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DO NOT PASS GO, DO NOT COLLECT \$200: EXPLORING THE NCAA'S  
MONOPOLY ON ATHLETE COMPENSATION BEHIND THE 'PAY THE  
PLAYERS' DEBATE

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❖ Note ❖

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### I. INTRODUCTION

On February 2, 2021, EA Sports made an announcement that excited college sports fans everywhere—the NCAA football game that many had grown to love before its discontinuation in 2014 would be returning in 2023.<sup>1</sup> Along with this excitement came a reignited debate about whether student-athletes should be paid for the use of their name, image, and likeness (“NIL”); an issue that contributed to the game’s discontinuation.<sup>2</sup> Despite the profit made by the video game franchise, the National Collegiate Athletic Association’s (“NCAA”) longstanding prohibition on student-athletes receiving any compensation beyond their athletic scholarships precluded featured players from receiving compensation.

This Note will explore the intricacies of the debate about whether college athletes should be compensated for their services, primarily using revenue generating sports as a point of examination. Part II will introduce the backdrop of the debate, discussing the “players” in college athletics and the stake that each has in the resolution of this debate. Part III will analyze the current guidelines regulating the compensation—or lack thereof—of student-athletes. Part IV will propose a solution that pleases both

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1. Michael Rothstein, *EA Sports to Do College Football Video Game*, ESPN (Feb. 2, 2021), [https://www.espn.com/college-football/story/\\_/id/30821045/school-plan-ea-sports-do-college-football](https://www.espn.com/college-football/story/_/id/30821045/school-plan-ea-sports-do-college-football).

2. See Jason Kirk, *EA Sports Halting College Football Video Games Series After All*, SBINATION (Sept. 26, 2013, 4:29 PM), <https://www.sbnation.com/college-football/2013/9/26/4774556/ea-sports-college-football-video-game-series>.

sides, while keeping in mind the best interests of the most important players, student-athletes. Part V will conclude.

## II. BACKGROUND

To understand why the “pay the players” debate has been heated and ongoing, it is first important to understand what is at stake for those involved. This section will discuss the NCAA and university athletic conferences, their media counterparts, and student-athletes.

### A. *The NCAA*

In 1906, in response to the rampant violence in collegiate football and threats to cut the sport altogether, then-President Theodore Roosevelt, along with college football representatives, formed what later became known as the NCAA.<sup>3</sup> The original goal of the NCAA was to prevent the exploitation of student-athletes.<sup>4</sup> Since then, the NCAA has become the authority on all collegiate athletics: regulating play and sanctioning schools or teams who violate said regulations. One of the most foundational principles of the NCAA is the association’s focus on the distinction between amateurism and professionalism.<sup>5</sup> According to Article 2.9 of the NCAA Division I Manual, “[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is avocation, and student-athletes should be protected from exploitation . . . .”<sup>6</sup> This quote demonstrates how the NCAA views intercollegiate athletics—as a voluntary activity where student-athletes are not to be viewed as professionals.

The NCAA encompasses several university conferences, typically divided by region. While there are ten football conferences in total, there are five major conferences—known as the autonomous conferences or the Power Five (“P5”)—that really hold much of the power within the NCAA, especially regarding revenue streams

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3. Dan Treadway, *Why Does the NCAA Exist?*, HUFFPOST, [https://www.huffpost.com/entry/johnny-manziel-ncaa-eligibility\\_b\\_3020985](https://www.huffpost.com/entry/johnny-manziel-ncaa-eligibility_b_3020985) (Dec. 6, 2017).

4. *Id.*

5. NAT’L COLLEGIATE ATHLETIC ASS’N, 2020-2021 NCAA DIVISION I MANUAL CONST., Art. 2.9 (2020), available at <http://www.ncaapublications.com/p-4605-2020-2021-ncaa-division-i-manual.aspx>.

6. *Id.*

that come from media rights.<sup>7</sup> This power was demonstrated when COVID-19 threatened to end fall sports championships in 2020, which threatened the P5’s cash cow—the College Football Playoff (“CFP”).<sup>8</sup> Because the CFP is not sponsored by the NCAA, the P5 conferences flexed their power by threatening to hold their own championships for all fall sports.<sup>9</sup> This move would have justified keeping the CFP afloat during the COVID-19 pandemic, solidifying the autonomy of the conferences moving forward.<sup>10</sup> In the end, two Power Five powerhouses faced off in the lucrative college football playoff despite earlier concerns of a potential cancellation.<sup>11</sup>

### B. *The Media*

Another major player in the collegiate athletics debate is major media conglomerates. Prior to the Supreme Court’s 1984 ruling in *NCAA v. Board of Regents of the University of Oklahoma*—which held that the NCAA’s control over television contracts was a violation of the Sherman Act—the NCAA had full control over the media rights related to its member institutions.<sup>12</sup> Because of the freedom that the *Board of Regents* decision gave NCAA conferences and member institutions, four of the five autonomous conferences now have their own dedicated channels.<sup>13</sup> In 2012, ESPN reached an agreement to broadcast the CFP, including the championship game—that had its inaugural game in 2014—for \$7.3 billion over twelve years.<sup>14</sup> This does not even account for the revenue made for each conferences’ regular season games,

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7. David Broughton, *Power Five: An \$8.3 Billion Revenue Powerhouse*, SPORTS BUS. J. (Aug. 17, 2020), [https://www.sportsbusinessjournal.com/Journal/Issues/2020/08/17/Colleges/Revenue.aspx?ana=register\\_free\\_form\\_2\\_filled](https://www.sportsbusinessjournal.com/Journal/Issues/2020/08/17/Colleges/Revenue.aspx?ana=register_free_form_2_filled).

8. Ross Dellenger & Pat Forde, *Power 5 Leaders Exploring Possibility of Staging Their Own Fall Sports Championships*, SPORTS ILLUSTRATED (Aug. 1, 2020), <https://www.si.com/college/2020/08/01/power-5-exploring-staging-own-fall-sports-championships-2020>.

9. *Id.*

10. *Id.*

11. Ralph D. Russo, *No. 1 Alabama Wins National Title 52-24 over No. 3 Ohio State Championships*, CHI. TRIBUNE (Jan. 12, 2021, 12:10 AM), <https://www.chicagotribune.com/sports/college/ct-alabama-ohio-state-national-championship-20210112-wspbv4lzhofdbvk2ww2fdga4-story.html>.

12. *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 85–136 (1984).

13. Andrew Weiss, Note, *The California Fair Pay to Play Act: A Survey of the Regulatory and Business Impacts of a State-Based Approach to Compensating College Athletes and the Challenges Ahead*, 16 RUTGERS BUS. L. REV. 259, 263 (2020).

14. Allen R. Sanderson & John J. Siegfried, *The Role of Broadcasting in National Collegiate Athletic Association Sports*, 52 REV. INDUS. ORG. 305, 308 (2017).

many of which are broadcasted on ESPN, ESPNU, and conference specific networks.<sup>15</sup> While college football is the largest revenue generator for much of the P5, media broadcasting revenue from college basketball is no small amount.<sup>16</sup> In 2017, CBS and Turner Broadcasting, the broadcasting company with rights to the collegiate basketball tournament known as March Madness, generated an ad revenue of \$1.285 billion from broadcasting the tournament.<sup>17</sup>

These media revenue streams are so important that conferences have aligned to ensure an increase in media revenue.<sup>18</sup> While never stated officially, in 2014 the Big Ten—which is a predominantly midwestern conference—realigned to include Maryland (a former Atlantic Coast Conference school) and Rutgers (a former Big East school).<sup>19</sup> By adding these two schools, the Big Ten cast its net beyond the rust belt and gained access to a much larger east coast market, a move that significantly increased media revenue for the conference.<sup>20</sup> This move was a win-win situation for the schools and the conference—the conference got expand its reach within the media market, and the schools were able to join a more lucrative conference allowing for more resources for their athletic programs.<sup>21</sup>

### *C. Student-Athletes*

Arguably the most important players in collegiate athletics are the players themselves—without them, there would be no NCAA. At the center of the “pay the players” debate are almost 500,000 student-athletes that dedicate their time to their sports each year.<sup>22</sup> Many opponents of compensating student-athletes, including the NCAA itself, argue that the tuition-free academic experience should be compensation

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15. Broughton, *supra* note 7 (approximating NCAA TV Broadcast Revenue at \$827 million and NCAA Expenses Attributed to Division I Members at \$246.28 million).

16. Mike Ozanian, *March Madness Is Most Profitable Postseason TV Deal in Sports*, (Mar. 19, 2019, 9:24 AM), <https://www.forbes.com/sites/sportsmoney/2019/03/19/march-madness-is-most-profitable-postseason-tv-deal-in-sports/?sh=30d051951795>.

17. *Id.*

18. Brett McMurphy & Dana O’Neil, *Maryland Accepts Big Ten Invite*, ESPN (Nov. 19, 2012), [https://www.espn.com/college-sports/story/\\_/id/8651934/maryland-terrapins-join-big-ten-rutgers-scarlet-knights-join-well-sources-say](https://www.espn.com/college-sports/story/_/id/8651934/maryland-terrapins-join-big-ten-rutgers-scarlet-knights-join-well-sources-say).

19. *Id.*

20. Steve Berkowitz, *Big Ten Conference Revenues Rise 33% in One Year*, USA TODAY, <https://www.usatoday.com/story/sports/college/2016/05/18/big-ten-revenue-jim-delany-pay-salary-compensation-television/84553752/>.

21. McMurphy & O’Neil, *supra* note 18.

22. Amy Wimmer Schwab, *Number of NCAA College Athletes Reaches All-Time High*, NAT’L COLLEGIATE ATHLETIC ASS’N (Oct. 10, 2018, 2:00 PM), <https://www.ncaa.org/about/resources/media-center/news/number-ncaa-college-athletes-reaches-all-time-high>.

enough for the athletes' participation in their sport.<sup>23</sup> This ignores the fact that according to the NCAA, between Division I and Division II sports, 180,000 student-athletes receive athletic scholarships, which pales in comparison to the almost 500,000 student-athletes that compete each year.<sup>24</sup>

This is compounded by the fact that these athletes have a very small chance of ever playing their sport professionally.<sup>25</sup> According to NCAA statistics, in 2019, 73,712 athletes competed in collegiate football and of the 16,380 players that were eligible for the NFL draft, 254 (or 1.6%) were drafted.<sup>26</sup> In comparison to the 18,816 athletes that competed in collegiate basketball—4,181 of which were draft eligible—only 52 (1.2%) of athletes were drafted from the NCAA.<sup>27</sup> Despite the fact that the NCAA fights to maintain the rigid demarcation between amateurism and professionalism, so few athletes will compete at the professional level that the collegiate level is the end of the road for them. This means that student-athletes who work an average of forty hours a week toward their sport,<sup>28</sup> on top of the average amount of hours necessary to remain academically eligible to compete are using their “lucrative” years generating millions in revenue yet playing for free.<sup>29</sup>

### III. ANALYSIS

The pay-the-players debate at the heart of this Note is not a new one; proponents and opponents of compensation for participation in collegiate athletics have argued the merits of compensation models for decades.<sup>30</sup> On one side, proponents

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23. Zach Dirlam, *There's No Crying in College: The Case Against Paying College Athletes*, Bleacher Report (Apr. 3, 2013), <https://bleacherreport.com/articles/1588301-theres-no-crying-in-college-the-case-against-paying-college-athletes>.

24. *Scholarships*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/student-athletes/future/scholarships> (last visited Mar. 19, 2021).

25. *Estimated Probability of Competing in Professional Athletics*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (last visited Mar. 19, 2021).

26. *Id.*

27. *Id.*

28. Peter Jacobs, *Here's the Insane Amount of Time Student-Athletes Spend on Practice*, BUS. INSIDER (Jan. 27, 2015, 10:44 AM) <https://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1>.

29. *Finances of Intercollegiate Athletics*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics> (last visited Mar. 19, 2021) (noting that in 2019 the revenue reported among all NCAA athletics departments was \$18.9 billion).

30. Jon Solomon, *The History Behind the Debate over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/> (Discussing the origin of the NCAA's use of the term “student-athlete” in response to the

argue that there exists a grave injustice where student-athletes meet the high demands of participating in collegiate athletics and garnering billions in revenue for universities without being compensated.<sup>31</sup> While on the other side, opponents of compensation models argue that student-athletes are already given much in the way of compensation via free tuition and cost-of-living stipends.<sup>32</sup>

#### A. *The Case for Compensation*

The first argument that many proponents of compensating student-athletes is the discrepancy between the amount of money generated by these athletes' athletic performance, and what they receive in return. This discrepancy is particularly unjust when the increase in revenue is considered in comparison to the increase in tuition over about the same period of time. For example, in 1981 the March Madness tournament generated about \$9 million, while in 2017, the tournament brought in \$1 billion.<sup>33</sup> On the other hand, the average annual tuition cost grew by 260% in the same period, a number dwarfed by the increase in revenue generated by the annual March Madness tournament.<sup>34</sup> If the NCAA is to stand by the argument that tuition-free education is compensation for athletic participation, student-athletes are still being severely underpaid. Another injustice that proponents argue justifies compensating players for their participation is the exorbitant salaries of coaching staffs in revenue generating sports. For instance, in 2013 the median salary for head football coaches was \$1.9 million, while the average head basketball coach's salary was \$1.2 million.<sup>35</sup>

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potential for worker's compensation claims by the family of a deceased NCAA football player who sustained a critical head injury during play).

31. Sarah Lytal, *Comment: Ending the Amateurism Façade—Pay College Athletes*, 9 HOUS. L. REV. 158, 159 (2019).

32. Paul Daugherty, *College Athletes Already Have Advantages and Shouldn't Be Paid*, SPORTS ILLUSTRATED (Jan. 20, 2012), <https://www.si.com/more-sports/2012/01/20/no-pay>.

33. Mike Gilleran, Ron Katz & Issac Vaughn, *Should College Athletes Be Paid?*, DISCUSSION F. INST. SPORTS L. & ETHICS SANTA CLARA UNIV. (July 15, 2013), <https://law.scu.edu/sports-law/should-college-athletes-be-paid/>. See also Andrew Lisa, *The Money Behind the March Madness NCAA Basketball Tournament*, YAHOO! ENT. (Mar. 9, 2020), <https://www.yahoo.com/entertainment/money-behind-march-madness-ncaa-194402803.html>.

34. Abby Jackson, *This Chart Shows How Quickly College Tuition Has Skyrocketed Since 1980*, BUS. INSIDER (July 2015, 2:24 PM), <https://www.businessinsider.com/this-chart-shows-how-quickly-college-tuition-has-skyrocketed-since-1980-2015-7#:~:text=The%20average%20annual%20increase%20in,to%20the%20Department%20of%20Education>.

35. Allen R. Sanderson & John J. Siegfried, *The Case for Paying College Athletes*, 29 J. ECON. PERSP. 115 (2015), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.29.1.115> (citing Daniel L. Fuls, *NCAA Division I Intercollegiate Athletics Programs Report, 2004–2013: Revenues and*

Looking at these numbers, it is hard to advocate for a position that allows college coaches to continue to see an increase in salary while the players who generate the NCAA and its member institutions' revenue, are supposed to accept free tuition in return for the revenue they generate each year. Lastly, those in favor of compensating student-athletes argue that if the NCAA is going to perpetuate the idea that athletes should be content with free tuition because they are "students first," they should only demand of athletes what they would of the average student. While the NCAA's twenty-hour rule seems reasonable considering the fact that almost half of full-time undergraduate students are employed for approximately the same amount of hours each week, this rule is a little deceptive.<sup>36</sup> While the rule is that student-athletes can spend a maximum of twenty-hours a week on athletic related activities, the exceptions to this rule mean that in practice the average student athlete is actually spending approximately forty hours a week on athletic activities.<sup>37</sup> By exempting team travel, compliance meetings, recruiting activities, team-building activities, and a host of other required activities from being counted toward the twenty hours a week rule, the NCAA creates a loophole where student-athletes are working in excess of twenty hours a week on athletics-related activities.<sup>38</sup> If the NCAA wants to stand by its "student-first" approach, it must address the realities that student-athletes are rarely able to focus primarily on their studies when what is demanded of them is above and beyond what is demanded of the average student.

### B. *The Case Against Compensation*

While to some compensating college athletes seems like the fair and logical thing to do, the idea of compensating student-athletes has also faced its fair share of opposition. Opponents often argue that student-athletes should be treated no differently than other students and that receiving a free education is compensation enough for their contributions to the program.<sup>39</sup> Not only do student-athletes receive a free education, they receive free medical care, and "a national stage to audition for a

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*Expenses*, NAT'L COLLEGIATE ATHLETIC ASS'N: INDIANAPOLIS, IND. (2014),

<http://www.ncaapublications.com/p-4344-division-i-revenues-and-expenses-2004-2013.aspx>).

36. *Bylaw 17.1.7.1*, NAT'L COLLEGIATE ATHLETIC ASS'N, DIVISION I MANUAL (2020);

*College Student Employment*, NAT'L CTR. EDUC. STAT.,

[\(https://nces.ed.gov/programs/coe/indicator\\_ssa.asp#:~:text=In%202018%2C%20the%20percentage%20of,time%20students%20\(43%20percent\)](https://nces.ed.gov/programs/coe/indicator_ssa.asp#:~:text=In%202018%2C%20the%20percentage%20of,time%20students%20(43%20percent))) (May 2020).

37. Jacobs, *supra* note 28.

38. *Id.*

39. Zach Dirlam, *There's No Crying in College: The Case Against Paying College Athletes*, BLEACHER REP. (Apr. 3, 2013), <https://bleacherreport.com/articles/1588301-theres-no-crying-in-college-the-case-against-paying-college-athletes>.

job in the professional ranks,” opportunities that are not afforded to the average college student.<sup>40</sup> These opponents also argue that while the revenue generated by the NCAA each year is exorbitant, it is misleading because 96% of that revenue generated is distributed to its member institutions.<sup>41</sup> Additionally, opponents argue that while the compensation that college coaches receive may seem excessive given the lack of compensation for athletes, these salaries account for the differences in contractual responsibilities between college coaches and athletes.<sup>42</sup> While athletes are expected to perform to the best of their athletic ability, and maintain academic eligibility, coaches are expected to shape an entire program that often leads to more recruits and the bottom line, winning.<sup>43</sup> When coaches sign their contracts, they are promising the institution not only years of their careers, but they are also promising the most lucrative deliverable, wins.<sup>44</sup> Coaches who don’t win, don’t work—it is not uncommon for losing coaches to be on the proverbial hot seat.<sup>45</sup> This is in stark contrast to student athletes who commonly transfer to other schools, and in sports like men’s basketball it is increasingly rare for elite players to stay in college once they’ve reached the age of 19, the NBA’s minimum age under the “one-and-done rule.”<sup>46</sup> Lastly, many opponents argue that allowing for unlimited NIL payments would cause its own host of issues. First and foremost, unlimited NIL payments run the risk of emulating an employment relationship between member institutions and student-athletes which comes with its own host of issues including vicarious liability and Title IX issues.<sup>47</sup>

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40. *Id.*

41. *Id.*

42. Martin J. Greenberg, *Symposium: College Coaching Contracts Revisited: A Practical Perspective*, 12 MARQ. SPORTS. L. REV. 127, 151 (2001) (discussing the most common contractual responsibilities for coaches).

43. *Id.* at 242.

44. *Id.*

45. Randall S. Thomas & R. Lawrence Van Horn, *Article: College Football Coaches’ Pay and Contracts: Are They Overpaid and Unduly Privileged?*, 91 IND. L.J. 189, 192 (noting that the connection between coaching performance and compensation often means that poorly performing coaches will be terminated). *See also* Brad Shepard, *Way-Too-Early College Football Head Coach Hot-Seat Predictions*, BLEACHER REP. (Jan. 19, 2021), <https://bleacherreport.com/articles/2926862-way-too-early-college-football-head-coach-hot-seat-predictions> (speculating about the college football coaches that must win in order to stay with their programs and noting that “[a] contract extension means little if the on-field production is not up to snuff.”).

46. Rachel Stark-Mason, *The One-and-Done Dilemma*, NCAA CHAMPION MAG., Fall 2018 <https://www.ncaa.org/static/champion/the-one-and-done-dilemma/>.

47. David Bayard, *After Further Review: How the NCAA’s Division I Should Implement Name, Image, and Likeness Rights to Save Themselves and Best Preserve the Integrity of College Athletics*, 47 S.U. L. REV. 229, 244 (2020); Robert A. McCormick & Amy C. McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 84 (2006)



### C. Representative Litigation

In 2009, former UCLA national championship winner Ed O'Bannon and other similarly situated plaintiffs filed a class action lawsuit against the NCAA for a violation of antitrust laws.<sup>48</sup> O'Bannon's case was primarily based on the NCAA's prohibition of athletes being compensated for the use of their name, image, and likeness.<sup>49</sup> O'Bannon's case was spurred by the use of his likeness in an EA sports video game that was created well after his graduation,<sup>50</sup> but due to the NCAA's prohibition on allowing players to be paid for the use of their NIL, O'Bannon was still uncompensated for this use.<sup>51</sup> The Court relied on the district court's that "the NCAA's compensation rules were an unlawful restraint of trade," in violation of Section 1 of the Sherman Antitrust Act.<sup>52</sup> The court also that without a prohibition on NIL compensation there would be a competitive market for schools to offer recruits different NIL compensation models, which the court deemed an antitrust violation.<sup>53</sup> This case quite literally changed the game, signaling a move to a more just compensation system for student-athletes.

In 2015, shortly before the *O'Bannon* decision—and perhaps after seeing the writing on the wall—the P5 conferences voted to move to a full cost-of-attendance model of student compensation.<sup>54</sup> This means that the expenses associated with living would be covered beyond the former student athletic scholarship amount.<sup>55</sup> In addition to the effort by conferences to compensate student-athletes more justly for their participation, states have now stepped in to do the same.<sup>56</sup> While California's SB 206—known as the "Fair Pay to Play Act"<sup>57</sup>—is the most well-known of these acts,

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(discussing the origin of the term Student-Athlete in response to the potential for an employment relationship between universities and athletes).

48. O'Bannon v. NCAA, 802 F.3d 1049,1052 (9th Cir. 2015).

49. *Id.*

50. Former College Basketball Star Who Sued the NCAA Says California's Fair Pay Bill is 'Changing the Game', CNN (Sept. 14, 2019, 1:19 PM), <https://www.cnn.com/2019/09/14/us/ed-obannon-ncaa-california-bill-trnd>.

51. Harmeet Kaur, *Former College Basketball Star Who Sued the NCAA Says California's Fair Pay Bill is 'Changing the Game'*, CNN (Sep. 14, 2019, 1:19 PM), <https://www.cnn.com/2019/09/14/us/ed-obannon-ncaa-california-bill-trnd>.

52. *Supra* note 48, at 1052–53. See also Sherman Antitrust Act, 15 U.S.C. § 1.

53. *Supra* note 48, at 1070.

54. Mitch Sherman, *Full Cost of Attendance Passes 79-1*, ESPN (Jan. 17, 2015), [https://www.espn.com/college-sports/story/\\_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins](https://www.espn.com/college-sports/story/_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins).

55. *Id.*

56. See S.B. 206, 2019 Leg. Reg. Sess. (Cal. 2019); Fla. H.B. 7051; Colo. S.B. 20-123.

57. S.B. 206, 2019 Leg. Reg. Sess. (Cal. 2019).

likely due to the several professional athletes that demonstrated their support for the act,<sup>58</sup> other states such as Florida and Colorado have enacted similar legislation.<sup>59</sup> On September 27, 2020, Governor Gavin Newsom signed the Fair Pay to Play Act which will take effect on January 1, 2023.<sup>60</sup> The bill will allow student-athletes at all California colleges and universities to earn money from third-party sources for the use of their NIL.<sup>61</sup> Included in the bill are several provisions to protect student-athletes and universities alike from being penalized for NIL compensation.<sup>62</sup> One provision prevents the NCAA—and other athletic associations, conferences, or organizations—from prohibiting student-athletes from monetizing their NIL.<sup>63</sup> The bill further protects universities by preventing them from being penalized because a player has been compensated for their NIL.<sup>64</sup> These provisions also prevent universities, associations, and organizations from compensating prospective players for their NIL.<sup>65</sup> In sum, these provisions prevent the NCAA from prohibiting athletes from exercising their NIL rights and penalizing universities for their athletes doing so. The NIL legislation in Florida and Colorado are largely the same, the common thread being a desire to protect student-athletes hoping to exercise their NIL rights without fear of being penalized.<sup>66</sup> Though the Fair Pay to Play Act has been touted as the most equitable solution to the problem of student-athletes working for free, with about two years left until the legislation takes effect, the NCAA seems intent on throwing a wrench in California's plans.<sup>67</sup>

If there was any doubt about how the NCAA felt about NIL legislation, the NCAA's responses to the Fair Pay to Play Act have eliminated those doubts. In September 2019, prior to the act being signed by Governor Newsom, the NCAA sent a letter to the Governor expressing its concerns with the implications of the Act.<sup>68</sup> In that letter, the NCAA took issue with two foreseeable consequences of the Act: first, by allowing individual states to draft their own NIL legislation, the NCAA will lack

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58. See The Shop: Uninterrupted, *Gavin Newsom Signs California's 'Fair Pay to Play Act' with LeBron James & Mav Carter*, YOUTUBE (Sept. 30, 2019), <https://www.youtube.com/watch?v=7bfBjxVgTw>.

59. See Fla. H.B. 7051; Colo. S.B. 20-123 (effective January 1, 2023).

60. S.B. 206, 2019 Leg. Reg. Sess. (Cal. 2019).

61. *Id.*

62. *Id.*

63. *Id.* at §2(2).

64. *Id.* at §2(3).

65. *Id.* at §2(3)(b).

66. See Fla. H.B. 7051; Colo. S.B. 20-123 (effective January 1, 2023).

67. Stevie Baker-Watson, et al., *NCAA Responds to California Senate Bill 206*, NAT'L COLLEGIATE ATHLETIC ASS'N (Sept. 11, 2019, 10:08 AM), <https://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206>.

68. *Id.*

the cohesion that athletes have come to expect; and second, that the distinction between amateurism and professionalism<sup>69</sup> at the heart of the NCAA would be eliminated by such legislation.<sup>70</sup> Then in July 2020, Mark Emmert—the President of the NCAA—attended a Senate Judiciary Committee hearing to request federal legislation regulating NIL compensation.<sup>71</sup> There, Emmert reiterated the NCAA’s fear that allowing states to individually legislate NIL compensation will disrupt the cohesion of the NCAA.<sup>72</sup>

*NCAA v. Alston* is the most recent litigation addressing whether there is an appropriate structure for student-athletes to be compensated has just reached the Supreme Court, and the Court has yet to rule on the issue.<sup>73</sup> What the Court has offered though provides some insight into the thinking of the Justices when deciding the case. Most notably, Justice Thomas was very vocal about his stance that the NCAA is relying on antiquated ideas about amateurism to continue to undercompensate student-athletes.<sup>74</sup> While the outcome of *Alston* promises to be impactful, what’s at issue is whether NCAA and its member *institutions* may compensate student-athletes *not* whether third parties are able to compensate athletes for the use of their NIL and what role, if any, the NCAA may play in regulating such compensation.<sup>75</sup>

#### D. Current Recommendations

Along with this constantly reignited debate has come legal scholarship proposing policy recommendations. These recommendations have ranged from developing trust accounts for athletes in which their NIL payments will be

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69. Jake New, *More Money . . . If You Can Play Ball*, INSIDE HIGHER EDUC. (Aug. 12, 2015), <https://www.insidehighered.com/news/2015/08/12/colleges-inflate-full-cost-attendance-numbers-increasing-stipends-athletes>.

70. Baker-Watson, *supra* note 67.

71. Emily Giambalvo, *As the NCAA Asks Congress for Help on NIL legislation, Lawmakers Want More Rights for College Athletes*, WASH. POST (Jul. 23, 2020, 4:39 PM), <https://www.washingtonpost.com/sports/2020/07/23/ncaa-asks-congress-help-nil-legislation-lawmakers-want-more-rights-college-athletes/>.

72. *Id.*

73. *NCAA v. Alston*, 141 S.Ct. 1043 (2021).

74. Transcript of Oral Argument at 10–11, *NCAA v. Alston*, 141 S.Ct. 1043 (2021) (No. 20-512).

75. *Id.* at 4–5.

deposited,<sup>76</sup> to the NCAA adopting the amateurism model used by the Olympics,<sup>77</sup> and everything in between.

The first recommendation involves establishing a trust account for each athlete and “[a]fter a player receives an NIL payment, he or she would need to deposit the check with the athletic department or face consequences.”<sup>78</sup> This check would then be deposited into the athlete’s trust account after the university completes federal and state withholding.<sup>79</sup> This recommendation is based on the NCAA working group’s goal to “[a]ssure student-athletes are treated similarly to non-athlete students unless a compelling reason exists to differentiate.”<sup>80</sup> This recommendation fails to account for the working group’s other principles, namely the goal to “[r]eaffirm that student-athletes are students first and not employees of the university.”<sup>81</sup> The payment scheme proposed in this recommendation is encroaching on an employment relationship between athletes and universities. Additionally, by allowing universities to play the middleman between student-athletes and third parties, universities gain more control over the NIL process than is necessary.<sup>82</sup>

The second recommendation would have the NCAA adopt the amateurism model used by the Olympics.<sup>83</sup> This recommendation, while practical, is not without its issues. The recommendation properly addresses the fact that other amateur athletes—Olympic athletes in this case—are able to benefit from their NIL while still maintaining amateur status.<sup>84</sup> On the other hand though, the Olympics and the NCAA differ in very significant ways. First, while the Olympic model is referred to as an “amateur” model, one has to look no further than the U.S Men’s Basketball roster to see why that label is absurd.<sup>85</sup> The roster for the 2019-21 Men’s National Team is composed of some of the NBA’s best and brightest, including hall of fame coaches.<sup>86</sup>

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76. Bayard, *supra* note 47, at 24.

77. Dave Wilson, *Massachusetts at the Forefront: How to Protect the Most Vulnerable Group in a Post-Legal Sports Betting World—NCAA Student-Athletes*, 15 U. MASS. L. REV. 124, 162.

78. Bayard, *supra* note 75.

79. *Id.*

80. REPORT OF THE NCAA BOARD OF GOVERNORS OCT. 29, 2019 MEETING 3, NAT’L COLLEGIATE ATHLETIC ASS’N (2019), [https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec\\_boa\\_rdgov/Oct2019BOG\\_Report.pdf](https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boa_rdgov/Oct2019BOG_Report.pdf) [hereinafter OCT. 29, 2019 MEETING REPORT].

81. *Id.*

82. Bayard, *supra* note 75 at 236–40.

83. Wilson, *supra* note 76.

84. *Id.*

85. *U.S. Men’s Olympic Team Finalists Roster*, USA BASKETBALL, <https://www.usab.com/mens/national-team/roster.aspx> (last visited Apr. 13, 2021).

86. *Id.*

Second, while the Olympic athletes are not directly compensated for their participation, many countries provide their athletes with “medal bonuses,” which incentivizes participation.<sup>87</sup> To implement this model within the world of collegiate sports would mean that member institutions should not only allow for third-party NIL compensation, but also incentivize athletes for winning performances in some of the sports world’s biggest events and tournaments. Because of the NCAA’s staunch stance on never compensating athletes for their performance due to amateurism, this recommendation is unlikely to be implemented within college sports.

#### IV. RECOMMENDATION

Perhaps the most just model of compensation for collegiate athletes is one where the NCAA and its member institutions are completely uninvolved. This means not only prohibiting these institutions to determine a maximum for NIL payments, but also ensuring they are uninvolved in the process of vetting agents allowed to represent athletes.

This model would eliminate any issues of fairness between men’s and women’s sports and revenue and non-revenue generating sports, while also preventing the worry of inadvertently creating an employment relationship between schools and athletes. Student-athletes would simply receive what third parties believe to be the market value of their NIL. Opponents of this approach might argue that this approach will unfairly disadvantage certain athletes that participate in non-revenue generating sports, specifically female athletes. While not without merit, this objection ignores the very quickly changing landscape in collegiate sports.<sup>88</sup> No longer are the days where football and basketball players are the only household names. For instance, in 2019, UCLA gymnast Katelyn Ohashi performed a floor routine that went viral on all social media platforms, and to this date has over 158 million views on the UCLA athletics YouTube page.<sup>89</sup> Besides the fact that the UCLA Athletics media department likely earned ad revenue from this viral video that Ohashi was unable to benefit from, Ohashi was

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87. Kathleen Elkins, *Here’s How Much Olympic Athletes Earn in 12 Different Countries*, CNBC, <https://www.cnbc.com/2018/02/23/heres-how-much-olympic-athletes-earn-in-12-different-countries.html#:~:text=The%20International%20Olympic%20Committee%20doesn,member%20splits%20the%20pot%20evenly> (Feb. 25, 2018, 9:01 AM).

88. Sarah Traynort, Article, *California Says Checkmate: Exploring the Nation’s First Fair Pay to Play Act and What It Means for the Future of the NCAA and Female Student-Athletes*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 203, 224 (2020).

89. UCLA Athletics, *Katelyn Ohashi—10.0 Floor (1-12-19)*, YOUTUBE (Jan. 12, 2019), <https://www.youtube.com/watch?v=4ic7RNS4Dfo>.

unable to capitalize on her fame by leveraging her NIL.<sup>90</sup> Another such example is the story of Oregon women's basketball star Sedona Prince, who has had her fair share of viral fame across platforms such as TikTok and Instagram and became a household name for many during the 2021 March Madness tournament for exposing the discrepancies between amenities provided for male and female athletes.<sup>91</sup> Despite her popularity among sports fans and non-sports fans alike (even though she participates in a non-revenue generating sport), Sedona will likely never be able to capitalize on her fame at the collegiate level because of NCAA regulations that deem student-athletes as amateurs that are participating in exchange for an academic experience.<sup>92</sup>

A federal NIL guideline that is not regulated by the NCAA is the most just way of compensating collegiate athletes without running afoul of Title IX guidelines and protecting institutions and athletes alike from the implications of an employment relationship. By allowing all student-athletes to receive third-party NIL compensation, the market is completely outside of the control of the universities and allows athletes to leverage their NIL for market value. Implementing this model is sure to be one of the rare instances in sports where everyone wins.

## V. CONCLUSION

The most unfortunate aspect of the pay-the-players debate is that it has become so polarized that there seems to be no middle ground. On one hand, requiring student-athletes to work the equivalent of a full-time job, combined with the average rigor of a college education, without them being compensated in any tangible way is a grave injustice. On the other hand, compensating student-athletes directly for their participation in competition poses its own host of issues that would change the landscape of collegiate sports. It is time for both sides to meet in the middle and create a free market for exercising NIL rights that allows student-athletes the opportunity to receive their fair share of what has become a billion-dollar industry, without treating these athletes as professionals.

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90. Katelyn Ohashi, *Everyone Made Money off MY N.C.A.A. Career, Except Me*, N.Y. TIMES (Oct. 9, 2019), <https://www.nytimes.com/2019/10/09/opinion/katelyn-ohashi-fair-play-act.html>.

91. Sedona Prince (@sedonaprince\_), TWITTER, (Mar. 18, 2021, 9:26 PM), [https://twitter.com/sedonaprince\\_/status/1372736231562342402](https://twitter.com/sedonaprince_/status/1372736231562342402) ("Let me put it on Twitter too cause this needs the attention."). At the time of writing this tweet had over 17 million views, 214,000 "retweets," and 623,000 "likes." *Id.*

92. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 5.