fair market value of athletes, as well as the issue of rent sharing, place the monetary value of this labor into perspective. This Note highlights recent legislative pushes, both state and federal, to compensate athletes through name, image and likeness laws and the subsequent approval of the NCAA. However, this Note proposes that this new publicity surrounding NIL law creates the opportunity to rectify injustices beyond that of what third-party compensation models could provide. In conclusion, this Note advocates for the full-spectrum protection offered through a proposed College Athletes Bill of Rights.*

Δ 2021 Louise Halper Award Winner for Best Student Note

* Candidate for J.D., May 2022, Washington and Lee University School of Law. Former Division I athlete. I would like to extend my appreciation to everyone who helped me throughout the Note writing process. In particular, to my faculty advisor Karen Woody and Note Editor Charles Bonani for their recommendations and motivational pushes. I would also like to express my gratitude to my family for their support throughout my own experience with college athletics, and their encouragement as I took on an endeavor of great personal significance.

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I. Introduction

Collegiate athletes have long been fighting to expand their rights, most notoriously on the compensation field.[1] The National Collegiate Athletic Association ("NCAA") is one of the most profitable businesses in the country, raising $10.6 billion in revenue in 2019 alone.[2] The thirteen largest athletic departments

1. *See* Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011) (discussing the structure of college sports and the billion-dollar revenues generated by athletes that do not receive compensation) [perma.cc/BZH9-UY8H].

2. *See Finances of Intercollegiate Athletics*, NCAA (noting the amount of revenue generated by athletics departments) [perma.cc/2Y8J-H5KJ].

each bring in more than $100 million annually from sports—almost entirely from men's basketball and football.[3] However, that money goes towards paying millionaire coaches, building upscale stadiums, and funding television ads, not paying the athletes that bring in the crowds and provide their labor.[4]

Marketing experts have acknowledged that successful collegiate athletic programs have a direct correlation to admissions increases, often called the "Flutie Effect."[5] Harvard Business School Assistant Professor Doug Chung found in his study that when a school raises performance levels on the football field, applications increase by 18.7%.[6] To get a similar effect, the school would have to lower tuition rates by 3.8%.[7] With this increase in applications, schools can become more academically selective—raising both the quantity and quality of students—mostly due to the success of the performing athletes.[8] Success in sports raises a general awareness of the institution, but sports-heavy American culture also influences prospective students to want to be a part of the winning side.[9]

Despite clear evidence that collegiate athletics create substantial revenue and student admission increases to schools, many fans still argue against the payment of players, believing they already receive enough compensation through the benefit of a "free education."[10] However, it is important to note that the benefit

3. *See* Eben Novy-Williams, *College Sports*, BLOOMBERG: QUICKTAKE (Sept. 27, 2017, 11:11 AM) (calculating the revenue top college athletics programs make in a year) [perma.cc/6DG8-S7PV].

4. *See id.* (discussing the uses that the money raised goes towards).

5. *See* Sean Silverthorne, *The Flutie Effect: How Athletic Success Boosts College Applications*, FORBES (Apr. 29, 2013, 9:48 AM) (discussing how Boston College applications skyrocketed after Doug Flutie threw Hail Mary pass to beat the University of Miami) [perma.cc/2MRQ-2JEW].

6. *See id.* (quantifying the theory that the primary form of mass media advertising by academic institutions is through their athletic programs).

7. *See id.* (explaining Professor's Chung's research which found that athletic success boosts admissions applications at academic institutions).

8. *See id.* (discussing how Georgetown University applications multiplied by 45% between 1983 and 1986 following significant basketball success).

9. *See id.* (discussing Professor Chung's speculation around a prospective student's wish to be a part of the social whirl associated with a winning sports program).

10. *See* Brian Frederick, *Fans Must Understand That College Sports is Big Business*, U.S. NEWS: DEBATE CLUB (Apr. 1, 2013, 5:46 PM) (debating the

of education is dependent upon an athlete's health and success, and it always comes second to athletics.[11] The system constantly creates strategies to circumvent the rules by providing under-the-table benefits to athletes that the schools believe will improve their chances of success on the court or field.[12] Reform efforts to protect young athletes from exploitation from the billion dollar sports business are underway—but who should be responsible for implementing them?

NCAA officials and school administrators may be too biased to participate in leading reform for student athletes, as a main component of these positions is to make money for their respective organizations.[13] For example, college administrators harp on the wellbeing of students in the midst of the COVID-19 pandemic, yet also vocalize the importance of student athletes physically returning to campuses despite the inevitable health risks posed to these players.[14] Therefore, lawmakers would likely be the best equipped to create and implement reform.[15]

This Note examines the history of college sports, the unrest revolving around compensation to athletes, and then the recent influx of legislative reform before endorsing a particular bill. Part II analyzes the historical context around compensation, predominantly through the ever-changing rules of amateurism and the creation of the term "student athlete."[16] Part III looks to efforts made in the past regarding athletes as employees through the lenses of litigation, unionization attempts, and also economic

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arguments for and against athletes being paid for their efforts) [https://perma.cc/7W43-4UEY].

11. *See id.* (discussing how the so-called reward of free education is often taken away when an athlete becomes injured or unproductive).

12. *See id.* (discussing how coaches and boosters find ways to get around rules and bribe young athletes).

13. *See* John Feinstein, *College Sports Needs Reform, and Congress Has a Better Shot Than the NCAA*, WASH. POST (June 3, 2020) (discussing the skepticism surrounding Power Five administrators pushing for change) [perma.cc/TG9A-PUFU].

14. *See id.* (pointing out Notre Dame President John Jenkins' explanation for why there needed to be a physical presence of students on campus in August 2020, even though there would be a high risk of illness).

15. *See id.* (theorizing issues that would occur if the NCAA and individual universities were left to create NIL law applicable to collegiate athletes).

16. *See infra* Part II.

feasibility after considering the market value of athletes and prospective compensation models.[17] Part IV delves into the impact of recent antitrust litigation, specifically a recent Supreme Court decision.[18] Part V discusses name, image, and likeness ("NIL") legislation at both the state and federal levels, the chain reaction push for reform these proposals caused, and the NCAA's response.[19] Part VI makes the case that new NIL compensation model is beneficial, but instead endorses the opportunity to implement full-spectrum protection for student athletes such as Senator Booker's proposal.[20]

II. A History of Amateurism

As of the time of writing, the NCAA requires all of its athletes to be deemed amateurs before they are allowed to compete.[21] There are stringent requirements to ensure conformity—including a list of actions for athletes to complete and an entire separate committee to ensure that the information entered is correct.[22] But, these rules have not always been the same: the NCAA's 1906 bylaws forbade the "offering of inducements to players to enter colleges or universities because of their athletic abilities or maintaining players while students on account of their athletic abilities," which would have made athletic scholarships as we know them today a violation of the rules.[23]

Since the 1906 bylaws, the NCAA has continuously drafted changes in its definition of amateurism.[24] In 1916, the bylaws stated that an amateur is "one who participates in competitive

17. *See infra* Part III.

18. *See infra* Part IV.

19. *See infra* Part V.

20. *See infra* Part VI.

21. *See Amateurism*, NCAA (describing guidelines all collegiate athletes must follow) [perma.cc/HQ2H-QJQN].

22. *See id.* (displaying links for hopeful collegiate athletes to follow, including to the Eligibility Center and the Clearing House).

23. *See* 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, 250–51 (2020) (quoting previous NCAA bylaw which contained penalties for violation).

24. *See id.* at 250–53 (discussing the history of amateurism as the NCAA has evolved).

physical sports only for the pleasure, and the physical, mental, moral, and social benefits derived therefrom."[25] Again changed in 1922, "an amateur sportsman is one who engages in sport solely for the physical, mental, or social benefits he derives therefrom, and to whom the sport is nothing more than an avocation."[26] Without having enforcement power in the early-to-mid 1900s, there was rampant disregard of the amateurism rules by institutions, which led to the NCAA attempting to ratify the reality that players were receiving financial aid due to their athletic ability.[27]

Even after modifying rules to allow for athletic-based scholarships, the NCAA continued to evolve those rules from need-based only, to allowing compensation of educational expenses, to the modern annual renewal of scholarships seen today.[28] Interestingly enough, as early as 1957, the NCAA anticipated the argument of compensating athletes and coined the term "student-athlete" as a way to cloak the actual relationship between the parties.[29]

The term came in response to a 1953 Colorado Supreme Court case which upheld a determination by the State Industrial Commission that a football player at the University of Denver was an employee within the meaning of the Colorado worker's compensation statute.[30] From this decision, the NCAA quickly revised its bylaws to use the term "student-athlete" and required

25. *Id.* at 251.

26. *Id.*

27. *See id.* (referencing a 1929 report that found three-quarters of the 112 colleges that were investigated violated the NCAA's amateurism code, and a 1946 *New York Herald Tribune* article declaring that big-time football is in a class by itself when it comes to "chicanery, double-dealing, and undercover work behind the scenes").

28. *See id.* at 252–53 (detailing the evolution from the 1948 "Sanity Code" which only allowed financial aid if there was a need, to the 1957 expansion which included room, board, tuition and other living costs, and finally to the 1973 response to complaints from coaches about the mandated four-year guarantee scholarship).

29. *See* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 83–84 (2006) (detailing the history of how "student-athlete" was created).

30. *See* Univ. of Denver v. Nemeth, 257 P.2d 423, 430 (Colo. 1953) (finding that an injury that was suffered during spring football practice arose out of and in the course of the student's employment with the university).

its exclusive use thereafter in hopes to diminish tendencies to characterize them as employees.[31] Even then-NCAA Executive Director Walter Byers wrote that the "NCAA adopted and mandated the term 'student-athletes' purposely to buttress the notion that such individuals should be considered students rather than employees."[32]

In recent years, the NCAA has continued to modify amateurism rules at a rapid pace with the influx of litigation regarding antitrust and labor laws.[33] Changes have included multi-year scholarship awards, an expansion of food services, additional stipend money, and the permission to keep certain awards and gifts.[34] However, the current NCAA bylaws still mandate that financial aid is not considered to be pay or the promise of pay for athletics skills, and that payments to athletes for athletic services are prohibited.[35] Additionally, the bylaws prohibit athletes from receiving money for promoting commercial products and from using their own "name, photograph, appearance or athletics reputation," but also that "the NCAA and its member institutions may use athletes to endorse their products and activities in a wide variety of circumstances."[36]

The ever-shifting rule changes demonstrate that the amateurism requirements are whatever the NCAA decrees them to be at the time. Athletes pushing for advancement of rights, such as the creation of scholarships to cover educational expenses and

31. *See* McCormick & McCormick, *supra* note 29 (discussing the NCAA's reaction to the Colorado Supreme Court's ruling that allowed workers' compensation to be received by an athlete for football injuries).

32. *See id.* at 84 (quoting a writing by Byers discussing how the NCAA addressed the "threat" of athletes being labeled employees).

33. *See* Meyer & Zimbalist, *supra* note 23, at 254–55 (referencing adjustments that the NCAA has made regarding amateurism bylaws due to external pressures).

34. *See id.* at 255–56 (listing changes in NCAA bylaws that increase protection and benefits to athletes—such as being permitted to keep Olympic prize money or merchandise from bowl games).

35. *See* 2020–21 NCAA DIVISION I MANUAL, ¶¶ 12.01.4, 12.1.2 (Aug. 1, 2020) (stating that athletes lose amateur status and eligibility if they are compensated for performing, accept promise of payment, commit to play professional athletics, receive salary or reimbursement from a professional sports organization, compete on any professional team even without payment, enter a draft, or sign with an agent).

36. NCAA DIVISION I MANUAL ¶ 12.5.1.1.

the recent expansion of allowing the retention of Olympic prizes, show that the NCAA is not resistant to change when pushed for by proponents.[37] Due to this demonstrated propensity for change, there should be no issue once again realigning the bylaws to expand the rights of collegiate athletes to include appropriate compensation for the work they provide for the NCAA and member institutions.

III. Employment Benefits and Protections: Are Athletes Employees?

It is almost impossible to name another group of people that are prohibited from financially benefiting from unique talents—a clear issue of discrimination against college athletes.[38] Senator Richard Blumenthal, a proponent of legislative reform, said that, "[t]he present state of college athletics is undeniably exploitive," and that the "the literal blood, sweat and tears of student athletes" fuels the multi-billion dollar industry.[39] To the proponents of legislation, reforming the system is all about basic justice—racial justice, economic justice, and health care justice—and holding schools and the NCAA accountable for their actions should be the first step in accomplishing this goal."[40]

A. Litigation Efforts Regarding Employment Status

So far athletes have been unsuccessful in litigation regarding their status as employees, but the courts have left the door open

37. *See* Meyer & Zimbalist, *supra* note 23 (showing the flexibility of the NCAA through the history of its rule changes regarding amateurism).

38. *See* Sean Gregory, *How California's Historic NCAA Fair Pay Law Will Change College Sports for the Better*, TIME (Oct. 1, 2019, 8:16 AM) (quoting legislators who support California's compensation bill, which equates the lack of fairness in compensation to discrimination against athletes) [perma.cc/AA8F-85BD].

39. *See Booker, Senators Announce College Athletes Bill of Rights*, CORY BOOKER (Aug. 13, 2020) (explaining ten senators' proposed framework for a new college athletes bill of rights, including a guarantee of fair and equitable compensation) [perma.cc/DCN9-7P3E].

40. *See id.* (quoting Blumenthal's description of the bill intended to empower athletes' rights in many different arenas).

for future claims.[41] In *Berger v. National Collegiate Athletic Association*,[42] former women's track athletes sued the NCAA alleging that student athletes are employees within the meaning of the Fair Labor Standards Act (FLSA),[43] and therefore claimed that the NCAA and member schools violated the FLSA by not paying athletes a minimum wage.[44] There, the court refused to consider the multi-factor tests that would satisfy the FLSA, as it would not "take into account [the] tradition of amateurism or the reality of the student-athlete experience."[45] To this court, Division I sports were classified as an "extracurricular," and therefore not considered to be employment under the meaning of the FLSA.[46]

However, the loss in *Berger* has not prevented other athletes from bringing labor violation actions.[47] In 2019, a former PAC-12 football player brought a putative class action against the NCAA and the PAC-12 Conference alleging violations of the FLSA and the California Labor Code.[48] There, the court determined that the test of employment under the FLSA was one of "economic reality," and that the economic reality of the relationship between the NCAA and the PAC-12 to student athletes does not reflect an

41. *See* Billy Witz, *N.C.A.A. is Sued for Not Paying Athletes as Employees*, N.Y. TIMES (Nov. 6, 2019) (discussing the failed attempts to force colleges to treat athletes as employees) [perma.cc/F7F8-XU2V].

42. *See* Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285, 294 (7th Cir. 2016) (holding that former student athletes were not employees of the university).

43. *See* Fair Labor Standards Act ("FLSA") of 1938, 29 U.S.C. §§ 201–219 (2018) (establishing national labor standards meant to maintain minimum thresholds of health, efficiency, and worker wellbeing without "substantially curtailing employment or earning power" in the relevant industries).

44. *See Berger*, 843 F.3d at 289 (explaining the claims brought by student athletes against the NCAA).

45. *Id.* at 291.

46. *See id.* at 292 (discussing the use of the Department of Labor Field Operations Handbook in determining employment status of university or college students).

47. *See* Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905 (9th Cir. 2019) (exemplifying a later class action brought to determine whether FBS football players were employees of the NCAA and PAC-12 within the meaning of the FLSA).

48. *See id.* at 907 (questioning whether the NCAA or the PAC-12 were the plaintiff's employers under federal and state law).

employment relationship.[49] Under the circumstances of the whole activity, the NCAA and respective conferences do not create an expectation of compensation as neither the NCAA nor the PAC-12 award athletes scholarships, nor do the entities have the power to hire or fire, and there is no evidence NCAA bylaws were conceived or carried out to evade the law.[50] However, the court left the gate open for athletes to use labor laws to gain compensation by refusing to rule on student athletes' employment status in any other context.[51]

Following the same course, another class action lawsuit brought by a former athlete claims the NCAA and many of its member schools violated minimum wage laws by refusing to pay their athletes.[52] In several past arguments, the NCAA relied upon *Vanskike v. Peters*,[53] in which the court denied an inmate a litmus test to determine his employment status, as it would not "capture the true nature of the relationship" between inmates and state prisons.[54] The NCAA's reliance on *Vanskike*'s determination that the Thirteenth Amendment permits involuntary servitude as punishment for crime is both "offensive and misplaced."[55] By arguing that exemption applies to the issue at hand, the NCAA effectively compares college athletes to prisoners.[56]

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49. *See id.* at 909 (discussing various factors a court may consider in determining an economic relationship).

50. *See id.* at 909–10 (applying the factors mentioned above to the relationship the athletes have with the NCAA).

51. *See id.* at 913–14 (explaining that the court did not reach other issues urged by the parties nor express an opinion on employment status in other contexts).

52. *See* Complaint ¶ 6, Johnson v. NCAA, 2019 WL 5847321 (E.D. Pa. 2019) (No. 19-5230) (exemplifying another class and collective action brought against the NCAA and several member schools).

53. *See* Vanskike v. Peters, 974 F.2d 806, 813 (7th Cir. 1992) (affirming the district court's decision that neither the Department of Corrections nor the state of Illinois acted as an employer with respect to prisoners).

54. *See id.* at 809 (discussing that the application of employment factors would not reveal the reality of the situation by implying a free labor relationship of an inmate due to the very nature of incarceration).

55. *See* Complaint, *supra* note 52, ¶ 6.

56. *See* Witz, *supra* note 213 (showing that by the NCAA arguing the same exemption should apply to athletes, the organization analogizes its student athletes to prisoners).

While courts classify sports as an extracurricular activity, that classification makes little sense when the substantial costs and average workload are examined.[57] Athletes spend on average fifty hours a week on athletics during the season—well over a standard full-time job.[58] While there are limits placed on required athletic activity, many fail to realize that other activities that may not be deemed required, but carry significant consequences to the athletes if not completed, take up a majority of the time.[59] For example, travel time for competition is not factored into time restraints, yet takes up around twenty-two hours a week and forces missed classes, rescheduling of academic assignments, and missed sleep and social events.[60] Sleep was found to be the number one thing that student athletes claim their time commitments prevent them from doing.[61]

B. Unionization Attempts

Another way student athletes have sought to enforce their rights is through unionization.[62] In 2014, the Chicago region of the National Labor Relations Board ("NLRB") found that scholarship players on the Northwestern University football team are employees of the school, and therefore have the right to form a union.[63] In making this determination, the NLRB concluded that "players receiving scholarships to perform football-related services

57. *See Student-Athlete Time Demands*, PENN SCHOEN BERLAND & PAC-12 CONFERENCE (Apr. 2015) (referencing a study conducted among 409 PAC-12 student athletes from nine universities to assess time demands and stressors) [https://perma.cc/9FDL-UPQ4].

58. *See id*. (showing results of the study with average times spent on activities related to athletics).

59. *See id.* (showing an additional twenty-nine hours per week spent on activities such as voluntary workouts, treatment, and traveling for competitions).

60. *See id.* (discussing that 80% of PAC-12 athletes said they have missed class for competition during the 2014–2015 season).

61. *See id.* (showing that 71% of student athletes mentioned sleep as the top activity prevented by athletic commitments).

62. *See* Ian Crouch, *Are College Athletes Employees?*, THE NEW YORKER (Mar. 27, 2014) (discussing the efforts of college athletes to unionize) [https://perma.cc/BTZ2-YCVT].

63. *See id.* (referencing the Region 13 decision that classified student athletes as employees).

for the Employer [Northwestern] under a contract for hire in return for compensation are subject to the Employer's control and are therefore employees within the meaning of the [National Labor Relations] Act."[64] The NCAA quickly responded with a statement that the union-backed attempt to turn student athletes into employees undermines the ultimate purpose of college—an education.[65]

The NCAA argued that student athletes participate voluntarily and are provided scholarships and other benefits for participation.[66] In 2015, the NLRB affirmed this principle in dismissing the petition.[67] However, in that decision, the board did not rule directly on if players are university employees, instead finding that the wide-ranging impact on college sports would not have promoted "stability in labor relations."[68] This decision was a narrow one, leaving open the possibility that a future case regarding similar issues could be brought before the board.[69]

The National Labor Relations Act ("NLRA") is the foundational labor relations statute in the United States, acting as the cornerstone of U.S. labor policy for over seventy years.[70] While the argument may be made that the NLRA addresses only private enterprises, many state statutes are modeled after the NLRA and usually derive meanings from its interpretation, as well as the

64. Nw. Univ. Emp. & Coll. Athletes Players Ass'n (CAPA), 2014 WL 1246914, *14 (N.L.R.B. Mar. 26, 2014).

65. *See* Donald Remy, *NCAA Responds to Union Proposal*, NCAA: PRESS RELEASES (stating that the voluntary participation in sports does not make athletes employees and that education is the purpose of college) [https://perma.cc/FA4F-4C3P].

66. *See id.* (arguing that scholarships and unnamed "other benefits" for participation are adequate compensation and do not form an employment relationship).

67. *See* Nw. Univ., 362 N.L.R.B. 1350 (N.L.R.B. Aug. 17, 2015) (declining jurisdiction because the Board concluded it would not effectuate the purposes of the National Labor Relations Act).

68. *See* Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug. 17, 2015) (summarizing the decision of the NLRB board to deny the petition but refusing to rule on the central question in the case) [https://perma.cc/3YMZ-D7H3].

69. *See id.* (discussing how the board decision applied only to the Northwestern case, leaving the door open for similar claims in the future).

70. *See National Labor Relations Act*, NAT'L LABOR RELATIONS BD. (detailing the history and the language of the Act) [https://perma.cc/56LH-3VAD].

National Labor Review Board ("Board") and federal courts.[71] There are two tests that must be met under the NLRA to classify a person as an employee—a common law test and a recently changed statutory test for university students seeking coverage under the Act.[72]

Historically, the Board adopted the common law approach for defining employees, known as the "right of control test," with the most important factor being the degree of control the alleged employer maintained over the working life of the alleged employee.[73] Therefore, there is an employer-employee relationship where the employer's right to control or right of control included "both the end result and the manner of achieving it," and that "under the common law, an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment."[74] In practice, the Board's reasoning has been swayed due to the economic dependence of an employer—instead of solely using the control rule, there is a blended approach of measuring the degree of control with a consideration of the alleged employee's economic dependence upon the employer.[75]

The special statutory test introduced above culminated in *Brown University*,[76] in which the Board determined that students who work for their universities are not employees if their work is primarily educational, and if their relationship with the university

71. *See* McCormick & McCormick, *supra* note 29 (addressing how the NLRA is applicable to private institutions if it is designed to govern private enterprises).

72. *See id.* (discussing how the NLRB typically uses several tests to determine if an employment relationship exists).

73. *See id.* (discussing the formation of the meaning of employee within the NLRA).

74. *Id.* (noting that Congress reaffirmed the right of control test in its Taft-Hartley Amendments to the Act).

75. *See* Paladini, A., Inc., 168 N.L.R.B. 952 (N.L.R.B. Dec. 19, 1967) ("Rather, it has been necessary to apply the control test in light of the economic realities of the particular situation.").

76. *See* Brown Univ., 342 N.L.R.B. 483, 493 (N.L.R.B. July 23, 2004) (determining that the collective bargaining process would be detrimental to the educational processes).

is not an economic one.[77] Athletes could have easily passed this two-part test; however, even this test was overturned in 2016 by *Trustees of Columbia University*.[78] Concerned that *Brown* restricted the purpose of the Act—to encourage the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom and association, self-organization, and designation of representatives of their own choosing—the Board found it appropriate to extend statutory coverage to students working for universities covered by the Act unless there were strong reasons not to do so.[79]

1. Potential COVID-19 Impact on Unionization Efforts

The Northwestern players did not lose their case on the argument players were not employees, but rather that allowing them to unionize would create jurisdictional issues.[80] However, the NLRB in declining jurisdiction due to the complications of only having a single school in the NCAA unionized left the door open for a larger coalition of athletes to try again.[81] The COVID-19 pandemic could create this viable opportunity for NCAA athletes to create this wide-scale coalition with similar goals.[82] College

77. *See id.* (discussing that the principal time commitment of the student is spent obtaining a degree and therefore the individual is first and foremost a student).

78. *See* Tr. of Columbia Univ. in the City of New York & Graduate Workers of Columbia-GWC, UAW, 364 N.L.R.B. 90 (N.L.R.B Aug. 23, 2016) (overturning *Brown* and the decision that graduate student assistants are not employees within the meaning of the FLSA).

79. *See id.* (reasoning that given the purpose of the Act, coupled with the broad statutory definitions of employer and employee, student workers should be within its protection).

80. *See* Nw. Univ., 362 N.L.R.B. 1350 (N.L.R.B. Aug. 17, 2015) (declining to rule due to lack of jurisdiction); *see also* Dan Wolken, *Opinion: As College Football Plans Are Discussed, It's Time For Athletes To Have A Say*, USA TODAY (May 19, 2020) (analyzing the differences in college sports in 2020 versus in 2014 when the NLRB last considered the issue) [https://perma.cc/7TSX-ZDPW].

81. *See* Rohan Nadkarni, *College Football Players Need a Union Now More Than Ever*, SPORTS ILLUSTRATED (Jul. 2, 2020) (summarizing the previous NLRB decision and how the time now may be right for a larger group of athletes to repeat the process to obtain a different outcome) [https://perma.cc/2C6P-BQUN].

82. *See* Wolken, *supra* note 80 (discussing how the pandemic has created leverage for athletes to form a union).

administrators and coaches pushed for football players to return to school in the summer of 2020 while numbers of COVID-related deaths rose—while the players whose health was at risk had no authoritative voice on the matter without fear of scholarships being cut.[83]

The universal hardship felt by the pandemic creates a perfect storm for NCAA athletes to form a union and have the voice to negotiate their rights, health concerns, working conditions and compensation.[84] Athletes in the past may have been motivated by peer pressure from teammates, the fear of losing scholarships, the appearance of being ungrateful for the opportunities presented or being snubbed by the legions of fans in refusing to unionize.[85] But, the fear of COVID-19 could allow college athletes to act without apprehension of blame by understandably wanting to protect themselves from an unprecedented virus with unknown long-term effects on health.[86]

An example of this attempt, called the #WeAreUnited campaign, was created by many PAC-12 conference football players in early August 2020.[87] Among other requests, the campaign announced the intention of the athletes to opt-out of participating in preseason practice, or even regular season games, unless the conference agreed in writing to guarantee certain protections related to health, safety, and welfare.[88]

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83. *See id.* (calling the push of athletes returning to campus amid the pandemic a "science experiment" promoted by college coaches and administrators).

84. *See id.* (discussing how the NCAA resists change until it is pushed by a legitimate threat and how the COVID-19 pandemic creates that threat).

85. *See id.* (theorizing that fear of ostracization and losing scholarships prevails over action to form a union).

86. *See id.* (discussing how the fear of the unknown from COVID-19 could benefit athletes by allowing them to act without fear of blame or acting ungrateful for their scholarship opportunity).

87. *See #WeAreUnited*, THE PLAYERS' TRIB. (Aug. 2, 2020) (publishing the demands of the PAC-12 athletes in the campaign) [https://perma.cc/K6D6-BW7N].

88. *See* Darren Heitner, *Could the #WeAreUnited Campaign Lead to the Unionization of College Athletes?*, SPORTSPRO (Aug. 5, 2020) (analyzing the campaign with potential outcomes for the demands) [https://perma.cc/XZ39-UZXD].

The list of demands the players created is a prime example of how, when presented, a nationwide event could be the catalyst to further the rights of NCAA athletes.[89] Prompted by the lack of voice related to decisions that impacted their own personal health, the athletes created a list of health and safety precautions, but also demands related to other rights, such as racial injustice and economic freedom.[90] In demanding transparency about the risks associated with playing amid the COVID-19 pandemic, the players also stated: "Because immoral rules would punish us for receiving basic necessities or compensation for the use of our names, images and likenesses, while many of us and our families are suffering economically from the COVID-19 fallout, #WeAreUnited."[91] This clearly demonstrates the ability of these athletes to connect issues and collectively voice concerns, skills which are essential in establishing bargaining power regarding their rights.[92]

While the #WeAreUnited movement gained significant attention and had the ability to force change, the boycott flopped after the PAC-12 cancelled, and then later resurrected, the season.[93] While the COVID-19 protection requests were honored, the other widespread demands were largely ignored by the conference and the NCAA.[94] A potential explanation for this may be the failure of the athletes to stand united—directly contradicting the name of the movement.[95] For example, some

89. *See #WeAreUnited*, *supra* note 87 (showing how the published demands started with COVID-related threats to physical health, but then stretch to issues of entire fairness within the NCAA).

90. *See id.* (demanding not only health-related changes, but also steps to ensure racial equality and adequate compensation for labor).

91. *Id.* (emphasizing a need for transparency about risks associated with playing collegiate sports during the COVID-19 pandemic).

92. *See* Heitner, *supra* note 88 (discussing the bargaining power that is essential to unionize).

93. *See* Doug Robinson, *Whatever Happened to PAC-12 Player Demands? Did Love of the Game Trump Desire for Change?*, DESERET NEWS (Sept. 20, 2020, 1:23 PM) (discussing the failure of the movement and how it went wrong) [https://perma.cc/PCY7-B82P].

94. *See id.* (discussing how the leverage existed to make these demands, but those behind the movement failed to follow through).

95. *See id.* (revealing that mere days after the publication of the opt-out threat, players withdrew their statements and joined other movements that pushed for the continuation of football season).

athletes fled to the #WeWantToPlay movement credited to Clemson athletes Trevor Lawrence and Darien Rencher.[96] That movement instead sought to play the season despite the threat of COVID-19, as other advances in rights would be null if there were no games played.[97] Both movements created headlines but ultimately became moot when the conferences cleared teams for fall season—as the allure of playing became too strong for those boycotting to opt-out of the season as they threatened.[98]

It is important to note that most professional sports leagues are heavily unionized, with strong representations most notably in baseball, football, basketball and hockey.[99] Professional sports unions work with athletes and leagues in areas ranging from financial security, healthcare coverage, and workplace safety to philanthropy efforts.[100] The sports business has been called "recession proof," with organizations weathering large economic fallouts that often result in high unemployment rates.[101] However, the COVID-19 pandemic and political unrest caused significant cancellations and postponements that challenged the ability of

96. *See* David M. Hale, *Clemson's Trevor Lawrence, Darien Rencher: We Want to Play and Bring About Change*, ESPN (Aug. 10, 2020) (discussing the efforts of the two athletes to work with nearly a dozen other college football players around the country) [https://perma.cc/5R38-VW7S].

97. *See id.* (quoting Rencher in regard to NIL efforts and compensation being held moot if there are no games played to be compensated for).

98. *See* Robinson, *supra* note 93 (theorizing that the love for the game and the desire to play was too strong for these athletes to make significant change); *see also* Hale, *supra* note 96 (quoting Lawrence stating that the number one priority for athletes was to play).

99. *See* Maury Brown, *As Unions Dwindle, The Value of Those in Pro Sports Never More Important*, FORBES (Sept. 5, 2016, 4:45 PM) (discussing the importance of unions for the four most prominent professional sports leagues in the United States) [https://perma.cc/7LF4-Y6NG].

100. *See* Ross Evans, *What Do (Sports) Unions Do in a Pandemic?*, ONLABOR (May 12, 2020) (discussing the areas that unions often cover) [https://perma.cc/9DLP-JM87].

101. *See* Matthew Futterman, Kevin Draper, Ken Belson & Alan Blinder, *The Financial Blow of the Coronavirus on Sports*, N.Y. TIMES (Mar. 14, 2020) (discussing how the business of sports did not suffer even through the September 11 terrorist attacks and the financial crisis of 2008) [https://perma.cc/M6XL-8T6Y].

professional athletes to perform, and in turn be compensated for their labor.[102]

The Major League Baseball Players Association ("MLBPA") is the union that represents players on the forty-man rosters of the Major League Baseball ("MLB") teams, and is often credited with laying the groundwork on which modern players' unions were born.[103] The MLBPA and the MLB generated news with initially not being able to reach a settlement,[104] but eventually worked to reach agreements protecting the players and promoting the game during the summer of 2020 amid COVID-19 outbreaks by allowing both sides to voice concerns regarding health safety and season length.[105] Additionally, the MLBPA negotiated baseline salaries if the season were to be completely cancelled, pro-rated salaries for the sixty game season, and a minimum per-week stipend and medical care.[106]

Another example of the power of unionizing sports was the ability for National Basketball Association ("NBA") teams to walk out of playoff games in protest of police brutality and the shooting of Jacob Blake.[107] Fueled by frustrations regarding lack of support of the Black Lives Matter movement, players refused to step foot on the court with the thought that providing basketball games as entertainment diverted the public's attention away from the social

102. *See id.* (detailing how the pandemic caused, for the first time in nearly two decades, the sports world to pause competition).

103. *See id.* (discussing the labor strife surrounding the MLB during the 1960s); *see also* MAJOR LEAGUE BASEBALL PLAYERS: ABOUT (describing main functions of the union) [https://perma.cc/6G38-YLKG].

104. *See* Ron Cook, *Will There Be Any Winners in Baseball's Ongoing Discord?*, PITT. POST-GAZETTE (June 22, 2020, 7:00 AM) (discussing the "unconscionable bickering" between owners and players while more than forty million Americans were unemployed) [https://perma.cc/2NHB-4H6C].

105. *See* Dayn Perry, *MLB, MLBPA Reportedly Agree to New COVID-19 Safety Protocols; Rule Breakers Face Season-Long Suspension*, CBS SPORTS (Aug. 6, 2020, 1:37 PM) (describing in detail safety protocols and disciplinary measures for players, team personnel and staff) [https://perma.cc/5HE4-XMXT].

106. *See* Evans, *supra* note 100 (discussing some of the fruits of negotiation by the MLB and MLBPA from Coronavirus concerns).

107. *See* Rick Wartzman, *Jacob Blake, Chris Paul, and the Hidden Power of the NBA*, FAST CO. (Aug. 8, 2020) (discussing the benefits that NBA players possess by belonging to a union) [https://perma.cc/QBN3-DSQM].

justice movement.[108] By belonging to a union, the athletes were able to mobilize quickly and take a stand for a cause they were passionate about.[109]

The National Basketball Players Association ("NBPA") has stated its mission is to "ensure that the rights of NBA players are protected and that every conceivable measure is taken to assist players in maximizing their opportunities and achieving their goals, both on and off the court."[110] Additionally, the NBPA provides a forum for the athletes to participate in union activities, such as executive leadership roles, team representative positions, global community outreach initiatives and more.[111] Athletes are often looked to as leaders and role models, so the ability to collectively use a single voice to protest social injustice and promote change is an imperative tool to not only further their own rights, but also force betterment in communities.[112]

If college athletes were permitted to unionize, the National College Players Association ("NCPA") could make an impact as a nonprofit organization already in place that aims to protect student athletes from NCAA legislation.[113] The nonprofit advocacy group has been in place for nearly two decades, with the mission to "protect future, current, and former college athletes."[114] Among other goals, such as increasing graduation rates and relaxing

108. *See* Marc Stein, *Led by NBA, Boycotts Disrupt Pro Sports in Wake of Blake Shooting*, N.Y. TIMES (Aug. 26, 2020) (analyzing the refusal of the Milwaukee Bucks to perform in a playoff game, as well as George Hill's statement that the games distracted from the focal points of what the issues were) [https://perma.cc/53CA-XWGF].

109. *See* Wartzman, *supra* note 107 (analyzing benefits of being unionized).

110. NBPA: ABOUT (showing the history and general information about the NBA Players Association) [https://perma.cc/C3XL-5PB3].

111. *See id.* (explaining opportunities presented to union members).

112. *See Play for Change*, NBPA: PRESS RELEASES (Sept. 15, 2020) (promoting the actions of NBA players in protesting systemic racism and reestablishing commitment to social justice through increased initiatives and amplification of athlete voices) [https://perma.cc/XGJ4-ZMCH].

113. *See* Rohan Nadkarni, *College Football Players Need a Union Now More Than Ever*, SPORTS ILLUSTRATED (July 2, 2020) (promoting the unionization of college athletics and the existing association designed to protect athletes) [https://perma.cc/P258-A6GN].

114. *See Mission & Goals*, NAT'L COLL. PLAYERS ASS'N (elaborating on goals the association seeks to reach for athlete rights) [https://perma.cc/V9N6-8SC2].

transfer rules, the NCPA is another key advocate for the push for NIL compensation and COVID-19 protections.[115]

Ramogi Huma, president of the NCPA, believed that the push of players to return to campus amid the COVID-19 pandemic was the prime time to organize into a true labor union.[116] Using professional league examples of efforts to protect athletes, as mentioned above, Huma discussed the ability of those athletes to have a mechanism to voice concerns and not be "isolated or coerced into taking risks they are not comfortable with."[117] Collegiate football coaches have regarded players as "test cases," with the ability to use them as a "trial and error" run before the student bodies returned to campus.[118] Comparing the ability of professional athletes to negotiate with their respective leagues, college athletics appear to be a "system of fear and power dynamics that's being used to stomp out the voices of these athletes."[119]

C. Economic Feasibility of Compensation

A recent study released by the National Bureau of Economic Research discovered that less than seven percent of the revenue generated by the NCAA is given back to football and men's basketball players through their scholarships and living stipends.[120] For comparison, professional athletes for the National Football League ("NFL") and the NBA receive approximately fifty percent of the revenue generated by their athletic activities in the

115. *See id.* (listing the elimination of NIL restrictions and establishing mandatory health and safety standards as key goals of the association).

116. *See* Nadkarni, *supra* note 113 (discussing the rush to return athletes to campus during the pandemic under threat of losing nearly $4 billion if football season did not occur).

117. *Id.*

118. *See id.* (recounting statements coaches made to athletes regarding COVID-19 protection measures).

119. *See id.* (discussing how the pandemic and ongoing fight for racial equality have exposed hypocritical systems including college athletics).

120. *See* Tommy Beer, *NCAA Athletes Could Make $2 Million a Year if Paid Equitably, Study Suggests*, FORBES (Sept. 1, 2020, 1:03 PM) (breaking down study completed by the National Bureau of Economic Research regarding the redistribution of revenue made by the NCAA) [https://perma.cc/R32N-4RPH].

form of salary.[121] While the NCAA hides behind the shield of amateurism, the economic reality is that "athletic departments have developed into complex commercial enterprises that look far more like professional sports organizations than extracurricular activities."[122] The NCAA's proposal would force athletes seeking compensation to contract with third-parties, undoubtedly benefitting those athletes who have achieved stardom.[123] Results would be fairer to every athlete, not just the recognizable quarterback or point guard, if the NCAA or member universities were to take accountability in compensating their athletes rather than contracting with third parties for NIL benefits, but the availability of endorsements could be a step in the right direction.[124]

1. Who Profits from Amateurism? The Case of Rent-Sharing and Fair Market Value

Amateur athletics in the United States prevents student athletes from sharing in any of the profits generated by their participation—creating substantial economic rents for universities.[125] Economic rent is defined as an amount of money earned that exceeds that which is economically or socially necessary, which often arises in instances of market inefficiencies or information asymmetries.[126] By compiling data from college

121. *See id.* (juxtaposing professional sports statistics with the study results).

122. *See* Craig Garthwaite, Jordan Keener, Matthew J. Notowidigdo & Nicole F. Ozminkowski, *Who Profits From Amateurism? Rent-Sharing in Modern College Sports* (Nat'l Bureau of Econ. Res., Working Paper No. 27734, 2020) [https://perma.cc/37JW-QM87].

123. *See* Michael McCann, *Legal Challenges Await After NCAA Shifts on Athletes' Name, Image and Likeness Rights*, SPORTS ILLUSTRATED (Apr. 29, 2020) (discussing the availability of endorsement deals from third parties for highly recognizable men's basketball and football stars) [https://perma.cc/RYA9-3YZ8**]**.

124. *See id.* (noting how the availability of third-party compensation is the most beneficial to men's basketball and football players, but how female athletes could also benefit from NIL).

125. *See* Garthwaite et al., *supra* note 122 (referencing study conducted by the National Bureau of Economic Research).

126. *See* Adam Hayes, *Economic Rent*, INVESTOPEDIA, (last updated Jan. 19, 2020) (defining economic rent and common instances where it arises) [https://perma.cc/6Z5V-NFCW].

athletics departments for revenue producing football teams, it was found that the rent-sharing effectively transfers resources away from students who are more likely to be Black and more likely to come from poor neighborhoods.[127]

Due to the successful nature of Power Five[128] conferences in athletic play, the athletic departments in those schools are able to negotiate media rights packages and typically self-sustain on revenue generated directly by the activities of the athletic department, which closely represents a commercial enterprise generating economic rents.[129] Without delving into the economic models that show the distribution of revenue at this time, it is yet another way athletes are systematically denied compensation they have earned.[130]

Football and men's basketball are the consistent revenue-producing sports at NCAA institutions—and nearly fifty percent of the athletes participating are Black.[131] Advocates of change have long stated that the Black athlete is the backbone of the process of producing tremendous wealth—with nearly every other person involved with the process profiting off of the uncompensated labor of these players.[132] Rent-sharing studies have found that the efforts of athletes in revenue sports—football and men's

127. *See* Garthwaite et al., supra note 122 (analyzing data to determine Black and lower-income students were those most impacted by rent-sharing).

128. *See id.* (noting that the Power Five conferences include the Big Ten, PAC-12, Big 12, Southeastern Conference ("SEC"), and the Atlantic Coast Conference ("ACC")).

129. *See id.* (explaining that the study uses Power Five schools as the main sample for the rent-sharing analysis due to the self-sufficient nature of the athletics programs).

130. *See id.* (creating a wage structure similar to those in professional sports leagues to analyze the college athletics data showing the transfer of sources away from student athletes).

131. *See id.* (breaking down demographics of Power Five conference football team rosters by race).

132. *See* Lulu Garcia-Navarro, *Activist on California NCAA Law*, NPR: SPORTS (Oct. 6, 2019, 7:59 AM) (interviewing Harry Edwards, professor at University of California at Berkeley and former NCAA athlete on the exploitation of Black athletes resulting from lack of compensation for labor) [https://perma.cc/S3N7-VBD7].

basketball—generate the economic rents contributing to coaches' salaries and spending on other sports.[133]

If the industry were to be governed by revenue-sharing agreements, the fair market values of these revenue-sport athletes demonstrate the magnitude of the economic injustice.[134] Using information from the Equity in Athletics Disclosure Act,[135] the average fair market value of a Division I football player per academic year would equal approximately $208,202—or $832,832 over a four-year span of time.[136] If belonging to a Power Five Conference, those numbers jump to $337,755 and $1,351,020, respectively.[137] For men's basketball players belonging to Power Five and Big East Conference institutions, the study found their value to be $551,183 per academic year, totaling $2,204,733 over the standard four-year period of play.[138]

Furthermore, based on decades of data, college athletes of color in football and men's basketball have a lower graduation rate than those of other students, athletes, and their teammates.[139] Research shows that students with greater financial security are more likely to graduate from college.[140] According to a report comparing six-year graduation rates between 2016 and 2018, Black athletes were graduating at rates that were nineteen percent behind those for undergraduate students, and Black male

133. *See* Garthwaite et al., *supra* note 122 (discussing that the average Power Five conference football coaching staff was paid approximately $9.6 million—capturing approximately 7.75% of overall revenue).

134. *See* Ramogi Huma, Ellen J. Staurowsky & Lucy Montgomery, *How the NCAA's Empire Robs Predominantly Black Athletes of Billions in Generational Wealth*, NAT'L COLL. PLAYERS ASS'N 1, 2–3 (2020) (examining studies estimating the fair market value of football and men's basketball players divided by conference) [https://perma.cc/2NJT-NCB7].

135. 20 U.S.C.§ 1092 (2018).

136. *See id.* at 2 (noting the value of a NCAA Division I Football Bowl Series athlete).

137. *See id.* at 2–3 (including conferences like the Atlantic Coast Conference, Big Ten, Big 12, PAC-12, Southeastern Conference and independent programs like Brigham Young and Notre Dame).

138. *See id.* at 3 (referencing the same conferences as the football analysis).

139. *See id.* at 9 (comparing graduation rates of athletes in by race).

140. *See id.* at 5 (referencing a Pell Institute study in which students from wealthy families had a high probability of receiving an undergraduate degree, while only 10% of those from the lowest economic quartile would finish their degrees).

athletes were graduating at rates five percent lower than Black undergraduate men overall.[141] Of the sixty-four teams that participated in the NCAA March Madness tournament in 2017, the players had a federal graduation rate that was 21.5% behind that of students at their colleges and universities.[142] Because statistics show that Division I teams consisted predominantly of Black athletes (fifty-six percent), racial minorities produced the most revenue, yet suffered the lowest graduation rates for their respective institutions.[143]

2. Prospective Compensation Models

The common argument against compensation for collegiate athletes is based on the inability to pay athletes or the possible creation of bidding wars over top-level recruits.[144] This section is intended to provide a brief summary of several economic models that researchers have created to demonstrate that there are viable options available for the NCAA to pursue.

One of the more popular models has been coined "The Duke Model," and it was proposed by Professor David Grenardo.[145] Under this model, athletes would be eligible to receive compensation in the following ways:

> 1) A base compensation system that pays football players based on how many games a player started, and whether the athlete is a starter, back-up, or third stringer. Men's basketball players

141. *See id.* at 9 (referencing a report conducted by Southern California's Center on Race and Equity on the NCAA Power Five schools).

142. *See id.* (citing research conducted on federal graduation rates versus the NCAA-created "graduation success rate," where the numbers often differ).

143. *See id.* at 6 (citing data drawn from the NCAA Race and Gender Demographics Database).

144. *See* Cody J. McDavis, *Paying Students to Play Would Ruin College Sports*, N.Y. TIMES (Feb. 25, 2019) (positing that paying athletes would distort the economics of college sports and hurt the broader community of student-athletes) [https://perma.cc/5963-WKYG].

145. *See* David A. Grenardo, *The Duke Model: A Performance-Based Solution for Compensating College Athletes*, 83 BROOK. L. REV. 157, 164 (2017) (offering a structure that slows for "consistency, a level of uniformity, predictability, and opportunity for every university to participate").

> would be compensated similarly, based on an average of minutes played during a season.
>
> 2) Compensation based on statistical or external athletic achievement or honors (Heisman Trophy winners, All-American honors, etc.).
>
> 3) Compensation based on an athlete's academic performance.[146]

This model closely mirrors what would be seen in a structured, negotiated agreement between the players, the NCAA, and member institutions.[147] This model works by separating conferences, thus allowing the flexibility to function with both the highest revenue producers to the lowest.[148]

Other scholars have pursued the revenue-sharing route, but in a way that would compensate all college athletes, not just those in the most prominent sports.[149] This particular model aims to practically provide student athletes with an equitable share of the revenue they help produce for their athletic departments—allowing athletes in sports such as track and field, soccer, and golf to have the opportunity to make financial gains.[150] By considering factors such as team performance, percentage of revenue produced by each individual athletic team, and individual performance, athletes would have the opportunity for immediate payout, but also earned funds would be held in trust funds to be released after

146. *See* Jason Scott, *Professor Proposes Pay for College Athletes*, ATHLETIC BUS. (Apr. 4, 2017) (summarizing Professor Grenardo's proposal) [https://perma.cc/ADV8-D98M].

147. *See* Paul Steinbach, *Law Professor Promotes Way to Pay College Athletes*, ATHLETIC BUS. (June 29, 2017) (interviewing Grenardo on his proposal) [https://perma.cc/KXK4-E34V].

148. *See id.* (addressing how the Model would prevent conferences that produce lower revenue from arguing they could not afford to pay players).

149. *See* Mike Stocz, Nicholas Schlereth, Dax Crum, Alonzo Maestas, and John Barnes, *Student-Athlete Compensation: An Alternative Compensation Model for All Athletes competing in NCAA Athletics*, 1 J. OF HIGHER EDUC. ATHLETICS & INNOVATION 82, 88 (2019) (framing how revenue-sharing models could include all sports, not only the highest revenue sports).

150. *See id.* at 87 (introducing the market economy-based compensation model the researchers proposed).

the student graduates.[151] This model would provide compensation to student athletes, but also promote academic success and high graduation rates.[152]

Additionally, other proponents of athlete compensation have proposed the Olympic Model.[153] Under this model, amateur athletes have access to the commercial free market, giving them the ability to secure endorsement deals, get paid for signing autographs, or to accept compensation for NIL.[154] This model would not be equitable to all athletes, as many factors such as sport played, success on the playing field, or even geographic location of the school, could make an impact on the type of endorsement deals available.[155] However, the idea that compensation could be an even playing field in the first place may be an unattainable goal.[156] As Southeastern Conference Commissioner Mike Slive stated, "there are significant differences between institutions in resources, climate, tradition, history, stadiums and fan interest . . . " that make the idea of a level playing field "an illusion."[157]

IV. The Impact of Antitrust Litigation

The NCAA has been battered by several antitrust suits in the past, and it received its latest slap with the Supreme Court's recent decision in *National Collegiate Athletic Association v. Alston*.[158] Previously in *O'Bannon v. National Collegiate Athletic*

151. *See id.* at 88–89 (explaining the factors and how the model would compensate student athletes accordingly).

152. *See id.* at 89 (discussing how the contingency of graduation would benefit the model).

153. *See* Ramogi Huma & Ellen J. Staurowsky, *The Price of Poverty in Big Time College Sports*, NAT'L COLL. PLAYERS ASS'N 1 (2011) (conducting study exploring how full scholarships do not cover all expenses of a student athlete and how the Olympic Model could be an appropriate remedy) [https://perma.cc/WY5Z-9GL5].

154. *See id.* at 5 (discussing that the international definition of amateurism used by the Olympics allows access to the free market for athletes to profit).

155. *See id.* at 26 (addressing arguments against implementing the Olympic Model).

156. *See id.* (acknowledging the inherent disparities that already exist among athletes and institutions).

157. *Id.*

158. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

Association,[159] the Ninth Circuit determined that the NCAA's compensation rules were subject to antitrust scrutiny, and the group of athletes that brought the class action suffered an antitrust injury as a result of those rules.[160] There, the plaintiffs were current and former college football and men's basketball players, alleging violations from restraining trade in relation to NIL.[161] Significantly, the court rejected the argument that *NCAA v. Board of Regents of the University of Oklahoma*[162] gave authority to the proposition the NCAA's rules are presumed valid or exempt from antitrust scrutiny.[163] Instead, the Ninth Circuit applied what is known as the "rule of reason" test:

> [1] The plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market. [2] If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's procompetitive effects. [3] The plaintiff must then show that any legitimate objectives can be achieved in a substantially less restrictive manner.[164]

When applying the above test to the facts, the court found that when, "[NCAA] regulations truly serve procompetitive purposes, courts should not hesitate to uphold them."[165] While affirming the NCAA is subject to antitrust scrutiny, the court firmly struck down the idea of small cash payments to athletes for compensation.[166]

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159. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1066 (9th Cir. 2015) (holding that the NCAA's compensation rules are within the ambit of the Sherman Act).

160. *See id.* at 1067 (determining the rules, having foreclosed the market in part, resulted in injury).

161. *See id.* at 1055 (detailing how O'Bannon discovered he was being depicted in a video game without his consent).

162. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984) (affirming the Court of Appeals decision that the Sherman Act applies to NCAA members' contracts with television networks).

163. *See O'Bannon*, 802 F.3d at 1063 (finding that the lengthy discussion of amateurism rules was dicta, and therefore the court was not bound to conclude every NCAA rule relating to amateurism automatically valid).

164. *Id.* at 1070 (quoting Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)).

165. *Id.* at 1079.

166. *See id.* at 1078–79 (discussing that offering athletes cash sums untethered to educational expenses is a "quantum leap" in compensation).

In early 2020, the Ninth Circuit once again took up the topic of college athlete compensation through an antitrust lens.[167] In this decision, the court considered an appeal of an order enjoining the NCAA from enforcing rules that restricted the education-related benefits that member institutions may offer Football Bowl Division ("FBS") and Division I basketball players.[168] Determining that *O'Bannon* was a decision of limited scope and did not preclude the litigation, the court once again applied the Rule of Reason test and affirmed the lower court's decision that the limits were anticompetitive under federal antitrust law and upheld the injunction in all respects.[169]

The injunction upheld in the decision mandated that the NCAA would have no ability to limit benefits, including scholarships to complete undergraduate or graduate degrees at any school, nor to limit the provision of equipment or benefits including study-abroad programs, paid post-eligibility internships, or tutoring.[170] The NCAA appealed the case to the Supreme Court, with Chief Legal Officer Donald Remy stating that "the NCAA and its members continue to believe that college campuses should be able to improve the student-athlete experience without facing never-ending litigation regarding these changes."[171] The court foreshadowed the decision in the appeal, with Judge Smith writing in her concurring opinion that:

> The treatment of Student-Athletes is not the result of free market competition. To the contrary, it is the result of a cartel

167. *See* In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239 (9th Cir. 2020), *cert. granted sub nom.* Am. Athletic Conference v. Alston, 141 S. Ct. 972 (2020), and *cert. granted sub nom*. NCAA v. Alston, 141 S. Ct. 1231 (2020) (affirming the decision that the NCAA limits on education-related benefits do not "play by the Sherman Act's rules") (citation omitted).

168. *See id.* at 1243 (discussing the background of the appeal).

169. *See id.* at 1256–66 (analyzing the district court's decision and agreeing with the reasoning).

170. *See* Steve Berkowitz, *Judge's Ruling Stands: NCAA Can't Limit College Athletes' Benefits That Are Tied to Education*, USA TODAY (May 18, 2020, 4:09 PM) (discussing the details of the injunction from the ruling) [https://perma.cc/4XLM-56NE].

171. Melissa Quinn, *Supreme Court Takes Up NCAA Antitrust Dispute Over Compensation for College Athletes*, CBS NEWS (Dec. 16, 2020, 11:09 AM) [https://perma.cc/24QB-MJ5A].

> of buyers acting in concert to artificially depress the price that sellers could otherwise receive for their services. Our antitrust laws were originally meant to prohibit exactly this sort of distortion.[172]

A. National Collegiate Athletic Association v. Alston

In recent years, the NCAA has continued to modify amateurism rules at a rapid pace with the influx of litigation regarding antitrust and labor laws.[173] Most recently before the Supreme Court of the United States was the *National Collegiate Athletic Association v. Alston*,[174] in which current and former student athletes brought an antitrust lawsuit challenging the NCAA-mandated restrictions on compensation—specifically that the rules violate § 1 of the Sherman Act.[175] It is important to note the Supreme Court only considered the subset of rules that restrict education-related benefits, not a full-spectrum challenge of restraints on athlete compensation.

Many issues most commonly debated in antitrust litigation were uncontested in the case.[176] For example, the parties did not challenge the definition of the relevant market, that the NCAA enjoys monopoly control in that labor market, nor that member schools compete for athletes but remain subject to enforced limits on the amount of compensation that can be offered.[177] Instead, the Court viewed this as a suit involving "admitted horizontal price

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172. In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1267 (9th Cir. 2020), *cert. granted sub nom.* Am. Athletic Conference v. Alston, No. 20-520, 2020 WL 7366279 (U.S. Dec. 16, 2020), and *cert. granted sub nom.* NCAA v. Alston, No. 20-512, 2020 WL 7366281 (U.S. Dec. 16, 2020).

173. *See* Jayma Meyer & Andrew Zimbalist*, A Win Win: College Athletes Get Paid for Their Names, Images, and Likenesses and Colleges Maintain the Primacy*, 11 J. OF SPORTS & ENT. L. 247, 254 (2020) (stating the NCAA has continued to go through rule modifications).

174. National Collegiate Athletic Association v. Alston, 594 U.S. *1 (2021).

175. *See* 15 U.S.C. § 1 (2018) (prohibiting "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce"); *see also Alston*, 594 U.S. at *1 (challenging the regulations under the Sherman Act).

176. *See Alston,* 594 U.S. at *14 (challenging the regulations under the Sherman Act).

177. *See id.* (highlighting what the parties did not challenge).

fixing in a market where the defendants exercise monopoly control."[178] The main point of issue stemmed from the NCAA's argument the standard antitrust "rule of reason" analysis[179] was inapplicable.[180]

However, the Court found that the rule of reason applies to restrictions on education-related benefits.[181] Although the NCAA argued that the courts should have given the restrictions a "quick look," the Court determined that the issues presented are far too complex of questions to not perform a fact-specific antitrust analysis on the anticompetitive effects.[182] After rejecting arguments that the NCAA should be exempt due to it being a joint venture, that an aside in *Board of Regents*[183] declared compensation restrictions procompetitive in 1984 and forevermore, and that the Sherman Act did not apply to noncommercial enterprises, the Court upheld the use of the rule of reason and the injunction prohibiting restrictions on education-related benefits to student athletes.[184]

Notably, the Court cites to the Ninth Circuit stating that "[t]he national debate about amateurism in college sports is important . . . [b]ut our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law."[185] Even

178. *Id.*

179. The "rule of reason" standard consists of a three-part test to determine if the alleged restraint is unreasonable. *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1256 (9th Cir. 2020) (discussing the three-part framework). The plaintiffs must first show the challenged practice unreasonably restrains competition in the relevant market. *Id.* Once shown, defendants must show a pro-competitive justification for the practice. *Id.* Finally, the burden shifts back to plaintiffs to show there is a less-restrictive alternative available. *Id.*

180. *Alston,* 594 U.S. at *15 (stating "the rule of reason" standard consists of a three-part test to determine if the alleged restraint is unreasonable).

181. *See id.* at *31.

182. *Id.* at *21.

183. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 113 (1984) (comparing Board of Regents to the current NCAA case).

184. *See Alston*, 594 U.S at *22 (summarizing what the Court previously found in regard to the Sherman Act) (citing to Nat'l Collegiate Athletic Ass'n, 468 U.S. at. 101–02).

185. *Id.* at *35.

in argument, the NCAA asked the Court to "defer to its *conception* of amateurism," in which the district court found it had not adopted any consistent definition.[186] Although the NCAA claimed the district court erred by "impermissibly redefin[ing]" its "product" by rejecting its views about what amateurism requires, the Supreme Court agreed that the rules and regulations regarding compensation have "shifted markedly" over time, and that the analysis was not product redesign, but instead a straightforward application of the rule of reason.[187]

Justice Kavanaugh raised many issues not addressed by the Court in his concurring opinion relating to the legal arguments the NCAA may, or may not have, in defense of its remaining compensation laws. However, he also acknowledged difficult policy and practical questions that would almost certainly arise from the abolishment of these compensation rules not impacted by the *Alston* decision.[188] For example, he asked:

> How would paying greater compensation to student athletes affect non-revenue-raising sports? Could student athletes in some sports but not others receive compensation? How would any compensation regime comply with Title IX? If paying student athletes requires something like a salary cap in some sports in order to preserve competitive balance, how would that cap be administered? And given that there are now about 180,000 Division I student athletes, what is a financially sustainable way of fairly compensating some or all of those student athletes?[189]

Kavanaugh finished his concurrence with a declaration that, regardless of the important traditions that have become "part of the fabric of America . . . The NCAA is not above the law."[190] This seemingly invited not only litigation to resolve the remaining questions he framed, but also legislation as a solution for the NCAA's compensation regime to comply with antitrust laws.

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186. *Id.* at *29–30 (emphasis added).

187. *Id.* at *30

188. *See Id.* at *2–3 (Kavanaugh, B., concurring) (explaining rules which violate antitrust laws present difficult questions).

189. *Id.* at *4–5 (Kavanaugh, B., concurring).

190. *Id.* at *5.

V. Pushes for Legislative Reform

While *Alston* provided the answer that the NCAA is not allowed to cap benefits for education-related expenses under antitrust provisions, the decision still leaves many hotly debated issues wide open. One of the most pressing issues is how to regulate NIL compensation.[191]

A chain reaction of legislative pushes began in the fall of 2019, started by California Governor Gavin Newsom signing Senate Bill 206 on September 27, which became known as the Fair Pay for Play Act.[192] This Act is designed to enable college athletes to sign endorsement deals and hire agents, all while protecting their collegiate eligibility.[193] Written with the intent to ensure appropriate protections are in place to avoid exploitation of student athletes, colleges, and universities, Newsom wrote that "the bill simply and rightfully allows student athletes to benefit from the multi-billion dollar enterprise of which they are the backbone."[194] It passed both the Assembly (73-0) and the Senate (39-0) without a single no vote, and prompted a significant increase in other states and federal legislators introducing similar legislation.[195]

Other state legislatures took it upon themselves to create NIL bills—with many having effective dates of July 1, 2021.[196] For example, in June 2020, U.S. Senator Marco Rubio introduced the Fairness in Collegiate Athletics Act.[197] This bill would require the NCAA to implement rules compensating student athletes for

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191. *Id*. at *35 (stating an issue on which the court did not definitively rule).

192. *See* Matt Norlander, *California Governor Signs Law Allowing College Athletes to be Paid for Name, Image and Likeness as NCAA Protests*, CBS SPORTS (Sept. 30, 2019, 6:49 PM) (discussing the significance of the passing of the bill) [https://perma.cc/8LQB-AZCE].

193. *See id.* (detailing highlights of the Fair Pay to Play Act passed in California).

194. *Id.*

195. *See* Gregory, *supra* note 38 (discussing the overwhelming support of the California law).

196. *See Tracker: Name, Image and Likeness Legislation by State*, BCS: BUS OF COLL SPORTS (June 28, 2021), (listing Alabama, Florida, Georgia, Mississippi, New Mexico, Texas, Kentucky and Ohio) [https://perma.cc/KK4M-7MDG].

197. *See* Fairness in Collegiate Athletics Act, S. 4004, 116th Cong. (2020) (requiring an intercollegiate athletic association to establish a policy that permits a student athlete to earn compensation).

name, image, and likeness from third parties; additionally, collegiate athletes would be permitted to obtain professional representation by way of an agent—a benefit once reserved for athletes only after their amateurism status had been lost.[198] Any violation of the Act would be treated as an unfair or deceptive act or practice under the Federal Trade Commission Act, which defines such behaviors as unlawful.[199] Significantly, no cause of action can be brought against the NCAA or an academic institution for the adoption or enforcement of a policy, rule, or program established from the Act, thus creating a legal shield for compliance.[200] However, this federal proposal by Rubio directly counteracts the state bill signed into law by Florida Governor Ron DeSantis.[201] The Intercollegiate Athlete Compensation and Rights bill authorizes college athletes to earn compensation for use of NIL and prohibits universities from preventing such compensation.[202]

California's Fair Pay to Play Act, and the subsequent flood of proposed legislation, caused backlash from the NCAA.[203] The NCAA lobbied against SB 206 after its introduction into the legislature, even going as far as threatening to prohibit all of California's fifty-eight member institutions from postseason play if the bill went into effect on the specified 2023 date.[204] Additionally, the NCAA created a committee referred to as the Federal and State Legislation Working Group ("Working Group") to investigate

198. *See id.* § 3(1)(B) (referencing the Sports Agent Responsibility and Trust Act, 15 U.S.C. 7802, which sets requirements for professional representation).

199. *See* 15 U.S.C. § 57a(a)(1)(B) (2018) (referencing 15 U.S.C. § 45(a)(1), in which unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful).

200. *See* Fairness in Collegiate Athletics Act, § 4(b) (providing an exception section allowing intercollegiate athletic associations a shield if found to be acting in good faith compliance with the Act).

201. *See generally,* Intercollegiate Athlete Compensation and Rights, SB 646 (Fla. 2020).

202. *See id.* (listing details of the bill).

203. *See generally*, Michael Long, *Fair Pay to Play: Is the NCAA learning an expensive lesson?*, SPORTSPRO (Oct. 18, 2019) [https://perma.cc/J2NZ-MCC3].

204. *See id.* (describing the bill and NCAA's lobbying efforts).

possible responses to the proposed legislation regarding NIL.[205] In a report submitted to the NCAA's Board of Governors, the Working Group recommended that the NCAA draft its own Pay for Play framework that is "consistent with NCAA values and principles and legal precedent."[206]

In addition to representatives promoting their own proposed federal legislation, the Working Group also recommended Congressional action.[207] These recommendations included engaging Congress to ensure federal preemption of state NIL laws, establishing antitrust exemptions for the NCAA, safeguarding the nonemployment status of athletes, and maintaining a distinction between college athletes and professional athletes.[208] However, in asking Congress for help, the NCAA opened the doors for even more scrutiny and criticism regarding athlete welfare.[209] Several congressional members are seeking more than just reform within NIL laws—instead putting an emphasis on "reforms with real teeth and real protection for the athletes."[210] While narrow NIL laws are a step in the right direction in compensation, they still restrict the protection of student athletes in other areas and prevent the gain of warranted rights.[211]

With the directly counteracting state versus federal laws, the pressure increased on the NCAA and federal lawmakers to find a

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205. *See* Michelle Brutlag Hosick, *NCAA Working Group to Examine Name, Image and Likeness*, NCAA (May 14, 2019, 2:40 PM) (discussing the appointing of a board and the positions it will examine) [https://perma.cc/39CF-KY9M].

206. *NCAA Board of Governors Federal and State Legislation Working Group Final Report and Recommendations*, 8 (April 17, 2020) [https://perma.cc/P6E8-HSUY].

207. *See id.* at 25–27 (urging the NCAA Board of Governors to engage Congress).

208. *See id.* at 27 (listing goals for the Board of Governors to reach for in Congressional action).

209. *See* Emily Giambalvo, *As the NCAA Asks Congress for Help on NIL Legislation, Lawmakers Want More Rights for College Athletes*, WASH. POST (July 23, 2020, 5:39 PM) (discussing feedback received by the NCAA upon requesting national standards in NIL legislation and an antitrust exemption from Congress) [https://perma.cc/A9GX-2QF4].

210. *See id.* (quoting U.S. Senator Richard Blumenthal criticizing the way the NCAA has approached compensating college athletes).

211. *See id.* (discussing the need to broaden the lens beyond endorsement deals and include basic rights and athlete welfare).

nationwide solution to varying NIL compensation models.[212] Due to the steady increase in legislation regarding compensation related to NIL, the NCAA's Board of Governors created a deadline of January 2021 for a workable athlete compensation framework.[213] The tentative plans would allow players to profit from fame, on the condition that they will not be treated as employees.[214] A statement released by the NCAA said that the modernization of the compensation rules should fall within certain guidelines, including: "[T]he clear distinction between collegiate and professional opportunities, that compensation for athletics performance or participation is impermissible, and that student athletes are students first, not employees of the university."[215] The compensation allowed to these athletes is strictly from third-party sources—not the NCAA, member schools or conferences.[216] Therefore, athletes must contract with outside parties to receive compensation, and then they must disclose the details with their respective schools.[217] Additionally, athletes would not be allowed to use their schools' logos or brands—as these are personal deals made in their individual capacities.[218]

212. *See* Dan Murphy, *NCAA, Congress Have a Labyrinth of Options, But NIL Clock Still Ticking*, ESPN (Dec. 17, 2020) (discussing the variety of legislation that has been proposed thus far) [https://perma.cc/85A2-MJ2P].

213. *See* Billy Witz, *NCAA is Sued for Not Paying Athletes as Employees*, N.Y. TIMES (Nov. 6, 2019) (referencing statement released by NCAA that was spurred by the passing of the California Act rewarding collegiate athletes for the use of their name, image and likeness) [https://perma.cc/F7F8-XU2V].

214. *See id.* (noting the restrictions put on the potential NIL framework).

215. *See Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunity*, NCAA: NEWS (Oct. 29, 2019, 1:08 PM) (citing principles and guidelines the NCAA governing board wishes to utilize in updating compensation rules) [https://perma.cc/HEX2-UX9B].

216. *See* Ralph D. Russo, *Skeptics Loom as NCAA Builds Guardrails Around Compensation*, NBC PHILA. (Apr. 29, 2020, 8:34 PM) (breaking down the details of the proposed NCAA plan) [https://perma.cc/SF9T-UGA6].

217. *See id.* (discussing how the NCAA would like to build "guardrails" around third-party compensation by monitoring deals made and requiring the disclosure of details).

218. *See id.* (giving the example of a star quarterback being unable to wear the recognizable Clemson tiger paw).

However, the NCAA announced January 11, 2021, that the vote on athlete compensation rules would be delayed.[219] In a statement, the Division I Council said that it "remains fully committed to modernizing Division I rules in ways that benefit all student-athletes," and that "external factors" required the pause in voting for the proposed legislation.[220] Additionally, pressure from the Justice Department's antitrust division may have added to the delay.[221] According to a letter sent on behalf of the Department, parts of the NCAA's prospective approach to the NIL deals may "raise concerns under the antitrust laws."[222]

The refusal to vote on NIL legislation came on an important date in college athletics—the college football national championship game.[223] To advocates for change in the system, the denial to vote on compensation legislation on the day of the biggest money-making game in college football was a "slap in the face to college athletes."[224] The Division I, II, and III Student-Athlete Advisory Committees ("SAAC"), consisting of current athlete representatives from member schools, released a statement disclosing the "disappointment" felt by the delay in the vote on NIL.[225] To several lawmakers invested in increasing the rights of

219. *See* Dan Murphy & Adam Rittenburg, *NCAA Delays Vote to Change College Athlete Compensation Rules*, ESPN (Jan. 11, 2021) (discussing the NCAA's decision to indefinitely delay the vote on the proposed rule change regarding compensation) [https://perma.cc/F6D8-2GZS].

220. *Id.*

221. *See* Steve Berkowitz and Christine Brennan, *Justice Department Warns NCAA Over Transfer and Name, Image, Likeness Rules*, USA TODAY (Jan. 8, 2021, 4:00 PM) (discussing the letter sent by the Justice Department to NCAA President Mark Emmert presenting issues with the rules that were to be voted on at the upcoming Division I Counsel meeting) [https://perma.cc/6PMM-GAPE].

222. *Id.*

223. *See Alabama vs. Ohio State: Date, Time, TV Channel for the 2021 National Championship Game,* NCAA.COM (Jan. 12, 2021) (summarizing the need-to-know information regarding the game and the outcome) [https://perma.cc/KW6W-SMTH].

224. *See NCAA Refusal to Vote on NIL Pay is "Slap in the Face" to Athletes*, NAT'L COLL. PLAYERS ASS'N: NCPA PRESS RELEASES & ADVISORIES (Jan. 11, 2021) (quoting NCPA Executive Director Ramogi Huma's statement on the refusal of the NCAA committee to vote on the proposed legislation) [https://perma.cc/WB9Y-4DQL].

225. *See Student-Athlete Committees Issue Joint Statement on Name, Image, Likeness Legislation Delay*, NCAA: NEWS (Jan. 15, 2021) (discussing the belief that the recommendations developed align with the best interests of student

student athletes, the action by the NCAA does not create meaningful legislation to protect athletes but instead does nothing more than protect their deep pockets and pacify those pushing for change.[226]

A. Current NIL Law

Due to this patchwork of state law and the impending state legislation effective dates, the NCAA adopted an interim policy suspending amateurism rules relating to NIL that took effect July 1, 2021.[227] Specifically, the policy allows college athletes to engage in NIL activities consistent with the law of the state where the school is located; if the state does not have NIL laws in place, college athletes may engage in similar activity under a school-created policy without violating NCAA NIL rules.[228] Athletes are allowed to use professional services providers for NIL activities. [229] While temporarily removing restrictions on NIL-related regulations, the NCAA remains committed on avoiding pay-for-play and improper inducements as a recruiting tool.[230]

NIL, also sometimes called right to publicity, will allow college athletes to accept money in exchange for featuring in advertisements and/or products.[231] Just on the first day of allowing NIL compensation, many athletes have been able to cash in on

athletes and the dedication to see it passed as soon as possible) [https://perma.cc/ZM66-NAA7].

226. *See* Ryan Nicol, *Chip LaMarca Bashes Proposed NCAA Changes on Athlete Compensation*, FLAPOL (Apr. 29, 2020) (quoting Chip LaMarca, a Florida lawmaker, regarding the blame shifting done by the NCAA caused by the push in state attempts to protect student athletes) [https://perma.cc/626W-QV9T].

227. *See* Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA.ORG (June 30, 2021, 4:20 PM) (announcing the interim policy and describing what it provides for student athletes) [https://perma.cc/MXC2-NSH5].

228. *Id.*

229. *Id.*

230. *Id.*

231. *See* Dan Murphy, *NCAA Name, Image and Likeness FAQ: What The Rule Changes Mean For The Athletes, Schools And More*, ESPN (June 30, 2021), (providing information on the NCAA approved NIL compensation plan) [https://perma.cc/5MPN-QSKR].

their rights to sell their names, images and likenesses.[232] For example, twin sisters and basketball stars Hanna and Haley Cavinder signed a deal with Boost Mobile just minutes after midnight.[233] However, it is still not a complete free market—schools or state laws may still restrict athletes on regards to what they endorse.[234] For example, athletes cannot endorse alcohol, tobacco, or gambling products in many places.[235]

It is important to remember that this is compensation from third parties only.[236] Almost all state laws and the NCAA's interim policy explicitly prohibit schools from paying the athletes directly—thus keeping athletes clearly distinguishable from employees.[237] This interim NCAA policy is in place until federal legislation or definitive NCAA rules are adopted.[238] The recent decision of *Alston* finding that compensation caps violate antitrust law is likely the reason that the NCAA took this more laissez faire approach in allowing schools to create NIL policies with few guidelines.[239] NCAA President Mark Emmert stated they will "continue to work with Congress to develop a solution that will provide clarity on a national level . . . [t]he current environment—both legal and legislative—prevents us from providing a more permanent solution and the level of detail student-athletes deserve."[240] However, Congress does not seem to be nearing a consensus on how to approach NIL.[241] This has become a bipartisan issue, with Republicans wishing to keep legislation

232. *See* Dan Murphy, *Let's Make a Deal: NCAA Athletes Cashing in on Name, Image and Likeness*, ESPN (July 1, 2021, 11:37 AM), (discussing deals several NCAA athletes were able to secure) [https://perma.cc/PY5E-N4QC].

233. *Id.* (providing an example of one of the deals NCAA athletes were able to secure).

234. *See* Murphy, *supra* note 231 (describing the rules on the NCAA approved NIL compensation plan).

235. *Id.* (stating an example of the limitations on what athletes can do).

236. *Id.* (highlighting the scope of the compensation limitations).

237. *Id.* (explaining the purpose of the rules prohibiting schools from paying athletes directly).

238. *Id.* (noting the temporary nature of the policy).

239. *See generally* National Collegiate Athletic Association v. Alston, 594 U.S. *1 (2021); Hosick, *supra* note 227.

240. Hosick, *supra* note 227.

241. *See* Murphy, *supra* note 231 ("Members of Congress have yet to agree on what should be included in a national law.").

narrow to allowing third-party compensation, while Democrats see this as an opportunity to allow a more full-spectrum approach including granting athletes bargaining and healthcare-related rights.[242]

VI. NIL Compensation Alone Is Not Enough

For Senator Cory Booker, the recent upheaval over the rights of college athletes has created an opportunity for the federal government to act, "to make sure there are certain basic rights that every athlete has, that will protect their health, protect their well-being, that will protect their achievement of an education, and address other issues of exploitation that continue."[243] From this, he and Senator Richard Blumenthal introduced the College Athletes Bill of Rights ("Bill of Rights"), which encompasses not only NIL compensation, but revenue sharing agreements, enforceable health and safety standards, and improved educational opportunities for all college athletes.[244] The NCAA has shown throughout its history that, while it will address the need for reform in establishing rights for athletes, it very rarely succeeds in substantively implementing it.[245]

Due to the need of public outcry to force the NCAA to change, a wide-ranging federal bill covering multiple faucets of athlete exploitation is the solution.[246] While acknowledging the Bill of Rights is a "comprehensive overhaul" of the current NCAA system, the reform required in every provision is attainable based on

242. *See id.* (same).

243. *See* Steve Berkowitz, *College Athletes "Bill of Rights" Unveiled by U.S. Senators Seeking to Change NCAA Systems*, USA TODAY (Aug. 13, 2020, 1:15 PM) (discussing how the recent push for NIL legislation has opened the door for broader awarding of rights to college athletes) [https://perma.cc/HL8C-N67M].

244. *See Senators Booker and Blumenthal Introduce College Athletes Bill of Rights*, CORY BOOKER: NEWS (Dec. 17, 2020) (announcing the introduction of the legislation) [https://perma.cc/4WZ6-7RHM].

245. *See supra* Part 0 (using the changing rules of amateurism to demonstrate this history); *see also* Cory Booker, *Why I'm Behind the Athletes Bill of Rights*, SPORTS ILLUSTRATED (Jan. 20, 2021) (discussing how NCAA President Mark Emmert agreed that there should be change regarding compensation in 2014 but has failed to act over six years later) [https://perma.cc/W7RY-W9YS].

246. *See* Booker, *supra* note 245 (determining that Congress must act to protect the wellbeing of athletes as the NCAA fails to act without significant fire from the press and public).

fundamental principles of fairness.[247] The bill is framed not only from Senator Booker's experience as a Division I football player at Stanford, but also from recent outcries from current athletes based around racial inequalities and social injustice.[248] Designed to set a new baseline standard, the bill seeks to compensate all athletes, but also fight for the equitable treatment of Black athletes who are over-represented in revenue-generating sports.[249]

The bill tackles NIL compensation, stating that "an institution of higher education, an intercollegiate athletic association, or a conference may not restrict the ability of college athletes, individually or as a group, to market the use of their names, images, likenesses, or athletic reputation."[250] However, compensation opportunities are not stopped at NIL endorsement deals.[251] This proposal requires that schools share fifty percent of profit with athletes from revenue-generating sports after accounting for cost of scholarships.[252] Using data supplied by universities, this formula would mean payouts of $173,000 a year to football players, $115,600 to men's basketball players, $19,050 to women's basketball players, and $8,670 to baseball players on full scholarship.[253] This revenue-sharing provision is likely to be the most problematic in getting the bill passed into law, but the

247. *See Senators Booker and Blumenthal Introduce College Athletes Bill of Rights, supra* note 244 (quoting Senator Blumenthal as stating that "every single provision is doable and based on the fundamental principle of fairness").

248. *See* Billy Witz, *Bill Offers New College Sports Model: Give Athletes a Cut of the Profits,* N.Y. TIMES (Dec. 17, 2020) (referencing the recent scrutiny of institutions across the country for systemic racism) [https://perma.cc/83MF-LTCE].

249. *See Senators Booker and Blumenthal Introduce College Athletes Bill of Rights, supra* note 244 (discussing the disproportionate number of Black athletes from lower income households in revenue-producing sports that pay lavish salaries to predominately white coaches).

250. College Athletes Bill of Rights, S. 5062, 116th Cong. § 3 (2020).

251. *See Senators Booker and Blumenthal Introduce College Athletes Bill of Rights, supra* note 244 (discussing the minimal restrictions proposed for NIL opportunities).

252. *See id.* (giving the example of Division I women's basketball players receiving 50% of total revenue generated by their play after deducting the cost of scholarships awarded to all Division I women's basketball players).

253. *See* Witz, *supra* note 248 (quoting Senator Booker's study supplied by numbers from the Department of Education).

numbers seem insignificant when compared to coaches' salaries.[254] For example, many football coaches earned over $3 million just this year, with Auburn paying its former head coach over $21 million in a buy-out provision.[255]

While the revenue-sharing provision is contentious, the additional factors of athlete welfare are what sets the Bill of Rights apart from other proposed legislation.[256] If enacted, the Department of Health and Human Services and the Center for Disease Control and Prevention would consult with both the Sports Science Institution and the NCAA to develop health, safety, and wellness standards that would address topics ranging from concussion protocols to sexual assaults.[257] Additionally, a Medical Trust Fund is to be established that athletes can use to cover the costs of any out-of-pocket medical expenses—for both the duration as their time as a college athletes and five years after the expiration of eligibility if used to treat a sport-related injury.[258] Many athletes suffer lifelong injuries—some that do not even fully unfold until years past careers—that cause significant medical costs.[259] Due to this, the Bill of Rights also gives athletes suffering from long-term injuries, such as chronic traumatic encephalopathy ("CTE"), the ability to continue drawing from the fund to treat these injuries.[260]

As discussed earlier in this Note, college athletes, particularly Black male athletes, graduate at a much lower rate than their peers.[261] The Bill of Rights aims to provide improved educational outcomes and opportunities by allowing athletes to receive a

254. *See id.* (analyzing potential issues arising from the proposed legislation).

255. *See id.* (using data from USA Today database and news surrounding the firing of Auburn's Gus Malzahn).

256. *See Senators Booker and Blumenthal Introduce College Athletes Bill of Rights, supra* note 244 (referencing mandatory health, safety and wellness standards).

257. *See id.* (summarizing section seven of the bill).

258. *See id.* (discussing the establishment of the trust fund for medical-related expenses).

259. *See* Booker, *supra* note 245 (discussing the need for the fund due to the number of injuries and no support available to pay related medical costs).

260. *See* College Athletes Bill of Rights, § 6 (elaborating on health care services for current and past college athletes).

261. *See supra* Part III.C (showing that Black male athletes graduate at a rate 19% less than other undergraduates).

scholarship for as many years as it takes for them to complete their undergraduate degree.[262] Furthermore, coaches and athletic department personnel would be banned from influencing or retaliating against a college athlete for a choice of major that could be seen as taking time and focus away from the sport, as well as prohibiting the restriction of the ability to accept internships or extracurriculars an athlete wishes to participate in.[263] Also catering to academic freedom, the bill includes a provision that would ban restrictions or penalties associated with athletes attending the institution of their choice—including transfer bans.[264]

Finally, the bill seeks to establish the Commission on College Athletics, a group composed of nine members—including no fewer than five former college athletes—to ensure these new rights are upheld and that athletes are aware of them.[265] The Commission would have enforcement powers, with the ability to levy fines, impose penalties, or even commence civil actions against institutions or individuals that violate provisions of the Bill of Rights.[266] To ensure the provisions are being followed, each school would be required to provide annual public reporting describing total revenues and expenditures and the number of hours athletes commit to athletic activities—including voluntary workouts, film study, and game travel.[267] As noted earlier in the PAC-12 study, so-called voluntary activities and travel time for competitions are not factored into time restraints.[268] Due to this misleading data and inadequately enforced time restrictions, it is difficult for

262. *See* College Athletes Bill of Rights, S. 5062, 116th Cong. § 8 (2020) (guaranteeing scholarship funds until an undergraduate degree is received, without regard for whether the individual is playing sports for the institution).

263. *See id.* (ensuring there will be no influence regarding selection of coursework, major, or internship opportunities).

264. *See id.* § 3(d) (setting rules relating to transfer requirements).

265. *See id.* § 11 (elaborating on Commission establishment and requirements).

266. *See id.* § 12 (detailing the enforcement abilities of the newly established Commission).

267. *See id.* § 10 (informing schools of the details that must be included on the report to be sent to the Commission).

268. *See Student-Athlete Time Demands, supra* note 57 (noting that non-mandatory activities were not factored into a study that found student athletes regularly spent well over forty hours a week on their sport).

athletes to balance a full course load, earn a degree on time, and meet the demands of the sport.[269] The enforcement abilities of the Commission, with its subpoena power and penalties, gives the Bill of Rights teeth to ensure the athletes receive the benefits that the bill intends to give them.[270]

VII. Conclusion

The NCAA has proven to be reluctant to change without significant pressure from the public or the legislature demanding reform.[271] The argument over NIL compensation provides a bipartisan sweet spot, in which representatives from both sides can unite over the need to create national law relating to the NCAA's amateurism model.[272] While the College Athletes Bill of Rights does not grant athletes employee status, it does create a framework that would guarantee similar rights and protections.[273] It advances athlete rights far beyond the third-party only NIL compensation models, taking into account the "systematic exploitation on the part of the NCAA that has robbed generation after generation of college athletes of the justice, fairness and opportunity that these young people deserve."[274]

Legislators have acknowledged that college athletics is one of the only industries that can rely on a large set of people's talents for which they can deny them any earnings and all

269. *See* Booker, *supra* note 245 (discussing the "fiction" created by the NCAA that a scholarship for education is proportionate compensation).

270. *See Senators Booker and Blumenthal Introduce College Athletes Bill of Rights, supra* note 244 (quoting Senator Blumenthal's statement on why he supports the bill).

271. *See supra* Part II.

(discussing the slow changes over history regarding NCAA bylaws related to amateurism); *see also* Patrick Hruby, *How Fighting the NCAA Became a Bipartisan Sport*, WASH. POST (March 17, 2020) (discussing how the threat of state NIL laws prompted the NCAA to change its "long-standing antipathy to federal oversight" by reaching out to Congress) [https://perma.cc/SB5K-Z8MW].

272. *See* Hruby, *supra* note 271 (discussing the ability of bipartisan legislature to unite over issues within the lack of a uniform compensation model for college athletes).

273. *See generally* College Athletes Bill of Rights, S. 5062, 116th Cong. (2020).

274. Booker, *supra* note 245.

compensation.[275] Recent unrest has once again exposed inequalities in the college athletic system. However, this time, there is proposed legislation that has the ability to create comprehensive reform that is so desperately needed.

275. *See* Billy Witz, *California Lawmakers Vote to Undo NCAA Amateurism*, N.Y. TIMES (Sept. 9, 2019) (last updated June 21, 2021) (quoting California Senator Nancy Skinner) [https://perma.cc/4A7M-7W4L].