

REESTABLISHING EDUCATION AS THE CORNERSTONE IN THE NCAA’S NAME, IMAGE, AND LIKENESS DEBATE

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INTRODUCTION

NCAA Football was among the more popular video game series of the last twenty-plus years, generating a revenue of nearly \$80 million and selling over two-million copies on an annual basis by 2014.¹ The game, developed by video game company Electronic Arts (EA),² was first created in the 1990s³ and continued in production into the 2010s.⁴ Over time, the game developed a cult-like following⁵ in part thanks to the game’s ability to replicate a realistic college football environment, including “realistic sounds, [] game mechanics, [and] mascots.”⁶ Another factor in making the

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¹ Steve Berkowitz, How EA Sports’s NCAA Football Video Game Could Make a Comeback, USA Today (May 20, 2019), <https://www.usatoday.com/story/sports/2019/05/20/how-ea-sportss-ncaa-football-video-game-could-make-comeback/3704876002/>.

² Electronic Arts Inc., CNN Bus., <https://money.cnn.com/quote/profile/profile.html?symb=EA> (last visited Nov. 24, 2019) (describing EA as a company that “engages in the provision of digital interactive entertainment [and] develops and delivers games, content, and online services for Internet-connected consoles, mobile devices, and personal computers.”).

³ See *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 146–47 (3d Cir. 2013) (discussing the origin of NCAA Football in 1993, then called “Bill Walsh College Football,” and EA’s annual release of new editions of the game thereafter).

⁴ See The History of NCAA Football, EA Sports (Nov. 27, 2013), <https://www.ea.com/news/ncaa-football-history> (reviewing some iterations of NCAA Football, through NCAA Football 14, the most recent edition of the game).

⁵ See Adam Kramer, The Cult of NCAA Football: How EA’s CFB Series Has Lived on Despite Cancellation (July 30, 2019), <https://bleacherreport.com/articles/2847267-the-cult-of-ncaa-football-how-eas-cfb-series-has-lived-on-despite-cancellation>.

⁶ *Hart*, 717 F.3d at 146.

game more lifelike was its use of “avatars” that effectively tracked actual members of the respective college teams.⁷ While not using players’ actual names, some players in the video game shared the same position, jersey number, height, weight, and even hometown and class year as their real-life counterparts.⁸ This likely contributed in large part to the games’ success, but ultimately it was a major reason its production was discontinued by EA in 2013.⁹

Ed O’Bannon, a former Division I basketball player,¹⁰ sued the NCAA after noticing that EA’s *NCAA Basketball* (college basketball’s analog to *NCAA Football*) contained a virtual player clearly based on O’Bannon, imitating his physical appearance and jersey number and playing for his college team.¹¹ O’Bannon had never consented to the use of his image and likeness, nor had he

⁷ See *id.*

⁸ *Id.*

⁹ See Darren Rovell, *EA Sports Settles with Ex-Players*, ESPN (Sept. 26, 2013), https://www.espn.com/college-football/story/_id/9728042/ea-sports-stop-producing-college-football-game (discussing EA’s announcement “that it would stop producing [the NCAA Football video game] beginning [in 2014]” in response to the Ed O’Bannon lawsuit, discussed *infra*). EA recently announced that it intends to release a new version of the *NCAA Football* video game, though the game will be built “around generic players and a deal with the Collegiate Licensing Company, which works with schools to market and sell rights to their brands.” Alan Blinder & Billy Witz, *E.A. Sports Will Resurrect College Football Video Game*, N.Y. Times (Feb. 2, 2021), <https://www.nytimes.com/2021/02/02/sports/ncaafotball/ea-sports-football-video-game-ncaa.html>. Of significant interest, Notre Dame Athletic Director Jack Swarbrick announced that the school will not participate in the game “until such time as rules have been finalized governing the participation of our student-athletes.” Statement from AD Jack Swarbrick on EA Sports College Football Series and Support Of NIL, UND.com (Feb. 22, 2021), <https://und.com/statement-from-ad-jack-swarbrick-on-ea-sports-college-football-series-and-support-of-nil/>. Swarbrick further emphasized the school’s interest in permitting its SAs to profit from their name and image in the game: “[I]t is our strong desire that student-athletes be allowed to benefit directly from allowing their name, image and performance history to be used in the game.” *Id.*; see also Mike Florio, *Northwestern Opts out of Rebooted EA Sports College Football Game, Pending NIL Rules*, NBCSPORTS (Feb. 25, 2021), <https://profootballtalk.nbcsports.com/2021/02/25/northwestern-opts-out-of-rebooted-ea-sports-college-football-game-pending-nil-rules/> (discussing Northwestern University’s decision, similar to that of Notre Dame’s, to decline participation in the new *NCAA Football* game until there is clarity with respect to the name, image, and likeness rights of student-athletes).

¹⁰ O’Bannon played for UCLA, an NCAA Division I institution. See *Division I Schools*, NCAA, <http://www.ncaa.org/about/division-i-schools> (last visited Nov. 24, 2019).

¹¹ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1055 (9th Cir. 2015).

received compensation for such use.¹² After his discovery, he sued the NCAA for violation of federal antitrust laws based on its restrictions on the ability of student-athletes (SAs) to profit from the use of his or her name, image, and likeness (NIL).¹³ The Ninth Circuit stopped short of requiring the NCAA to allow its institutions to pay SAs for the use of NIL, instead only ensuring that those schools could provide scholarships to SAs up to the full cost of attendance.¹⁴ However, NCAA decided that the potential cost of future litigation—and its quickly declining reputation because of the attention brought to its NIL rules by *O'Bannon*—was not worth the trouble. As a result, it chose to stop licensing the use of its name on EA's video game, leading to EA's decision to not develop further editions of *NCAA Football*.¹⁵ This is just one example demonstrating how the NIL debate has roped in not only student-athletes and NCAA institutions, but has also grabbed the public's attention at large.

The issue of pay for intercollegiate SAs has gone well beyond O'Bannon's lawsuit. For a number of years, collegiate SAs, school officials, and media members have debated how fair it is that NCAA Division I institutions reap immense financial benefits from intercollegiate athletics, particularly college football and men's basketball, while the SAs actually playing the sports make

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 1074–79. The district court had held that (1) scholarships for full cost of attendance *and* (2) deferred payments for NIL use of SAs were substantially less restrictive than the NCAA's compensation rules. *Id.* at 1074. The Ninth Circuit agreed that full-cost scholarships are “virtually as effective,” and thus substantially less restrictive than, the NCAA's rules, because such funds would be going toward SAs' “legitimate costs” for education. *Id.* at 1074–75. However, it did not agree with the district court that deferred NIL payments also are a viable alternative, in part because such payments would be “untethered to [] education expenses.” *Id.* at 1076.

¹⁵ Berkowitz, *supra* note 1 (“[NCAA Football] was halted not long after the NCAA decided in July 2013 not to renew its licensing deal with EA Sports. The association cited ‘the current business climate and costs of litigation’ that included name-image-and-likeness lawsuits featuring former UCLA basketball player Ed O'Bannon and former Arizona State and Nebraska quarterback Sam Keller. When the NCAA got out, so did some Power Five conferences. That still left EA Sports room to work with schools and other conferences, but in September 2013, it announced that because of ‘business and legal issues’ it would not develop another edition of the game.”).

no money whatsoever.¹⁶ This arrangement has led some to argue that the whole system has no place in the United States:

Big-time college sports are fully commercialized. Billions of dollars flow through them each year. The NCAA makes money, and enables universities and corporations to make money, from the unpaid labor of young athletes. . . . [C]orporations and universities enrich[] themselves on the backs of uncompensated young men [and women], whose status as “student-athletes” deprives them of the right to due process guaranteed by the Constitution¹⁷

While the merits of such a legal claim are unclear, broader notions of unfairness have made many uncomfortable with the NCAA’s insistence on an amateur model of collegiate athletics. The NCAA, to put it lightly, has not fared well in the court of public opinion in recent years. Its positions on compensation, particularly with regard to NIL, have inspired significant animosity toward the amateuristic scheme. One commentator, for example, said, “[i]t’s not enough for the [NCAA] to flash a knife and demand players’ wallets; it also has to tell everyone within earshot that, no, actually, empty pockets are good.”¹⁸ With amateurism functioning as a guiding hand, the NCAA has consistently bristled at any suggestion of paying SAs for participation in collegiate athletics, primarily in the name of maintaining the integrity of intercollegiate competition¹⁹ and

¹⁶ For example, Division I Football Bowl Subdivision (FBS) institutions made had a median sports-related revenue of over \$79 million in the 2017–18 fiscal year. *See* NCAA RESEARCH, 14-YEAR TRENDS IN DIVISION I ATHLETICS FINANCES (2019), http://www.ncaa.org/sites/default/files/2019RES_D1-RevExp_Report_Final_20191107.pdf.

¹⁷ Taylor Branch, *The Shame of College Sports*, Atlantic (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

¹⁸ Patrick Hruby, *The NCAA Says Paying Athletes Hurts Their Education. That’s Laughable.*, Chi. Trib. (Sept. 20, 2018), <https://www.chicagotribune.com/sports/college/c-t-spt-paying-college-athletes-ncaa-commentary-20180920-story.html>.

¹⁹ *See, e.g.,* Branch, *supra* note 17 (“This past summer, Sports Illustrated editorialized in favor of allowing college athletes to be paid by non-university sources without jeopardizing their eligibility. . . . And Mark Emmert, the NCAA president, recently conceded that big changes must come. ‘The integrity of collegiate athletics is seriously challenged today by rapidly growing pressures coming from many directions,’ Emmert said in July [of 2011].”).

protecting SAs.²⁰ As calls for some form of pay for SAs have grown louder, focus has turned to both the NCAA's stated principles against pay and NIL as a potential avenue for compensation. Perhaps this is because compensation of SAs for NIL is more palatable for the NCAA, since such compensation is not necessarily tied to participation in athletics. It also could be that the logistics of pay for NIL is easier—though still a puzzle in itself—compared to pay for play. Whatever the reason, NIL has quickly become not only a fertile ground for debate over the modern scheme of intercollegiate athletics, but also an opportunity for the NCAA to reassess its own values and chart a path that is more consistent with the most important of those principles.

This paper focuses on the difficulty, and perhaps intractability, of determining whether and where we should draw a line for NIL compensation of SAs. It begins in Part I with a background of the narrative surrounding the NCAA, its current amateurism-oriented approach to SA compensation, and its recent announcement that it intends to permit SAs to be paid in some fashion for use of name, image, and likeness. In assessing how to best take the next steps in the NIL realm, Part II draws out the relevant principles that the NCAA and the institutions of its three divisions should use in crafting the new NIL rules. These principles—namely, the primacy of education in the collegiate sphere, fairness to and equitable treatment of SAs relative to their student peers, and competitive equity—provide the broad normative framework within which to assess the situations where SAs ought, and ought not, to be compensated for use of NIL. Using that framework, Part III assesses how each principle guides the NIL analysis and suggests some broad guidelines within which SAs may be compensated consistent with those principles. I conclude that the NCAA has adhered—to the detriment of its institutions, its own credibility, and its SAs—to a theory of amateurism as its touchstone when education instead should be

²⁰ See 2020–21 Division I Manual § 2.9 (2020) [hereinafter *Division I Manual*], <https://www.ncaapublications.com/p-4577-2019-2020-ncaa-division-i-manual-august-version-available-for-presell-now.aspx> (“Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”).

the NCAA's primary guiding principle from which all else flows. In order to better understand where the NCAA has been and where it ought to be headed with respect to NIL rights, a review of the NCAA's current NIL rules and the atmosphere surrounding the conversation is useful.

I. BACKGROUND

A. *NCAA Rules on Student-Athlete Compensation*

The NCAA's current rules contain a broad, general prohibition against receipt of payment by SAs, with eligibility penalties for violating those rules. Article 12 of the 2019–20 NCAA Division I Bylaws provides the NCAA's rules relating to "Amateurism and Athletics Eligibility."²¹ At the outset, the NCAA makes clear that "[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation,"²² clarifying that "[a] grant-in-aid administered by an educational institution is not considered to be pay or the promise of pay for athletics skill."²³ The latter provision permits institutions to provide SAs with scholarships to cover the cost of attendance, which is defined broadly to include various different costs including tuition, room and board, transportation, books, and more.²⁴ Institutions may also provide expenses that are "actual and necessary" to competition.²⁵ There are other rules in the Manual that permit SAs to receive financial support in various forms in limited circumstances. But pay related to competition is strictly prohibited by the NCAA. Bylaw 12.1.2 declares that SAs will lose amateur status for the sweeping reason

²¹ Id. Article 12.

²² Id. § 12.01.1.

²³ Id. § 12.01.4.

²⁴ Id. § 15.02.2. At least for SAs participating in Division I women's and men's basketball and FBS football, Judge Claudia Wilken, the judge from the O'Bannon district court case, see *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), recently confirmed the breadth of educational benefits schools may provide to SAs. See *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1102 (N.D. Cal. 2019) (holding that NCAA must permit institutions to offer SAs educationally related benefits "on top of a grant-in-aid," including graduate school tuition, tutoring, and paid internships).

²⁵ Id. § 12.02.2, 12.02.2.1. These, too, are defined broadly to include meals and lodging, apparel, coaching, insurance, transportation, training and physical therapy, and facility use, as well as "[o]ther reasonable expenses. Id. § 12.02.2.

of “[using] his or her athletics skill (directly or indirectly) for pay in any form.”²⁶ That rule also does not permit SAs to accept promises of compensation, even if the compensation is deferred to post-graduation,²⁷ and generally prevents SAs from receiving athletically related pay from a professional athletics team.²⁸ Thus, Bylaw 12.1.2 sets the tone for the NCAA’s approach to SA compensation, while other rules clarify exactly what forms of pay to SAs are impermissible for purposes of amateurism.

Rule 12.1.2.1 provides somewhat clearer—as far as NCAA rules go, anyway—guidance as to “[p]rohibited forms of pay.”²⁹ Two of the broader prohibitions include “[a]ny direct or indirect salary, gratuity or comparable compensation”³⁰ and “[e]xcessive or improper expenses, awards and benefits.”³¹ The latter provision is defined to include cash or its equivalent “as an award for participation in competition at any time.”³² And, as may be clear from the rules already discussed, the NCAA sweeps into its prohibition on pay much more than just financial compensation for actual participation in competition. It also disallows “[p]referential treatment, benefits or services because of the individual’s athletics reputation or skill or pay-back potential as a professional athlete.”³³ The inclusion of preferential treatment based on athletics reputation is further emphasized in the NCAA’s rules most pertinent to this paper: those that expressly prevent SAs from receiving compensation for name, image, and likeness.

The prohibition on payment for NIL falls within the scope of the NCAA’s rules on “promotional activities.”³⁴ Under the current

²⁶ *Id.* § 12.1.2(a).

²⁷ *Id.* § 12.1.2(b).

²⁸ *Id.* § 12.1.2(c)–(f).

²⁹ *Id.* § 12.1.2.1.

³⁰ *Id.* § 12.1.2.1.1.

³¹ *Id.* § 12.1.2.1.4.

³² *Id.* § 12.1.2.1.4.1. This rule also ensures that a SA cannot simply forward an award or cash prize to a third party in his or her name. *Id.*

³³ *Id.* § 12.1.2.1.6. There are a number of particular exceptions to Rule 12.1.2’s general amateurism rule, see *id.* § 12.1.2.4, but the gist of these rules is that in general, SAs will not be permitted to receive compensation, benefits, or even preferred treatment based on participation in athletics.

³⁴ *Id.* § 12.5. Bylaw 12.5.1 provides permissible promotional activities, while Bylaw 12.5.2 lays out those activities for which SA participation will lead to a loss of eligibility.

rules, a SA takes part in an impermissible promotional activity if he or she

(a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or

(b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.³⁵

For participation in such activities, a SA will lose eligibility unless he or she meets an extremely narrow exception³⁶ or revokes permission for use of his or her NIL and stops receiving payment for that use.³⁷ Thus, under the current NCAA rules, a SA generally cannot profit for use of his or her name, image, or likeness. Further, a SA's NIL obligations extend beyond his or her personal promotion of a product or service. If a SA's NIL is used by a third party for commercial promotion and the SA did not know about or grant permission for that use, the SA or her institution must take action to stop the activity in order to maintain the SA's athletics eligibility.³⁸

An example might be helpful in illustrating how the rules currently function. A current SA started a YouTube channel in high school where he bakes cakes and other desserts, gathering a following large enough that culinary businesses want to pay the SA to run ads during his videos involving him promoting the businesses' cookware. Even though this YouTube channel clearly has nothing at all to do with athletics and began before the SA's

³⁵ Id. § 12.5.2.1.

³⁶ Bylaw 12.5.2.1.1(a) permits a SA who participated in the otherwise-violating activity prior to collegiate enrollment to continue the activity without affecting eligibility if he or she also meets the numerous requirements of Bylaw 12.5.1.3. Id. § 12.5.2.1.1(a). A threshold to the exception is that the activity is not athletically related. Id. § 12.5.1.3. Even if the SA's activity satisfies the threshold, the other requirements of Bylaw 12.5.1.3 include (1) that the activities cannot reference the SA's name or participation in intercollegiate athletics and (2) that the SA does not endorse the product. Id. The effect of these rules is to significantly circumscribe the circumstances in which a SA could actually benefit from this exception, especially considering the restriction on mentioning the SA's name.

³⁷ Id. § 12.5.2.1.1(b).

³⁸ Id. § 12.5.2.2.

enrollment in college, the SA still would not be permitted to continue receiving payment for the ads on the channel because the ads would both be using his name and indicating his endorsement of the products in violation of Bylaws 12.5.2.1 and 12.5.1.3.³⁹ This is just one example of the limitations on SAs' ability to receive compensation for NIL use and demonstrates the broad scope of those constraints under the current NCAA NIL regulations.

There is, at least, one option for a SA seeking to benefit from NIL use. The NCAA permits "legislative relief waivers,"⁴⁰ which institutions can apply for "when no other (sub)committee has the authority to waive specific NCAA legislation for extenuating or extraordinary circumstances."⁴¹ Thus, these waivers exist so that a SA or institution can seek to have the requirements of an NCAA rule waived.⁴² In this context, that means it is possible that a SA could seek to be excused from the ordinary NIL requirements if they can convince the NCAA that there are circumstances justifying such an excuse. Therefore, it is at least theoretically possible for a SA to receive compensation for NIL, but only if granted a waiver, and—based on the NCAA's current exceptions to the NIL rules—likely only if the use of that NIL is unrelated to the SA's participation in intercollegiate athletics. Further, it is unclear how often or whether waivers for NIL rules are likely to be granted.⁴³

³⁹ See *supra* note 36 and accompanying text.

⁴⁰ See Legislative Relief Waivers, NCAA, <http://www.ncaa.org/compliance/waivers/legislative-relief-waivers> (last visited Nov. 29, 2019) (briefly detailing the process of seeking a legislative relief waiver and noting the institutional "desire for more rules flexibility").

⁴¹ NCAA, NCAA Legislative Relief Waivers Frequently Asked Questions 1 (2014), <http://www.ncaa.org/sites/default/files/legislative-relief-waivers-faqs-20140408.pdf>.

⁴² For Division I pre-enrollment amateurism certification, the NCAA Eligibility Center amateurism certification staff is charged with verifying the amateur status of a SA who has not previously enrolled at a Division I or II institution. *Id.* at 18. Otherwise, the NCAA Division I Legislative Council Subcommittee for Legislative Relief may be able to review a request for relief from the normal amateurism requirements under Article 12 of the Division I Manual.

⁴³ The NCAA has long been criticized for lack of transparency, efficiency, and consistency in its waiver processes. See generally Ralph D. Russo, Waiver Woes: NCAA Decisions on Transfers Bring Relief, Angst, Associated Press (Aug. 28, 2019), <https://apnews.com/27f36c5ef69b470f842906d05a72100b> (discussing lack of uniformity and efficiency in the context of NCAA transfer waivers as well as the NCAA's policy of not publicly commenting on waiver decisions).

The potential availability of legislative relief waivers notwithstanding, it is clear from the above rules that the NCAA has viewed it as significant, if not critical, to the success of its operation that SAs not generally receive any compensation for either NIL or participation in competition. This position has drawn the ire of fans, SAs, and the media alike, especially as the NCAA has repeatedly preached the value of amateurism in response to critiques of its NIL rules. A brief review of this criticism is warranted, particularly in light of the recent influence it has had on legislation in the United States and the NCAA's approach to NIL.

B. Pushback on the NCAA's Approach to Compensation

People from all sorts of backgrounds have recently jumped into the conversation on NIL in intercollegiate sports, an indication of how the topic has gripped the United States. Much of the focus has been on the perceived unfairness to SAs, given the immense amount of money that certain college sports⁴⁴ pull in for the NCAA, while historically SAs have seen no proportionate financial gain as a result.⁴⁵ An internal NCAA poll indicated that nearly eighty percent of Americans believe that schools care more about money than about SAs,⁴⁶ reflecting a pervasive perception that is consistent with arguments in favor of paying SAs in some

⁴⁴ For example, the NCAA makes nearly a billion dollars annually from the NCAA men's basketball tournament. Tim Parker, *How Much Does the NCAA Make off March Madness?*, Investopedia, <https://www.investopedia.com/articles/investing/031516/how-much-does-ncaa-make-march-madness.asp> (last updated Oct. 31, 2019). See also *Should the NCAA Pay College Athletes?*, PBS News Hour (Mar. 17, 2016), <https://www.pbs.org/newshour/show/is-the-ncaa-a-cartel-some-former-and-current-athletes-say-yes> ("March Madness means a huge payday for coaches, colleges, networks and advertisers—everyone except the athletes themselves. Although television rights for the NCAA tournament this year alone brought in nearly a billion dollars, the players won't see a penny, and many are unhappy with the situation.").

⁴⁵ Student-athletes obviously do receive scholarships and other benefits as a result of participation in college athletics, but many do not view this as sufficient given the amount of money the NCAA and Division I institutions make from college sports.

⁴⁶ Jon Solomon, *The History of the Debate over Paying NCAA Athletes*, Aspen Inst. (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/> (discussing NCAA President Mark Emmert's reflection on the NCAA poll and his response that "I can't think of anything 79 percent of Americans agree to . . . but they agree to that").

capacity. The push for more general pay for play, while not the focus of this paper, is similarly grounded in fairness. Pay for play is not a novel concept,⁴⁷ but Shabazz Napier, a college basketball player, reignited the public's interest in the topic in 2014 when he stated that he would sometimes go to bed hungry because he could not afford food.⁴⁸ Coincidentally, Napier offered this information during the NCAA's annual highest-revenue event: the Division I men's basketball tournament.⁴⁹ Many took exception to the idea that SAs struggle to pay for food while putting in the work required to both earn a degree and participate in Division I athletics.

This has led to the suggestion that “student athletes who struggle to make ends meet [are] being exploited for [their] hard labor.”⁵⁰ Thus, unfairness is at the center of not only the basic economic argument that SAs deserve to be paid for whatever revenue they generate, but also the moral objection to the amount of work that SAs must put in to succeed as both a student and athlete.⁵¹ Even if one lacks a workable solution for how exactly to quantify an individual SA's value contributed to a university, the contention that it is unfair to not grant SAs any cut of the financial gains from college sports is understandable. Given that coaches, schools, the media, and the NCAA all profit from the intercollegiate athletics enterprise, the alleged unfairness is readily apparent: “[SAs] are fundamentally exploited by a system

⁴⁷ See generally *id.*

⁴⁸ Rodger Sherman, Shabazz Napier: ‘There’s Hungry Nights Where I’m Not Able to Eat,’ *SB Nation* (Apr. 7, 2014), <https://www.sbnation.com/college-basketball/2014/4/7/5591774/shabazz-napier-uconn-basketball-hungry-nights>.

⁴⁹ See Darren Rovell, NCAA Tops \$1 Billion in Revenue During 2016–17 School Year, *ESPN* (Mar. 7, 2018), https://www.espn.com/college-sports/story/_/id/22678988/ncaa-tops-1-billion-revenue-first (“The majority of the [NCAA’s] revenue came from its usual source—the NCAA men’s basketball tournament.”).

⁵⁰ Dalton Thacker, *Amateurism vs. Capitalism: A Practical Approach to Paying College Athletes*, 16 *Seattle J. Soc. Just.* 183, 183 (2017).

⁵¹ See *id.* (“Athletes at all levels deserve compensation because of the benefits that they offer to their schools, the time commitment that they must maintain, and the sacrifices that are required to succeed”); see also Gabe Feldman, *The NCAA and “Non-Game Related” Student-Athlete Name, Image and Likeness Restrictions 1* (2016) (“From both a moral and legal perspective, there is eroding tolerance for selective commercialization restrictions on student-athletes in a system that many perceive to be exploitative, unethical, unfair, inequitable, and unnecessary.”).

that makes not millions of dollars, but billions of dollars, and that enriches everybody around them except themselves.”⁵²

While pay for play itself merits significant attention and careful thought, it is not the focus of this Article. Recently, the calls for pay have been aimed at NIL in particular. Again, this may be because such compensation can be more readily dissociated from athletics participation than pay for play, which by definition directly results from competition in intercollegiate athletics. Pay for play runs counter to the NCAA’s stated goals of amateurism and maintaining a “clear line of demarcation” between college and professional sports, making the theory that SAs should be paid for play wholly unpalatable to the NCAA and its member institutions.⁵³ Or perhaps attention is on NIL because the actual payment method may be more workable than pay for play. Whatever the reason, student-athlete NIL rights are at the forefront of both legislative and NCAA reform.

Numerous parties have argued that it is unreasonable for the NCAA to prevent its SAs from receiving payment for NIL use, often on fairness grounds. If a SA has created a market for himself, should he not be able to profit for his efforts? We often see commercials for NCAA sporting events involving the names and images of prominent Division I SAs—but since those SAs cannot profit off NIL, who is signing the contract for use of such images? Originally, it was the NCAA.⁵⁴ Now, some conferences have taken the lead on requiring SAs to sign NIL waivers permitting use of an SA’s NIL for the financial gain of the conference.⁵⁵ While not all SAs necessarily feel that this is a problem,⁵⁶ others have

⁵² Should the NCAA Pay College Athletes?, *supra* note 44.

⁵³ Division I Manual, *supra* note 20, § 1.3.1.

⁵⁴ John Keilman & Jared S. Hopkins, College Athletes Routinely Sign away Rights to Be Paid for Names, Images, *Chi. Trib.* (Mar. 26, 2015), <https://www.chicagotribune.com/sports/college/ct-ncaa-waivers-met-20150326-story.html> (stating that in 2014 the NCAA did away with waivers requiring SAs to forfeit their publicity rights without compensation).

⁵⁵ *Id.* (“Colleges from the Big Ten to the Mid-American Conference ask or require athletes to sign waivers giving up their publicity rights without compensation, even as college sports generate billions of dollars in TV contracts and merchandise sales. The media deal for March Madness alone is worth \$771 million a year.”).

⁵⁶ *Id.* (quoting former Northwestern basketball player Sobolewski as saying that he has “no problem with my school or my conference or the NCAA using my image and likeness with no compensation I think it’s perfectly fair. I think college athletics

questioned whether a SA really understands what he is signing away by signing these waivers: “You see all the money that’s being made, and there’s a part of you that says, ‘So I’m not seeing any of this money that these people are making, that’s letting them live in nice houses and drive nice cars?’”⁵⁷ It is easy to see why a student-athlete might find it unreasonable that her image or likeness could be used in a promotion for a sporting event or in a video game, like Ed O’Bannon. Someone is making money from use of that NIL, and it is not the student-athlete. SAs, like anyone else in a free-market economy, ought to have the ability to take financial advantage of companies’ desire to pay them to endorse a product or service, so the argument goes.⁵⁸ Of course, in the background of all of this is that the NCAA otherwise negotiates and profits the same way any other organization might, while not allowing SAs to do the same: “[T]he NCAA preaches the importance of amateurism . . . and prevents student-athletes from using their own image and likeness for monetary gain [but] contradicts its own amateurism policies when it brings in numbers akin to those of a professional league.”⁵⁹ This consistent criticism has forced the NCAA to reconsider its policies on NIL, especially as the pool of commentators has gained new, more prominent voices.

Included in that pool is Cory Booker, U.S. Senator and former presidential candidate. Booker had an entire page of his campaign website devoted to concern for athletes’ rights.⁶⁰ That page

should focus on the student-athletes. We’re still amateurs. We’re not professionals. Our job is to be students”).

⁵⁷ Id. (quoting former University of Illinois football player Nathan Scheelhaase).

⁵⁸ See Marc Edelman, 9 Reasons to Allow College Athletes to License Their Names, Images and Likenesses, *Forbes* (May 11, 2018), <https://www.forbes.com/sites/marcedelman/2018/05/11/9-reasons-to-allow-college-athletes-to-license-their-names-images-and-likenesses/#1d17f2275488> (“We can reasonably infer that the consumers and fans of college sports favor college athlete endorsements. We can infer this because if consumers and fans were overall opposed, there would be no market for companies to hire college athletes as endorsers. That’s simply how capitalist, free-market principles work.”).

⁵⁹ Christian Dobosiewicz, Paying Players: Names, Likeness, and Pictures. The NCAA Owns Them All, *Exponent* (Apr. 26, 2018), https://www.purdueexponent.org/sports/article_d2039a14-6f89-51b1-9fdd-7ec06e06eeab55.html.

⁶⁰ See Justice and Opportunity for Athletes, Cory 2020, <https://web.archive.org/web/20191231132242/https://corybooker.com/issues/economic-security-and-opportunity/justice-and-opportunity-for-athletes/> (last visited Dec. 3, 2019).

included a section on intercollegiate athletics and, in particular, a stated desire to permit SAs to be compensated for NIL.⁶¹ Booker specifically asserted that the effect of the current NCAA scheme is that “the individuals at the heart of this immensely profitable industry are not permitted to share in its success.”⁶² He also observed the breadth of the rules’ scope: “A standout swimmer from Stanford is prevented from advertising swimming lessons over the summer[.] [A] star basketball player from Rutgers can’t receive payment for promoting a local business, or even her own YouTube channel.”⁶³

Interestingly, most of the public’s apparent focus on NIL has concentrated on NIL that is *related to* athletics—images of SAs playing their sports in promotional materials, for instance. But there is another form of NIL that is effectively prohibited by the current NCAA rules just the same as athletically related NIL: compensation for NIL that has nothing to do with sports, like the Youtuber student-athlete from the hypothetical in Section I.A, *supra*. In a report for the Knight Commission on Intercollegiate Athletics,⁶⁴ Professor Gabe Feldman drew a distinction between “game-related” and “non-game related” NIL, arguing that compensation for non-game related NIL should be permitted.⁶⁵ It appears that Feldman views the critical point of distinction between permissible and impermissible NIL payments as a particular athletic event. Thus, he argues that pay for NIL use related to an athletic event, like a broadcast of the event, should remain impermissible, while pay for NIL use unrelated to promoting the event should be permitted. This is not quite the same as the athletically related and unrelated distinction, though it may be a useful starting point. If we are to scrutinize the NCAA’s NIL rules, we should inspect the merits of regulation of athletically related and unrelated NIL alike.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ The Knight Commission is an independent organization that promotes an educational mission and focus of intercollegiate athletics and proposes recommended policy changes, which have caught the eye of the NCAA on more than one occasion. See About the Knight Commission, Knight Comm’n, <https://www.knightcommission.org/about-knight-commission/> (last visited Dec. 3, 2019).

⁶⁵ See Feldman, *supra* note 51, at 1, 3–9.

Having discussed the broader social criticism of the NCAA's current rules, it will be easier to understand the material explored in the next Section: state and potentially federal efforts to legislatively overturn the NCAA's current regulatory structure for NIL.

C. Legislative Action: California Fair Pay to Play and Related Acts

In 2018, U.S. House Rep. Mark Walker of North Carolina suggested that congressional action might be required to bring about what he argued is necessary change for the NCAA's NIL policy.⁶⁶ A little more than a year later, California heeded Walker's words, passing the California Fair Pay to Play Act (FPTPA), set to take effect in 2023.⁶⁷ The law makes it illegal for any institution, conference, or "athletic association . . . with authority over intercollegiate athletics"—in other words, the NCAA—to prevent SAs from receiving compensation for use of NIL.⁶⁸ In doing so, California put the NCAA institutions within its borders, as well as the NCAA itself, on notice that obeying the NCAA's current NIL rules will violate state law. The FPTPA does not mandate that a school directly compensate SAs—only that it not prevent a SA from seeking, and being compensated for, use of her identity in a video game, promotional materials, or

⁶⁶ See Mark Walker, *It's Time to Look at Compensating College Athletes*, News & Observer (May 11, 2018), <https://www.newsobserver.com/opinion/article210946329.html>; Brian Murphy, *Allow College Athletes to Make Money Off Their Names or Face Legislation, NC Republican Warns NCAA*, News & Observer (May 11, 2018), <https://www.newsobserver.com/news/politics-government/article210862184.html>.

⁶⁷ S.B. 206, 2019 Leg. (Cal. 2019), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB206; see also Jack Kelly, *Newly Passed California Fair Pay to Play Act Will Allow Student Athletes to Receive Compensation*, Forbes (Oct. 1, 2019), <https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-receive-compensation/#a2ae2db57d02> ("Current NCAA regulations disallow student athletes from executing any endorsement deals or accepting payment for the use of their images. The new California law, which is scheduled to go into effect in 2023, would now allow them to reap the financial rewards for their athletic abilities. It would also bar the NCAA from retaliating against the colleges and student athletes.")

⁶⁸ S.B. 206.

endorsements.⁶⁹ The NCAA quickly responded that it intends to adjust its NIL rules to be more consistent with its modern values but rejected that California or other states could control the issue in this manner: “[I]t is clear that a patchwork of different laws from different states will make unattainable the goal of providing a fair and level playing field for 1,100 campuses and nearly half a million student-athletes nationwide.”⁷⁰ Clearly, the Act supersedes the NCAA’s rules, forcing institutions into the Hobson’s choice of either (1) preventing SAs from profiting from NIL, thus violating California law, or (2) permitting SAs to reap such financial benefits, thus violating NCAA rules and risking not only the SA’s eligibility for NCAA competition, but the institution’s NCAA membership as well. Thus, the FPTPA has put the ball in the NCAA’s court: show that the law is invalid⁷¹ or change the NIL rules.

⁶⁹ See Michael McCann, *What’s Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, Sports Illustrated (Sept. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12>.

⁷⁰ Dan Murphy, *California Defies NCAA as Gov. Gavin Newsom Signs into Law Fair Pay to Play Act*, ESPN (Sept. 30, 2019), https://www.espn.com/college-sports/story/_/id/27735933/california-defies-ncaa-gov-gavin-newsom-signs-law-fair-pay-play-act.

⁷¹ Any one of the NCAA institutions in California, the Pacific-12 Conference (Pac-12), or the NCAA would have standing to challenge the FPTPA. McCann, *supra* note 69. The Pac-12 is an NCAA Division I conference and has four member institutions located in California. See *id.* *supra* note 69 (listing UCLA, USC, Cal and Stanford as Pac-12 member schools). The schools would lose NCAA membership by following the California law. The Pac-12 would lose multiple members of its conference, impacting its revenue significantly. The NCAA would either have to change the amateurism rules it finds critical to its existence, kick out the California schools, or permit them to continue being members in spite of a “sizable advantage in recruiting, since high school athletes would likely gravitate toward schools where they could be paid for [NIL].” See *id.* The NCAA in particular would be likely to challenge the FPTPA on dormant commerce clause grounds, since it could argue that California’s law would unreasonably or excessively interfere with interstate commerce, which has been defined broadly by the U.S. Supreme Court. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662 (1981). There is precedent for such a challenge: in *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993), the Ninth Circuit held that a Nevada law requiring the NCAA to provide certain due process rights in infractions proceedings violated the commerce clause because it would control the NCAA’s behavior in states outside of Nevada. *Id.* at 639. More pertinent to the FPTPA, the court also wrote that a “statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid.” See *id.* The NCAA could argue that the FPTPA, though not necessarily requiring it to affirmatively do anything, would substantially affect

California is not the only state that has actually taken or explored legislative action on the NIL front. New York, Georgia, and Florida are just some examples of other states that have proposed or are considering proposing similar—though, importantly, not identical—permissive NIL laws.⁷² Given the current popularity of criticizing the NCAA and the political gains to be had, it seems likely that other states will follow suit as well.⁷³ Representatives and senators in Congress have also initiated bipartisan discussions in the interest of assessing the possibility of federal legislation on NIL in intercollegiate athletics.⁷⁴ Given the potential legal barriers to allowing states to take different approaches to NIL,⁷⁵ a federal law that would apply uniformly across the United States could most directly challenge the NCAA's autonomy. Combined with the public's negative view of the NCAA, this current and potential legislation has encouraged the NCAA to respond quickly to the calls for change to its NIL policy.

interstate commerce by encouraging potential SAs to go to schools in California because of the ability to profit for NIL. Though not a sure thing, the NCAA may feel good about the odds of winning such a claim, given that it has leaned on the commerce clause in a relatively similar context and prevailed. This Article's purpose, however, is not to focus on the merits of legal challenges to the FPTPA, which is best left to other scholarship.

⁷² See Michael McCann, *California's New Law Worries the NCAA, but a Federal Law Is What They Should Fear*, *Sports Illustrated* (Oct. 4, 2019), <https://www.si.com/college/2019/10/04/ncaa-fair-pay-to-play-act-name-likeness-image-laws> (noting that New York, Florida, Illinois, Colorado, Kentucky, Minnesota, Nevada, Pennsylvania, and South Carolina all have NIL bills in the works); Bobby Caina Calvan, *Florida Considers Allowing College Athletes to Earn Money*, *Assoc. Press* (Oct. 24, 2019), <https://apnews.com/e4b82c29c9a44c6a968d51e906e8c3ba> (discussing Florida and Georgia's NIL proposals).

⁷³ This is not to suggest that the proposed bills are not themselves for good reason. Equitable treatment of SAs ought to be at the top of the NCAA's priority list. The modern trendiness of condemning the NCAA is just an additional incentive states have for enacting NIL legislation.

⁷⁴ McCann, *supra* note 72 (discussing bipartisan support for federal NIL law, as well as discussing value of such a law in light of legal challenges to various state laws); Dan Murphy, *Congressman to Propose Federal Legislation for Paying College Athletes*, *ESPN* (Oct. 2, 2019), https://www.espn.com/college-sports/story/_/id/27751454/congressman-propose-federal-legislation-paying-college-athletes (exploring specific examples of potential federal NIL proposals).

⁷⁵ See *supra* note 71 and accompanying text.

D. The NCAA's Response

In May of 2019, the NCAA created a NIL Working Group in response to the state NIL proposals.⁷⁶ The Working Group was specifically charged with reviewing potential changes to the NCAA's current NIL rules to assess whether such adjustments could comport with the NCAA's stated desire to both maintain amateurism, and thus not pay SAs for participation in college sports, and act in the best interest of its SAs.⁷⁷ Not long after the FPTPA was signed into law by California, the Working Group made its initial recommendations to the NCAA Board of Governors, which were preliminary and principled in nature as opposed to more concrete recommendations for actual rule changes.⁷⁸ Shortly thereafter, the Board of Governors announced its vote to permit SAs to profit from NIL in a manner "consistent with the collegiate model."⁷⁹ The announcement stated that the Board directed that all three NCAA divisions design and implement new NIL rules no later than January of 2021 in accordance with its guiding principles.⁸⁰ Simply reading that portion of the announcement might make one think that a monumental shift is at hand—and indeed, this is certainly the case to some extent. The NCAA has never generally permitted SAs to profit from NIL without a waiver, in either the athletically related or athletically unrelated context. In that sense, the legislators in California and other states could rejoice that the pressure put on the NCAA via the FPTPA and related legislation had its intended effect. Student-athletes may rejoice that they can finally get paid, at least in some capacity. Those who believe

⁷⁶ NCAA, NCAA Board of Governors Federal and State Legislation Working Group (2019); NCAA Working Group to Examine Name, Image and Likeness, NCAA (May 14, 2019), <http://www.ncaa.org/about/resources/media-center/news/ncaa-working-group-examine-name-image-and-likeness>.

⁷⁷ See NCAA Working Group, *supra* note 76.

⁷⁸ Dennis Dodd, NCAA Working Group to Deliver Preliminary Suggestions for Name, Image and Likeness Rule Changes, CBS Sports (Oct. 28, 2019), <https://www.cbssports.com/college-football/news/ncaa-working-group-to-deliver-preliminary-suggestions-for-name-image-and-likeness-rule-changes/>.

⁷⁹ Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities, NCAA (Oct. 29, 2019), <http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities>.

⁸⁰ *Id.*

payment in any form to SAs is a bad idea might shudder. But a closer look at the Board's pronounced guidelines and principles reveals that there is quite a bit of ambiguity, and thus room for discretion, in those stated principles.

The guidelines fall into four broad categories: (1) equitable treatment of SAs relative to other members of the student body, (2) the priority of education, (3) encouraging a competitive balance in intercollegiate athletics, and (4) a lingering desire to maintain amateurism.⁸¹ While all of these are informative, some leave open major questions. Perhaps most unclear is the goal that any new NIL rules “[m]ake clear that compensation for athletics performance or participation is impermissible.”⁸² What counts as compensation “for athletics performance or participation” in the context of NIL? Do volleyball lessons for which a Division I volleyball player receives payment constitute compensation “related to participation” in athletics? Some have argued that the NCAA's guidelines here are more of a “wish list,” and that “[o]f course the compensation will be based on the players' participation in athletics. That's how the market works.”⁸³ But is that the market the NCAA was talking about in the above-stated principle? A student-athlete can have a market that goes beyond the one generated by participation in a college sport. Recall the baking Youtuber example—under the NCAA's stated intention to allow SAs to profit from NIL consistent with the collegiate model, one would imagine that such an arrangement would clearly be permissible. Further, Gene Smith, athletic director of The Ohio State University and co-chair of the Working Group, articulated that “the NCAA's new rules would not follow the ‘California model’ of a virtually unrestricted market.”⁸⁴ So what exactly is the NCAA's goal?

⁸¹ See *id.*

⁸² *Id.*

⁸³ Andy Staples, *The NCAA Surrenders on Name, Image and Likeness. Now it's Time to Negotiate Terms*, *Athletic* (Oct. 29, 2019), <https://theathletic.com/1334301/2019/10/29/staples-the-ncaa-surrenders-on-name-image-and-likeness-now-its-time-to-negotiate-terms/>.

⁸⁴ Dan Murphy, *NCAA Clears Way for Athletes to Profit from Names, Images, and Likenesses*, *ESPN* (Oct. 29, 2019), https://www.espn.com/college-sports/story/_/id/27957981/ncaa-clears-way-athletes-profit-names-images-likenesses.

The overarching purpose of this paper is not to analyze whether SAs should be freely compensated for any and all NIL as opposed to only athletically unrelated NIL. Instead, it is first to clarify the principles the NCAA and its member institutions should adhere to in designing the new NIL rules in an effort to reorient the organization around the principles that matter most. Second, it is to assess what practical steps the NCAA can take to fit the new rules into the mold provided by those principles, and to evaluate how that applies to modern student-athletes competing at NCAA institutions. In other words, I seek not to debate the validity of the NCAA's proposed NIL approach. Instead, my objective is to illuminate the normative framework within which the NCAA will be crafting the rules and to assess some possible guidelines that fit within that structure. The normative framework begins with what should be the NCAA's touchstone: the primacy of education.

II. GUIDING PRINCIPLES IN THE NIL CONTEXT

A. Education over Amateurism

For years the NCAA has relied on amateurism as a justification for its rules against payment to SAs as well as a variety of other rules that limit SAs in some capacity. This might be because courts, in the context of antitrust challenges, have consistently found that the NCAA and intercollegiate athletics have unique standing at the intersection of athletics and academics. The most impactful example of this is when the U.S. Supreme Court effectively articulated in *NCAA v. Board of Regents* that the NCAA's objective of amateurism is legitimate:

[T]he NCAA seeks to market a particular brand of football—college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports In order to preserve the character and quality of the “product,”

athletes must not be paid, must be required to attend class, and the like.⁸⁵

The Court in that case held that the challenged NCAA television restrictions violated the Sherman Antitrust Act and were not “even arguably tailored” to the legitimate interests of amateurism and competitive balance.⁸⁶ But the rejected television restrictions mattered little in the grand scheme for the NCAA. As a result of *Board of Regents*, the principle of amateurism gained legal support from the Supreme Court as an independent ideal, providing the NCAA with a solid legal foundation for arguing in favor of its restrictions on institutions and SAs. Interestingly, Justice White dissented in *Board of Regents*, arguing that the majority’s holding promoting economic competition would hinder the NCAA’s primary goal: education.⁸⁷ This is somewhat ironic, as it appears clear now that the NCAA’s educational objectives are hindered not because of the economic competition discussed by Justice White, but because of the NCAA’s own relentless desire to cling to amateurism.

Not only has the NCAA called upon amateurism as a defense in court,⁸⁸ but it also emphasizes the principle in the Division I

⁸⁵ *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101–02 (1984). In March 2021, the Supreme Court will hear oral argument in a pair of consolidated cases seeking review of a Ninth Circuit decision that NCAA eligibility rules regarding SA compensation violate federal antitrust laws. See *National Collegiate Athletic Association v. Alston*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/national-collegiate-athletic-association-v-alston/> (last visited Feb. 26, 2021). The Supreme Court’s decision in these cases, one way or another, is likely to have a substantial impact on the NCAA’s approach to NIL in intercollegiate athletics. Because the cases involve a claimed violation of antitrust laws by the NCAA, the Court’s ruling is also likely to clarify whether Court still finds the reasoning in *Board of Regents* persuasive.

⁸⁶ *Id.* at 116–20.

⁸⁷ See *id.* at 122 (White, J., dissenting) (“By mitigating what appears to be a clear failure of the free market to serve the ends and goals of higher education, the NCAA ensures the continued availability of a unique and valuable product, the very existence of which might well be threatened by unbridled competition in the economic sphere.”). Justice White specifically argued that the NCAA’s rules at the time were in the interest of education, saying that those rules “represent[] a desirable and legitimate attempt ‘to keep university athletics from becoming professionalized to the extent that profit making objectives [sic] would overshadow educational objectives.’” *Id.* at 123 (quoting *Kupec v. Atl. Coast Conference*, 399 F. Supp. 1377, 1380 (M.D.N.C. 1975)).

⁸⁸ Feldman, *supra* note 51, at a n.3 (“Courts have consistently relied on the . . . language in *Board of Regents* to reject a variety of challenges to the NCAA’s amateurism restrictions.” (citing *Banks v. NCAA*, 977 F.2d 1081, 1090 (7th Cir. 1992))).

Manual and on its website. The Manual includes amateurism as one of the Association's fundamental purposes⁸⁹ as well as one of its guiding principles.⁹⁰ Further, there are only two eligibility-related articles in the Manual: Article 12, titled "Amateurism and Athletics Eligibility,"⁹¹ and Article 14, titled "Academic Eligibility."⁹² These titles are instructive; the NCAA appears to put amateurism on equal footing with academics for eligibility purposes. Section 20.9.1 of the Manual describes institutional commitment to the "collegiate model," including a "commitment to amateurism" describing the importance of "maintaining a line of demarcation between student-athletes who participate in the Collegiate Model and athletes competing in the professional model."⁹³ The NCAA's website informs prospective SAs that certification for amateur status is required prior to participation in intercollegiate competition.⁹⁴ On the whole, the NCAA has continued to trumpet amateurism above all else—or, at the very least, that seems to be a common (and reasonable) perception. It appears that the NCAA feels that amateurism is what distinguishes intercollegiate athletics from professional sports,⁹⁵ thus preserving the integrity of the whole of college sports. Historically, that has manifested itself in the rules against most forms of pay for SAs, including NIL.

The NCAA's consistent reliance on amateurism as an end in itself has led many to view the principle of amateurism with a more critical eye. Some find the NCAA's version of amateurism to be whatever best suits the NCAA at any given moment,⁹⁶

⁸⁹ Division I Manual, *supra* note 20, § 1.2(c) (stating that one of the NCAA's purposes is to "encourage its members to adopt eligibility rules to comply with satisfactory standards . . . amateurism").

⁹⁰ *Id.* § 2.9 ("The Principle of Amateurism").

⁹¹ *Id.* Article 12.

⁹² *Id.* Article 14.

⁹³ *Id.* § 20.9.1.2 (capitalization altered).

⁹⁴ See Amateurism, NCAA, <http://www.ncaa.org/student-athletes/future/amateurism> (last visited Dec. 4, 2019); NCAA, Amateurism Certification Basics (2019), http://fs.ncaa.org/Docs/eligibility_center/ECMIP/Amateurism_Certification/Amat_Basic_s.pdf.

⁹⁵ See Feldman, *supra* note 51, at 4 ("The NCAA argues that Amateurism restrictions are necessary to preserve the distinctive character and product of amateur collegiate sports . . .").

⁹⁶ Solomon, *supra* note 46 ("Never mind that NCAA rules allow two-sport athletes to be paid professionals in one sport while competing in a different college sport . . . [o]r

particularly because the NCAA provides exceptions permitting certain SAs to receive benefits or make money—sometimes large amounts of money.⁹⁷ In a recent lawsuit challenging limits on SA compensation, Judge Claudia Wilken dismissed the NCAA's argument that amateurism alone could sustain pay limitations: “[I]t is important to recognize that the challenged limits on compensation cannot be deemed procompetitive simply because they promote or are consistent with amateurism. To be procompetitive, the challenged rules must have some procompetitive effect on the relevant market.”⁹⁸ In so holding, Judge Wilken noted the wild inconsistency of the NCAA's amateurism rules due to the many situations in which it appears to permit some form of pay for play.⁹⁹ She reasoned that such compensation is tied to participation in athletics, and yet the NCAA did not show that such pay affected viewership or consumer demand.¹⁰⁰ Thus, the limits could not be justified on amateurism as a value on its own. These examples demonstrate just some of the legitimate pragmatic criticisms of the NCAA's continued use of amateurism as an enduring basis for its actions.

Even beyond practical issues with the NCAA's inconsistent defense of amateurism, more existential questions expose how vacuous such reliance is. Is amateurism, by itself, a solid foundation upon which the NCAA should build? As discussed above, it is hard to defend such a view, and the NCAA's answer

that tennis players can receive up to \$10,000 per year in prize money . . . during college. Or that college football players can receive bowl gifts up to \$550 in value. . . . Amateurism is whatever the NCAA says amateurism is at any particular moment.”); Dan Wolken, *More College Athlete Reform? That's Tough When 'Amateurism' Means Whatever the NCAA Proclaims It Does*, USA Today (May 15, 2019) (“The important thing to remember any time the NCAA talks about giving college athletes something they didn't have before is that amateurism is a word with no inherent meaning other than whatever the NCAA proclaims it to be.”).

⁹⁷ See Solomon, *supra* note 46 (noting that the NCAA permits SAs who win a medal at the Olympics to receive prize money for doing so, which sometimes leads to bonuses in the six-figure range).

⁹⁸ *In re NCAA Grant-in-Aid Antitrust Litigation*, 375 F. Supp. 3d 1058, 1098 (N.D. Cal. 2019).

⁹⁹ One example she provided was that the “NCAA permits schools and conferences to pay student-athletes awards for their performance in their sport, which can be paid in cash-equivalent Visa cards; student-athletes who reach high levels of competition can receive up to \$ 5,600 in such awards in a school year.” *Id.* at 1099.

¹⁰⁰ *Id.* at 1099–1100.

ought to be a resounding “No.” It does not seem that there is an obvious or inherent benefit to *not* compensating individuals who otherwise would be able to profit.¹⁰¹ In the most direct terms, amateurism is at best a neutral objective—it is most surely not a goal worthy of pursuit for its own sake, let alone the central ideal the NCAA has made it out to be. If there is any sound argument in amateurism’s favor, it is probably that it sets intercollegiate athletics apart from other sports leagues as a product. But, as Judge Wilken observed, the NCAA’s own exceptions permitting some financial benefits for SAs, which do not affect the “product” of college sports, likely defeats that argument.¹⁰² More importantly, reassessing this argument leads to a more compelling conclusion: what sets the NCAA and intercollegiate athletics apart—what makes it different and unique—is that it exists in the context of education.¹⁰³

Perhaps a good starting point is what should be obvious: student-athletes attend academic institutions and are students at those institutions. The NCAA often postures that it values education. The Division I Manual’s “Principle of Amateurism” states that SA’s “participation should be motivated primarily by education.”¹⁰⁴ The Manual also states that the NCAA’s basic fundamental purpose is “to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an

¹⁰¹ See, e.g., Joseph Nardone, NCAA Statement on NIL Rights Is Vague, Leaves Little Room for Optimism, *Forbes* (Oct. 29, 2019), <https://www.forbes.com/sites/josephnardone/2019/10/29/ncaa-statement-on-nil-rights-vague-leaves-little-room-for-optimism/#3533d83154fa> (critiquing the idea that “there’s something inherently wrong with laborers receiving a wage or being able to profit off their work” and arguing that “[t]he NCAA would clearly like you to believe there’s nobility in labor without a wage of any kind”).

¹⁰² See *supra* notes 98-100.

¹⁰³ Though not this paper’s focus, the NCAA’s rejected argument in the Grant-in-Aid case that consumers enjoy the college sports “product” because of amateurism could also be bolstered by a renewed adherence to education. There is a reasonable argument to be made that the academic institutional and regional affiliation inherent in college sports is something that significantly drives fandom and lasting interest in intercollegiate athletics. The Court in *Board of Regents* seemed to agree with that sentiment: “The identification of this ‘product’ with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable” *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101–102 (1984).

¹⁰⁴ Division I Manual, *supra* note 20, § 2.9.

integral part of the student body.”¹⁰⁵ The NCAA’s guiding principles also include multiple references to athletics as a “component” of education or “integral to” a SA’s academic experience.¹⁰⁶ Eligibility hinges on meeting academic standards just the same as amateurism requirements.¹⁰⁷ The list goes on. It would be simple for one unacquainted with the NCAA to conclude, by perusing the Manual, that education is substantially important—maybe the most important aspect of college sports. But familiarity with the NCAA and its continued emphasis on amateurism muddles this seemingly clear picture.

That the NCAA and its institutions truly value education is often far from obvious, since some schools—and indeed the NCAA—have taken actions that fly in the face of education as a priority. Schools may tailor courses—or even fabricate them¹⁰⁸—in order to get an edge in maintaining academic eligibility. Meanwhile, the NCAA permits schedules that make prioritizing academics a real challenge for SAs.¹⁰⁹ And there are other arrangements, like men’s basketball’s one-and-done rule, that make no sense at all if education is the priority.¹¹⁰ The NCAA’s repeated insistence on defending amateurism only further obscures any semblance that education is *the* foundational element distinguishing intercollegiate athletics. Though not always clear, there are prominent voices in intercollegiate athletics still advocating for academics first. Rev. John Jenkins,

¹⁰⁵ Id. § 1.3.1.

¹⁰⁶ Id. §§ 2.2.1, 2.5.

¹⁰⁷ Id. Article 14 (“Academic Eligibility”).

¹⁰⁸ In a well-known case, the University of North Carolina created fake courses that SAs took which allowed those SAs to more easily meet the NCAA’s eligibility requirements. See Marc Tracy, N.C.A.A.: North Carolina Will Not Be Punished for Academic Scandal, N.Y. Times (Oct. 13, 2017), <https://www.nytimes.com/2017/10/13/sports/unc-north-carolina-ncaa.html>.

¹⁰⁹ See Hraby, *supra* note 18 (discussing a survey that found that some SAs spent “an average of 50 hours per week on their sports and were often ‘too exhausted to study effectively,’” while some may only be able to spend around 20 hours per week on schoolwork because of sports).

¹¹⁰ See Comm’n on College Basketball, Report and Recommendations to Address the Issues Facing Collegiate Basketball 3, 19–20 (2018), http://www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf (arguing that the one-and-done rule has “undermin[ed] the relationship of college basketball to the mission of higher education” by encouraging high schoolers to attend college for one year “solely to play basketball”). To be clear, the NCAA is not responsible for this rule and cannot change it—that’s up to the National Basketball Association and its Players Association. Id. at 3.

president of the University of Notre Dame, emphasized the role universities should play for SAs: “Our relationship to these young people is to educate them, to help them grow . . . [n]ot to be their agent for financial gain.”¹¹¹ It is time for the NCAA to adjust its approach and renew the placement of education at the forefront of its policymaking.

Education belongs at the center of college sports. Higher education is an immense opportunity that can benefit a person in a variety of ways for the rest of his or her life, whether it be the actual academic education, relationship development skills, preparation for a career, or any of the multitude of other advantages of attending a university. Student-athletes who are skilled enough to earn a scholarship may be able to afford an education that would have otherwise been too expensive. And the vast majority of SAs do not go on to play professional sports,¹¹² making education even more important for those individuals. Additionally, the sports that SAs participate in only exist through and because of the educational institution, of which those athletic programs are a part. From an institutional perspective, a university’s control over its own academic programs and structure is of the utmost importance.¹¹³ This includes control over equitable treatment of all students, whether they participate in some extracurricular activity or not.

With this autonomy comes the right as an academic institution to define the relationship between faculty and attendees of the school as educator-student above all else. Some contend that the relationship between SAs and institutions is more like employer-employee. For example, the argument that “[i]t’s long overdue to see that revenue-producing college athletes

¹¹¹ Dan Barry, *Notre Dame President Stands Firm Amid Shifts in College Athletics*, N.Y. TIMES (Sept. 10, 2015), https://www.nytimes.com/2015/09/11/sports/ncaafootball/notre-dame-president-stands-firm-amid-shifts-in-college-athletics.html?_r=0.

¹¹² NCAA, *NCAA Recruiting Facts 2* (2018), <https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf> (“Fewer than 2 percent of NCAA student-athletes go on to be professional athletes.”); *Estimated Probability of Competing in Professional Athletics*, NCAA, <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (last updated Apr. 3, 2019).

¹¹³ See Christopher J. Gerace, *The NCAA’s Transfer Conundrum*, 94 *Notre Dame L. Rev.* 1819, 1841–42 (2019) (providing an overview of the importance of institutional control over academics in the context of NCAA rule and policymaking).

are employees and should get paid”¹¹⁴ is not an uncommon one. But the athletics programs are a part of the institution, not an independent body. In terms of institutional academic autonomy, then, there is not much difference between a member of the school band and a student-athlete. Both participate in a program that requires skill independent of academics. Both, at least at many Division I institutions, have the opportunity to be a part of a unique team that provides entertainment in some capacity. Both must commit significant time and effort to participate in a cocurricular. And both are students. This is not changed by the fact that the program in which the SA participates makes a significant amount of revenue, while the one the student flute player takes part in does not.¹¹⁵ The school band and a sports team both exist within and because of the institution, and band members and SAs can participate in those programs only because of their attendance of the university as students. Becoming a student is necessary to participation in the sport, while the converse is not true. Given this structure, schools must be able to define the nature of the relationship between SAs and institutions as educator-student, not employer-employee.

It is clear that a good education is a legitimate and valuable goal for SAs, institutions, and the NCAA alike. Having a clearly defined relationship of educator-student reinforces the role of SAs as students and highlights the significance of education in a SA’s collegiate experience. Education should always be the primary objective of the NCAA in crafting policy and rules consistent with its SAs’ and institutions’ best interests. Thus, maintaining the distinct relationship of educator-student, as opposed to employer-employee or something in between, must be a priority in drafting NIL legislation. Many scoff at the NCAA for asserting that education is a priority, perhaps for good reason. In order to bring credibility to the claim, and more importantly to create an

¹¹⁴ Mark Koba, *College Athletes or Unpaid Workers? A Debate Rages*, CNBC (Mar. 17, 2014), <https://www.cnbc.com/2014/03/17/paying-college-athletes-lawyers-academics-say-its-time-to-pay-them.html>.

¹¹⁵ Schools may make a substantial amount of revenue from several different endeavors, not only athletics, even if athletics brings in the most revenue of all. That an institution profits from some venture does not change the fact that education is at the heart of any school’s purpose and existence.

educationally focused organization, the NCAA must implement changes that actually prioritize education.

B. Fairness to Student-Athletes: Equitable Treatment with the Student Body

It is apparent throughout the Division I Manual that the NCAA in theory supports both the goals of fairness and equitable treatment of SAs. Included in the NCAA's requirements for commitment to the collegiate model is a "commitment to student-athlete well-being."¹¹⁶ The provision counsels that institutions must foster an environment conducive to both SAs' academic success as well as fairness among SAs and other members of campus.¹¹⁷ Another section within the NCAA Constitution¹¹⁸ lays out SA well-being as a principle that requires institutions to promote SAs' educational experience, to ensure fairness, and—perhaps most relevant to the NIL conversation—"to involve student-athletes in matters that affect their lives."¹¹⁹ In terms of equitable treatment, the NCAA Constitution also requires that SAs be "an integral part of the student body" and that the academic treatment of SAs "shall be consistent with the policies and standards adopted by the institution for the student body in general."¹²⁰ It is worth briefly reflecting on the rationales behind these principles to better understand why the NCAA needs to construct a regulatory structure that gives life to and animates these principles, rather than rendering such objectives hollow.

As a general matter, it is easy to see why fairness to SAs matters in the context of intercollegiate athletics. Being fair to others is, as a general matter, a legitimate and meaningful goal in any context. This is especially so in education, as students attend institutions during formative years of growth in innumerable aspects of life. For SAs, things are no different. Picking a school, moving away from home, and starting at a new institution may be

¹¹⁶ Division I Manual, *supra* note 20, § 20.9.1.6.

¹¹⁷ *Id.*

¹¹⁸ The NCAA Constitution can be found in the Division I Manual Articles 1–6. It covers topics such as the organization's "purposes and fundamental policy," principles for conduct, membership and organization, the NCAA legislative process, and "institutional control." *Id.* §§ 1.1–6.4.2.2.

¹¹⁹ *Id.* § 2.2–2.2.6.

¹²⁰ *Id.* § 2.5

challenging enough, even before considering the rigors of academics and participation in intercollegiate sports. The NCAA, along with a SA's school, is one of the two major organizations that govern much of the SA's college experience. As such, it "has a responsibility to keep the general welfare of its student-athletes in mind whenever it creates rules that can have a profound impact on those student-athletes during an important developmental period in their lives."¹²¹ Certainly, whether SAs are able to profit in any capacity from NIL clearly constitutes a "matter that affects their lives." Compensation for NIL implicates not only the ability to profit but also the property rights inherent in an individual's image and likeness and how it can be used commercially. As a result, fairness to SAs is an important factor for the NCAA to consider.

In addition to a more universal concept of fairness, and perhaps more directly relevant in the NIL context, is the goal of equitable treatment of SAs relative to the student body at a given institution. In order to be consistent with the educationally oriented model laid out in Section II.B, *supra*, and to hold that "the athlete [is] an integral part of the student body,"¹²² the NCAA must find a way to fashion its rules in a way that promotes such equity on campus. Otherwise, the idea that student-athletes are "students first" loses force and becomes nothing more than another weak defense the NCAA puts forward to defend its restrictions on SAs. This approach requires that SAs are, in general, not treated differently from non-athlete students in an inequitable way. While the NCAA Constitution only specifically mentions *academic* equity,¹²³ there is no reasoned basis for not treating SAs equitably to non-athlete students in other areas when education serves as the cornerstone of college sports.

It is important to note that "equitable" treatment does not necessarily mean "equal" treatment. Equity is imbued with a sense of general fairness and similar treatment and requires that if indeed there is different treatment, that disparity exists for a

¹²¹ Gerace, *supra* note 113, at 1839.

¹²² Division I Manual, *supra* note 20, § 1.3.1.

¹²³ *Id.* § 2.5 (The admission, academic standing and academic progress of student-athletes shall be consistent with the policies and standards adopted by the institution for the student body in general.).

legitimate reason.¹²⁴ Equitable treatment applies to academic work, where SAs should not be given inequitably beneficial treatment in grading or scheduling. It applies to extracurricular opportunities, where SAs should in general have similar opportunities for participation in various organizations or groups while attending an institution. And, relevant for our purposes, it applies to the ability of SAs to profit from NIL.

Regular students, including the school band members discussed above, can profit from NIL in any manner they like so long as it is otherwise legal to do so. Therefore, if the NCAA wants to treat SAs differently in that regard, it has to provide a clear and compelling reason for doing so. The Board of Governors stated as much in its NIL announcement.¹²⁵ This cannot simply be talk or lip service. The NCAA must do everything in its power to treat SAs equitably with non-athlete students unless there is a clear and persuasive reason to do otherwise. In the all-important interest of fairness to SAs as students in the educational system, rules cannot arbitrarily or carelessly put a student-athlete in a position he would not be in if he simply did not participate in college sports. Thus, with education as the leading principle, fairness and equitable treatment on campus form the second piece of the NIL puzzle.

C. Competitive Equity

The counterbalance to equitable treatment on campus is the NCAA's procompetitive interest in competitive equity. In the context of NIL, the NCAA would argue that competitive equity is a compelling reason for treating SAs differently than non-athlete students. The NCAA Constitution articulates the principle as requiring that the structure of intercollegiate athletics "promote opportunity for equity in competition to ensure that individual student-athletes and institutions will not be prevented unfairly

¹²⁴ What counts as a legitimate reason in this context may be slippery and hard to pin down. It most likely requires a fact-specific analysis for each individual case, to some extent. That is an unsatisfying answer, no doubt—but it demonstrates the difficult balancing that inevitably must take place in the complex world of intercollegiate athletics.

¹²⁵ Board of Governors, *supra* note 79 (listing "[a]ssure student-athletes are treated similarly to non-athlete students unless a compelling reason exists to differentiate" as a guiding principle for NCAA divisions drafting new NIL rules).

from achieving the benefits inherent in participation in intercollegiate athletics.”¹²⁶ All things considered, this principle is probably the most straightforward. At least facially, seeking to create rules that encourage competitive fairness and balance among institutions goes to the very heart of college sports. There would be little purpose to the enterprise as a whole if not for a genuine desire to provide competition for viewers and participants alike.

The Supreme Court effectively approved of this line of reasoning in *NCAA v. Board of Regents*, arguing that certain restraints “are essential if [intercollegiate athletics] is to be available at all.”¹²⁷ Because that case was based on an antitrust challenge to the NCAA, the Court determined that the “rule of reason” should be applied and held that the proper inquiry is whether the NCAA restraint is procompetitive or not.¹²⁸ As long as the challenged NCAA rule is procompetitive, the Court implied that it is not unreasonable under the Sherman Act.¹²⁹ And in spite of the Court’s finding that the regulation at issue in *Board of Regents* was not procompetitive, it emphasized that maintenance of competitive balance in college sports is a legitimate interest.¹³⁰ Significantly, the Court recognized that NCAA rules may be “justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.”¹³¹ This remains as true today as it was when Justice Stevens wrote it in 1984. Certain restrictions must be available to the NCAA, at least to some extent, if it is to provide the intercollegiate athletics competition that it always has. As a result, the NCAA may legislate in a way that encourages or promotes athletic competition—or that discourages activity that unfairly tips the competitive scales—between its institutions.

Of course, we must bear in mind that this is only one of the three major elements to balance within the normative framework. As Part III makes clear, the actual balancing of educational

¹²⁶ Division I Manual, *supra* note 20, § 2.10.

¹²⁷ *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984).

¹²⁸ *Id.* at 102–103.

¹²⁹ *Id.* at 103–04.

¹³⁰ *Id.* at 117.

¹³¹ *Id.*

values, fair and equitable treatment of SAs, and competitive equity is an exceptional challenge in the world of NIL. This Article's core objective is to provide a useful analytical framework to apply to any proposed NIL rules, which the NCAA or anyone crafting such rules should use. I do not advocate for any particular rule or system, but for faithfulness to the ideals laid out above. At this complicated intersection of law, education, and sports, the NCAA must approach the issue with great care and thought. It will best accomplish this goal by remaining committed to education, fair treatment of student-athletes, and promotion of competition between its institutions.

III. RULES INFORMED BY PRINCIPLE: FITTING THE PIECES TO THE PUZZLE

In shaping the new NIL regulations, the NCAA must strike a balance between the educational interest of SAs, equitable treatment between SAs and the student body, and competitive equity among NCAA institutions. This is a tall task but is one that must be undertaken if the NCAA is to ensure the continued existence of modern intercollegiate athletics. As a preliminary matter, it is useful to briefly note the relationships between the various elements of the normative framework.

As independent principles, equitable treatment and education go hand in hand. Treating SAs as similarly to regular students as possible fulfills the goal of equitable treatment while also serving the distinct, primary goal of education in intercollegiate athletics. Treating SAs as regular students ostensibly places SAs in the best position to succeed academically and to have an educational experience consistent with fellow students on campus. Thus, these principles generally track each other and work toward the same academic goal.

Competitive equity, meanwhile, lives in tension with equitable treatment in particular, and sometimes with education as well. Because there is sometimes a need to place SAs in a unique position as a result of competition in athletics, a SA will never be treated quite the same as a non-athlete student. There may be differences in scheduling, housing, meal plans, and availability of tutoring, which often are to the SAs' benefit. On the other hand, SAs are required to practice, travel, and do what is

required to excel in a sport while also excelling academically. Because there are benefits of athletic competition to all involved, this arrangement endures. However, the NCAA must ensure that rules that treat SAs differently do not do so in a way that wholly defeats the educational purposes of intercollegiate athletics. Such rules must be well justified. For competitive equity, this means having a genuine and substantial belief that the restricted activity will inhibit competition.

Having discussed those relationships, we turn to the specifics of how the elements of the framework interact with compensation for NIL, beginning with competitive equity. The predominant concern for the NCAA or its institutions is for abuse of the NIL market if one is indeed created. This could involve something like school boosters or fans who own local businesses paying exorbitant amounts of money to a SA for endorsing a product or service in a way that is entirely untethered to the reasonable market value of such an endorsement. Theoretically, this could impact competition by allowing the schools with the most fan and financial support—the so-called “haves”—to provide prospective SAs with unreasonable and unearned compensation, effectively in exchange for a SA to play for the booster’s favorite school.¹³² Such a scenario, if it occurred, would be out of step with the fairness and equity the NCAA desires in its collegiate competition.¹³³ Whatever NIL rules the NCAA crafts, it should ensure that SAs are only compensated for NIL commensurate with a reasonable value in the relevant market. For example, if the NCAA decides to permit SAs to profit only from NIL that has nothing to do with athletic ability, our baking Youtuber friend cannot receive \$50,000 from a local baker who happens to be a booster of the nearby Division I

¹³² Some might argue that this is already an issue, especially in light of the FBI investigation into college basketball that found an immense amount of financial corruption. See Andy Staples, What Has the NCAA—or Anyone—Learned from the College Basketball Black Market’s Time on Trial?, *Sports Illustrated* (May 9, 2019), <https://www.si.com/college/2019/05/09/ncaa-trial-fbi-bribery-corruption-mark-emmert>. But that is a discussion for another day.

¹³³ Judge Wilken rejected this argument in *O’Bannon* for an apparent lack of evidence, see *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 1001–02 (N.D. Cal 2014), but the assertion is at least plausible. For the sake of argument, it is fair to consider the possibility here.

school.¹³⁴ Or, if the NCAA permitted athletically related NIL compensation, a wide receiver for the football team could not receive \$100,000 to sign autographs. These are of course extreme examples, but the gist is that the NCAA probably does not need to fear for competitive equity as a result of NIL unless the payments to SAs are totally disproportionate to the relevant market value for the NIL use.

The question of NIL with regards to equitable treatment of SAs is the most straightforward of the three. We must consider that non-athlete students may generally reap the benefits of NIL in any context, be it for ads, endorsements, or developments of a product. Name, image, and likeness is a recognized property right that all students—athletes or not—have the ability to protect.¹³⁵ Based on this alone, one could make the argument that fairness and equity demand that SAs be able to profit for all types of NIL, related to athletics and otherwise. It is particularly unreasonable for the NCAA to restrict compensation for NIL use that is unrelated to participation in athletics since, in such a case, SAs are not gaining any perceivable advantage from participating in sports. In *O'Bannon*, Judge Wilken rejected the NCAA's argument justifying its broad rule against any NIL payments on SA integration in the student body.¹³⁶ It is not especially hard to see why, as a SA who receives compensation for non-athletic NIL is both treated similarly to other students and is not distinguished from the rest of the campus community in any meaningful way.

The story may be slightly different when NIL payments are directly related to athletics participation at a university, to use the example the NCAA probably is most uncomfortable with. In such a situation—for example, sales of a player's college jersey with her name on it—a SA is effectively being compensated for participation in athletics. Prohibiting compensation for such NIL may distinguish SAs from other students on campus in a manner inconsistent with the principle of equitable treatment, but we

¹³⁴ This assumes, of course, that the market for endorsements by popular Youtubers who bake does not reach the tens of thousands of dollars—an admittedly unresearched claim.

¹³⁵ Feldman, *supra* note 51, at 3.

¹³⁶ *O'Bannon*, 7 F. Supp. 3d at 1003. Judge Wilken did leave open the possibility that narrower restrictions might serve the interest of integration of SAs into the student community. *Id.*

need not, for purposes of this Article, determine conclusively whether such compensation should be permitted. For now, we can say that equitable treatment of SAs requires at least that the NCAA permits SAs to receive compensation for non-athletically related NIL, and it may permit much more.

Finally, we come to education. Taking for granted that the NCAA rallies around education as its foundational ideal (as it should), NIL compensation for SAs must be consistent with a model that promotes SAs as true *student-athletes*, with sports as an extra- or even co-curricular activity incident to academics. NIL compensation directly—and potentially even indirectly—related to participation in athletics could alter the relationship between institutions and students, even if the schools are not directly paying SAs. As previously discussed, Rev. Jenkins made the point succinctly in arguing that institutions serve as educators for SAs, not as “agent[s] for financial gain.”¹³⁷ Payment related to competition in athletics would seem to take things out of the realm of education and into the sphere of professional or semiprofessional sports, anathema to the NCAA.

Thus, there appear to be two options for the relevant distinction here: (1) NIL payments that are athletically related versus those that are not, or (2) NIL payments that are directly related to participation in a particular university’s athletics versus those that are not. From the NCAA’s perspective, approach (1) has the benefit of clearly drawing a line between anything resembling payment for competition and compensation not related to athletics participation. But bearing in mind our normative considerations, does it have anything to do with the educator-student relationship that is critical to the overarching educational interest of intercollegiate athletics? The answer is not entirely clear, but it is fair to say that it does not.

An example may help illustrate the point. A superstar basketball SA for a prominent Division I institution decides she wants to host her own basketball clinic and wants to charge a reasonable fee for attendance. This would constitute NIL and undoubtedly is related to her athletic ability. But it is far from obvious that anyone attending her camp would be doing so

¹³⁷ Barry, *supra* note 111.

particularly because of the SA's participation in *her school's* sports as opposed to *her own* basketball skill. If the concern with NIL is its ability to potentially reshape the core educational relationship between institutions and SAs, then NIL compensation should only be prohibited where it sincerely risks such a reshaping. In this hypothetical, it does not appear that compensation is likely to change the educator-student relationship. This is because the SA's affiliation with the school may at most be incidentally involved in attendance at the basketball clinic and thus the SA's compensation. To use Rev. Jenkins' words, in such a case the school is not clearly serving as the SA's "agent for financial gain."

For this reason, approach (2) may provide the more useful distinction considering both the educational objectives of college sports and the desire for NIL compensation. In the above example, the SA could profit for the NIL value that she has created consistent with equitable treatment of SAs. Permitting this would not offend competitive equity because of the market-based cost of attending the clinic. And it is not likely to threaten to change the nature of the relationship between the SA's school from educator-student to employer-employee, agent-client, or anything else. As long as the SA does not emphasize her affiliation with the university—by wearing a school shirt or advertising her participation on the basketball team, for example—the school is not implicated in a clear enough way to assert that the institution's educational goals for its SAs will be obstructed. It might be a different story if the school's starting quarterback is solicited to appear in ads for a famous local bakery and is asked to wear his school's apparel while being introduced as the school's quarterback in the ad. Such a situation may too directly involve the institution in the SA's compensation. Certainly, there will be cases where the differences between approaches (1) and (2) may not be as clear. But this is inherent to an issue as full of grey area as NIL compensation for student-athletes, and approach (2) provides a framework that is more consistent with the educational principles discussed throughout this Article.

Though the above analysis is surely complicated, some general themes emerge that are perhaps worth summarizing. First, for the sake of competitive equity it appears clear that the NCAA should not permit any NIL compensation, related to

university athletics participation or not, that is not based on a legitimate and reasonable market value for the NIL use. Outside of that scenario, competitive equity does not necessarily restrict NIL compensation for SAs to any one form. Similarly, equitable treatment of SAs not only does not counsel restriction on NIL payments, but instead encourages such payments in order to fairly treat SAs proportionately to non-athlete students. Finally, the principle of education permits, at the very least, NIL compensation for use unrelated to athletics and likely some use related to athletics. Currently, a useful distinction for when NIL payment should generally be permissible is when it is not directly related to participation in a specific institution's athletics. A permissive view of this distinction would permit SAs to profit not only for athletically unrelated NIL, but also athletically related NIL that does not clearly implicate the SA's institution in a way that could affect the educator-student relationship. Such a view may have support among even major Division I administrators, such as Rev. Jenkins:

And while Father Jenkins opposes sharing revenue with the Notre Dame quarterback, say, based on the sale of jerseys bearing his uniform number . . . he would support the quarterback's selling his autograph, or retaining an agent to help him monetize his fame, as long as Notre Dame did not become a partner in the endeavor.¹³⁸

The normative framework balancing education, fairness, and competitive equity provides the NCAA and its institutions with the tools it needs to approach the issue of name, image, and likeness with the attention to detail and thoughtfulness required in the ever-complex landscape of intercollegiate athletics. While the answers may not yet be clear, remaining committed to these principles will put the NCAA on the right path.

Finally, it is important to reemphasize the necessary commitment to the educational model in intercollegiate athletics. As discussed, it appears that education has taken a backseat to amateurism for the NCAA. If the NCAA truly wants to promote its student-athletes' best interests, and in doing so regain the

¹³⁸ Id.

confidence of its institutions and the public, that has to change. The answer to overreliance on amateurism is a renewed focus on education. Thus, the NCAA should draft legislation that is consistent with the ideal of education as the priority for each of the NCAA, its institutions, and its SAs. A good starting point might be suggesting that schools offer academic credit for athletics participation, thereby more clearly tying athletics to a student-athlete's educational progress. Another could be that the NCAA mandate a limit on missed classes or at least require its schools to do so, demonstrating that education is a priority. These are just a couple examples of potential options the NCAA could choose to pursue. With the many complexities and challenges it faces, the NCAA and its institutions will best serve student-athletes and themselves by committing to education as the bedrock for intercollegiate athletics.

CONCLUSION

The NCAA has been challenged frequently and forcefully on the issue of pay for student-athletes, particularly in the context of compensation for use of name, image, and likeness. Recent state legislation, especially California's Fair Pay to Play Act, has forced the NCAA into a position where it must amend its NIL rules to adopt to the modern landscape of intercollegiate athletics. As it creates these rules to compensate student-athletes for NIL, the NCAA must account for three major principles: (1) education as the main priority of participation in college sports, (2) fair and equitable treatment of student-athletes, and (3) competitive equity among its institutions. With these overarching goals as a guide, the NCAA can be confident that it will achieve a result that promotes the best interests of its organization, its institutions, and most importantly, its student-athletes.