COMMODIFICATION OF COLLEGE ATHLETES’ NAME, IMAGE, AND LIKENESS

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ABSTRACT

How should college athletes be paid for the use of their name, image, and likeness? An important scholarly debate has arisen around issues ranging from ethics to antitrust, but little work has previously addressed the inherent concerns relating to commodification of NIL. This Article seeks to fill that void by examining the potential consequences of commodifying NIL.

In so doing, the Article ventures into uncharted territory: there is no clear answer to the question of how to balance the unique qualities of amateur athletics with the right of college athletes to be paid for something that belongs to them. With state legislation governing the use of NIL likely forthcoming, this Article seeks to examine the repercussions of the commodification of NIL.

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I. INTRODUCTION

There’s a spectrum of opinions when asking people whether college athletes should be paid. On one end of the spectrum there’s a simple “no.” College athletes should not be paid because they are not professionals, and they play college athletics as an avocation. If college athletes are good enough to be paid, they can use college to be recruited as a professional athlete. Alternatively, the athlete could go straight into a professional sport from high school. Doubters will argue they can’t because of the age requirements of professional leagues, but the naysayers will point out that is not the fault of college athletics or the National Collegiate Athletic Association (“NCAA”), but instead the fault of the professional leagues. College athletes are receiving clout and exposure from playing in college athletics and if they are good enough to make it to the professional arena, that is where the money will be.

On the far opposite end of the spectrum are those who think there is no such thing as amateur athletics anymore. College athletes should be considered employees of the schools and make a salary. This argument focuses on how much money a team can bring in for the school as a whole and the players should receive a cut from the profit similar to the coaches. This argument acknowledges cases that have been decided against student athletes being employees but continue to assert that the amateur model will soon expire, and the student athletes will be considered employees. This argument emphasizes these student athletes are already so similar to professional athletes that there is no distinction. The time dedicated to playing collegiate sports is far from amateur, and the façade of schoolwork is not sufficient to surmount the real reason the student is at the school: to play sports and bring in funding for the university. This is shown through academic scandals, preferential treatment, and near failing grades riddled throughout college sports. Under this stance, college athletes should be paid because although some student athletes receive some kind of scholarship or stipend, not all do. Even the ones that do are pressed financially at times. This side often brings up the point that athletes cannot pay for a plane ticket home over the

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holidays. Athletes cannot send money to their families to put food on the table back home. Athletes cannot go buy a coffee off campus. Instead of attempting to convince the world that amateur sports still exist, the NCAA should call the players what they actually are, employees, and allow them to be paid by the schools.

Towards the “no” side of the spectrum are those who hold the idea that college athletes should not be paid because they already are being paid. Payment takes the form of free education. College athletics are founded on the principle of *Mens sana in corpore sano*, which means a sound mind in a sound body.\(^2\) The athletes who are on a full ride scholarship can make up to $400,000 in four years that is put towards their college degrees.\(^3\) In addition, most players are receiving stipends, housing, books, tutoring, early registration, unlimited free meals, athletic gear, clothes, medical attention, nutrition guidance, and advising from sports psychologists. Further, the players will be paid if and when they possess the skills to make it to the professional level. If not, they received an education that most other students are going into years of debt for.

Somewhere in the middle lies the perspective growing today. College athletes should be able to make some kind of money. Similar to an artist selling their work while they are in college, an athlete should be able to make money off their talents. To deny this opportunity is to unfairly limit athletes more than the rest of the student body. However, this is not to go so far as to say athletes should be considered employees. One day the reality could be student athletes are classified as employees, but the NCAA is taking one step at a time rather than making a leap.

This middle ground is unfamiliar territory for most. People often answer either yes, athletes should be paid, or no, athletes should not be paid. If someone argues college athletes should be paid, the other side thinks they are either a former college athlete or buy into the celebrity treatment of athletes without recognizing the privilege the athletes already receive. If someone argues college athletes should not get paid, the other side thinks they are an old curmudgeon who probably did not play college sports and do not understand the time athletes put into representing their school. The question does not consider “by who” should the athlete be paid. Most people would not recognize a middle ground argument. Without carefully reading into the moves that are happening now, most people still don’t understand

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what the current conversation over college athletes being paid is regarding. The important question that should be asked moving forward is, “by who should college athletes be paid.”

The current conversation is not about athletes being employees of the school (although this movement could push the conversation that way). Nor is it about scholarships or stipends. This conversation does not relate to schools paying athletes in any way. Scholarships stay the same, employment stays the same, but payment to college athletes is changing. So where does this payment come from? Nike, Adidas, Coca-Cola, Gatorade, Neutrogena, Joe Shmoe’s pizza parlor down the street, the local car dealership, the list goes on and on for who could be the ones paying college athletes to do a commercial or Spotify advertisement or social media post. The product is the athlete’s “Name, Image, and Likeness” (“NIL”). The athlete is marketing their persona rather than selling the actual playing of the sport like the employee end of the spectrum is arguing. In this scenario, not one cent comes from the schools and not one cent would go to the schools. This is the middle ground most people are glazing over but is now the forefront path.

This position could receive support from both ends of the spectrum. The naysayers may see the similarities between this and general students working a tutoring job, for example. Students are making money not from playing college sports, but from extra marketing jobs outside of school. On the other end of the spectrum, student-athlete-employee advocates may see this as a step in the right direction. At least the athletes are gaining rights by making money in some way, even if it is not from the school’s pocketbooks.

In order to gain support from both sides, support is needed from many different groups in society including the NCAA, law makers, colleges, student athletes, companies, and the general public. Without clarification on this middle ground in the heated debate, opinions will stay on their respective ends of the spectrum. To work towards a path that recognizes the rights of student athletes but still maintains the importance of amateur athletics in our society, the concept of athletes being paid for their NIL must be clear.

The goal of this article is to familiarize the concept of NIL and expose additional concerns around college athletes being paid specifically for their NIL. The goal of this paper is not to argue against college athletes’ profit off NIL, but to invite conversation around supplementary controversy around the issue, specifically commodification issues. This paper does not discuss college athletes being paid by the schools they play for. The trade in this paper is referring to commercial businesses directly paying athletes for their NIL.
This Article will proceed in five parts. Part I lays out the history of college sports and NIL, discussing the formation of the NCAA and provides foundational information on antitrust law, specifically NIL.

Part II provides a road map to related, but minimal case law. This case law is only tangentially related to the issue at hand but is an important consideration as it is the only case law in this arena so far. Part II also discusses the limitations between previous case law and the current issue.

Part III discusses the changes happening today, including California’s proposed bill and the response from the NCAA. The state bill would allow college students in California to profit from their NIL without regulation by the NCAA. This opposes a goal of the NCAA, which is to provide consistency across the league.

Part IV explores the concerns related to the commodification of college athletes’ NIL. This section addresses three concerns: coercion, crowding out, and corruption. These issues will become more urgent as schools begin to propose bills allowing college athletes to profit off their NIL. The goal of this section is to stimulate the discussion now rather than schools or the NCAA attempting damage control after the passage of these bills.

Finally, Part V surveys how we should regulate paying college athletes for their NIL if legislation is passed in California or elsewhere. This includes practical concerns for states, colleges, and the NCAA.

II. BACKGROUND ON COLLEGE SPORTS AND NIL

The background of college sports and the foundation of the National Collegiate Athletic Association (“NCAA”) is critical to understand the principles of the NCAA and how “Name, Image, and Likeness” (“NIL”) and the NCAA have come to intersect.

A. A LOSE-LOSE HISTORY OF COLLEGE SPORTS

College athletics began as intramurals in the 1800s as student-organized athletic competitions between students attending the same university. Growing interest in athletics brought inter-school competitions, with the first being a rowing competition between Yale and

5. Id.
Harvard in 1852. Yet, these seemingly harmless activities soon gained detractors. University administrators first expressed concern over the growth of intercollegiate athletics influencing the academic setting of college campuses. In addition to the academic concerns, administrators voiced concerns about the commercialism becoming intertwined with college sports. Commercialism is the “commercial spirit, institutions, or methods” or the “excessive emphasis on profit.” The NCAA is inherently at odds with this definition of commercialism because the NCAA is a nonprofit organization. In the 1920s, commercialism for college athletics included radio coverage with a commercial-free station because advertising was seen as “intrusive and vulgar.” In addition to radio advertising, commercialization included business sponsorships, ticket sales, and media production. Collegiate sports’ reliance on finances from commercial entities affects the autonomy of the NCAA and member schools.

Some administrators saw new opportunities through college athletics, including alumni involvement, branding, and increased enrollment, but pled for some regulations over these competitions. Some athletic events resulted in severe injuries and even death to athletes; in one year eighteen students died resulting from on-field injuries. President Theodore Roosevelt begged for organization to bring structure and integrity to college sports by calling on institution leaders to take action. Several member schools came together to discuss the need for one organization to regulate the academics, amateurism, ethics, and safety of college sports. The NCAA was born.

The NCAA was created to combat the injuries and the ethics of unregulated college sports as well as oversee the partnership between college education and sports. College sports stayed an integral part of the educational program of universities and the athletes stayed an integral part of the student body. The NCAA’s purpose was to initi-

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7. Id.
8. Id.
13. Id.
14. Joza, supra note 9, at 15.
15. Bass et al., supra note 6, at 4 (discussing the history of college sports).
16. Id.
17. Id.
18. Joza, supra note 9, at 15.
20. Id. at 3.
ate, stimulate, and improve athletics. Participating athletes would practice “educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit.” These values emphasized scholarship, sportsmanship, and amateurism.

Only twenty years after the creation of the NCAA, unease grew over the future of college athletics. In the 1920s, the forefront of this concern was over commercialization and professionalization of college athletics. In the years since, commercialization and professionalization has not slowed down. The NCAA increased the number of sports, and financial aid guidelines became a focus of the NCAA. A report by the Carnegie Foundation in 1929 found commercialism as the foundation for financial and cheating scandals in college sports. Commercialism was diminishing the education received by student athletes as well as denying non-athlete students’ involvement in college athletics. The Carnegie report warned against the rise of commercialism in college sports to maintain the essence of college sports as an opportunity for “mature youth.”

The Sanity Code adopted in 1948 attempted to reel back the commercialization by re-focusing education as a key to college athletics and maintaining amateur status. The thrust of the Sanity Code was to establish guidelines for athletes to receive financial aid if they met specific academic standards. For example, if the athlete was in the top 25% of his class out of high school or kept a B average in college, he could receive a full ride scholarship. This highlighted the principle that athletes remained amateurs and equal to other students at the school. The Sanity Code was overturned by the NCAA member institutions in 1951, partly because southern schools asked the NCAA to abolish financial aid regulation to allow aid based only on athletic ability in order to compete with Ivy League schools, and partly because some member institutions believed scrapping the Sanity Code

21. Id. at 7.
22. Id.
23. Id.
24. Bass et al., supra note 6, at 6.
25. Id.
26. Id. at 48.
27. Id. at 6-7.
29. Id.
32. Bass et al., supra note 6, at 7.
33. Id.
34. Chudacoff, supra note 31, at 8.
was the only way to maintain the NCAA. It was the fall of the Sanity Code and the creation of grant-in-aid (financial aid including tuition and fees, room and board, books, and other expenses related to the cost of attendance), which led to the term “student athlete.”

The rise of cable television, and specifically Entertainment and Sports Programming Network (“ESPN”), in the 1970s and 1980s added to the commercialization of college sports. Division I athletics is sustained through financial revenue generated from television contracts for men’s football and basketball. NCAA oversight is essential because without it, college sports would become over-commercialized, and both schools and teams would lose the ability to reverse course. Through the 20th and 21st centuries, faculty, school administration, intercollegiate sports organizations, and private foundations have expressed concerns over the commercialization and professionalization of college sports. Since the early 1900s, the NCAA has been criticized for both responding inadequately to combating commercialization and that its actions are the unfair exercise of authority. The NCAA is damned if they do and damned if they don’t. This Article will examine the criticism of commodification of college athletes’ ability to profit off their NIL in order to stimulate conversation prior to implementation of any legislation.

B. INTRODUCTION TO NAME, IMAGE, AND LIKENESS

The claim to a player’s NIL falls under the legal right of publicity. The right of publicity is the right “to control the use of their names and likeness for commercial purposes.” Privacy rights include “the right of a person to be free from unwarranted . . . appropriation or exploitation of one’s personality.” A common suit is when a person’s

35. Id. at 10-11.
37. Bass et al., supra note 6, at 8.
38. Id.
39. Id. at 10.
41. Benford, supra note 28, at 6.
42. Smith, supra note 30, at 16.
NIL is used for advertising purposes without his or her consent. Right of publicity claims are similar to copyright protections. Right of publicity expanded to apply to any parts of a person's identity.

When describing what NIL is, it can be helpful to describe what it is not. For example, people in public places have no reasonable expectation of privacy, and NIL only applies if a person is readily identifiable. However, if individuals are represented as members of a "definable group," there is no violation of right of publicity. This definable group could include a baseball team, for example.

Hype and lack of understanding contributes to confusion around commodification of a college athlete’s NIL. In fact, the bill California recently proposed is named the Fair Pay to Play Act. However, athletes are currently not allowed to be paid for playing, nor would they be allowed even if this legislation was passed. Specifically, the current trend in college sports would allow players to profit—not through payment for playing—but rather, from their name, image, and likeness, which are the three sources that make up a person’s right of publicity. Right of publicity is a protection similar to copyright. Thus, the Fair Pay to Play Act involves not paying to play, but rather commodification of a player's right to publicity or ability to profit from NIL.

III. RELATED CASE LAW

No case law has directly addressed the commodification of college athletes’ “Name, Image, and Likeness” (“NIL”). Because the issue has never been directly addressed in the courts, stakeholders currently lack a clear answer as to whether it is acceptable for the National Collegiate Athletic Association (“NCAA”) to oppose college athletes selling their NIL to commercial businesses.

45. Id.
46. Right of Publicity, supra note 42, at 1216.
47. Use of Name or Likeness, supra note 43.
49. Id.
50. Id.
A. Antitrust and NIL Applied to NCAA

Related legal challenges offer some insight into the way state courts might handle disputes surrounding NIL, however, there has been no consistent federal legislation to rely on. Specifically, the NCAA has been sued by former NCAA college athletes, who claimed the NCAA violated federal antitrust law.\footnote{Michael McCann, What Ed O’Bannon’s Victory over the NCAA Means Moving Forward, SPORTS ILLUSTRATED (Aug. 9, 2014), https://www.si.com/college/2014/08/09/ed-obannon-ncaa-claudia-wilken-appeal-name-image-likeness-rights.} Antitrust laws are enacted to protect competition for the benefit of consumers, while making sure there is stimulus for businesses to act efficiently.\footnote{The Antitrust Laws, FED. TRADE COMM’N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Dec. 12, 2020).} Within antitrust law, the Sherman Act\footnote{15 U.S.C.A §1 (West 2004).} rejects every contract, combination, or conspiracy in restraint of trade.\footnote{Sherman Act, 15 U.S.C.A. §1 (West 2004).} The college athletes claimed that the NCAA and its member institutions conspired to not allow college athletes from profiting off their NIL.\footnote{McCann, supra note 54.} These cases ended with the players’ ability to negotiate their constrained rights—an agreement favored by the NCAA.\footnote{Zachary S. Beal, “Is That Me I See on the TV?” an Analysis of the O’Bannon Decision, 34 CARDozo ARTS & ENT. L.J. 771, 786 (2015).} The misunderstanding of these cases provide false confidence in proponents of college athletes profiting off their NIL.

This section surveys the few judicial decisions that relate indirectly to the current disputes regarding NIL. The following cases discuss the availability of payment to student athletes from their schools for NIL. Notably, this is different from the proposed legislation which would not allow NIL payment from the student athletes’ schools, but only allow payment from third parties. It remains unclear how these cases would apply if a players’ NIL were bought by a commercial business. Existing case law does not provide objective standards that would determine how NIL applies to college athletes’ interactions with third parties,\footnote{Andrew Zimbalist, Whither the NCAA: Reforming the System, 52 REV. OF INDUS. ORG. 337, 343 (2017).} however, the case law gives an insight into the path athletes’ NIL has taken to this point. This Article will lay out the relevant case law without weighing on how it should have been resolved, at least as an initial matter.
1. Case History

The two cases that provide relevant direction for challenging the NCAA in regard to antitrust law are Adidas America, Inc. v. NCAA and O'Bannon v. NCAA.

The first issue relevant to current NIL disputes is the threshold question of whether a regulation is commercial or noncommercial. In Adidas America, Inc. v. NCAA, the U.S. District Court for the District of Kansas considered an antitrust suit brought by Adidas against the NCAA. Adidas challenged the NCAA rule limiting the size of the logos on players' uniforms and equipment. The NCAA defended this regulation, arguing this rule’s purpose is to, “(1) protect athletes against commercial exploitation, (2) prevent colleges from turning their athletes into billboards in pursuit of advertising revenues, and (3) avoid excessive advertising that could interfere with the basic functions of uniforms.” The court found logo restrictions protected the interest of college sports, Adidas could advertise on professional sports teams, and the logo restrictions did not impede Adidas’ ability to sell uniforms. The challenged NCAA rule was noncommercial in nature, the court held, and therefore was not subject to antitrust laws.

Adidas America provides an important foundation for an understanding of antitrust decisions relating to college athletics because antitrust challenges address only commercial decisions. Rules that contain both commercial and noncommercial effects may not be decided under the Sherman Act. Therefore, any analysis of NIL regulations would require an evaluation of whether the rule was commercial in nature such that the court could consider an antitrust challenge.

If a court did hold that regulation is strictly a commercial regulation, only then would the court consider the regulation under O'Bannon v. NCAA. In O'Bannon v. NCAA, the United States Court of Appeals for the Ninth Circuit explicitly considered issues re-

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63. 802 F.3d 1049 (9th Cir. 2015).
64. Porto, supra note 39, at 181.
65. Id.
66. Id.
67. Id.
68. Id.
70. Id.
71. See O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1065-66 (9th Cir. 2015) (noting the substance of a regulation is determinative and if a rule “is a quintessentially commercial transaction[,]” it falls within the purview of the Sherman Act).
72. O'Bannon, 802 F.3d at 1052.
lating to college athletes’ NIL. While there are many differences between O’Bannon and the newly proposed legislation being considered now, the case offers insight into the legal issues courts may find most important.

In O’Bannon, NCAA men’s football and basketball players challenged a NCAA rule prohibiting student athletes from profiting off their NIL in video games and television broadcasts.73 To illustrate how NIL in video games is possible, in O’Bannon for example, O’Bannon saw a friend’s son playing a video game produced by Electronic Arts (“EA”).74 O’Bannon’s avatar was his image and was wearing his retired UCLA jersey number.75 Specifically, the video company EA Sports used O’Bannon’s NIL in a video game without O’Bannon’s permission.76 Other markets that could be utilized for a player’s NIL include broadcasting, retail merchandise, and online media outlets like Facebook or YouTube.77

O’Bannon sued the NCAA, alleging the NCAA violated antitrust law by not allowing O’Bannon to profit off his NIL.78 O’Bannon argued that without the NCAA’s ban on NIL profit by players, he would have been able to profit off his NIL used by EA Sports.79 As an initial difference from the proposed legislation, O’Bannon involved scholarships paid by member schools of the NCAA, whereas this Article and the new legislation is addressing compensation by commercial entities, not payment by member schools.80 The O’Bannon plaintiffs challenged the NCAA regulation of payment by member schools under Section 1 of the Sherman Act.81 As explained above, the Sherman Act rejects “every contract, combination . . . , or conspiracy, in restraint of trade . . . .”82

The court in O’Bannon held the sale of a player’s athletic ability is a commercial behavior, passing the first threshold from Adidas America.83 However, the court in O’Bannon acknowledged the discrepancy in determining whether eligibility rules qualify as regulating

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73. Id. at 1055.
75. Id.
76. O’Bannon, 802 F.3d at 1055.
77. Agota Peterfy & Kevin Carron, Show me the Money! NCAA Considering Paying Student-Athletes, 76 J. Mo. B. 68, 70 (2020).
78. O’Bannon, 802 F.3d at 1055.
79. Id.
80. Id. at 1053.
81. Id. at 1055.
82. Id. at 1052 (quoting Sherman Act, 15 U.S.C.A. §1 (West 2004)).
83. Id. at 1065.
commercial activity. This court was convinced profiting off NIL is commercial activity, even though both the United States Court of Appeals for the Third Circuit and the United States Court of Appeals for the Sixth Circuit have held eligibility rules to be noncommercial in nature. Additionally, the Ninth Circuit did not address the court’s determination in Adidas America that rules containing both commercial and noncommercial effects may not be decided under the Sherman Act. While the court in O’Bannon held the regulation to have a commercial effect, other courts have held differently.

After the O’Bannon court determined the NCAA’s prohibition on athletes being paid for their NIL constituted a Section 1 claim under the Sherman Act, the court applied a Rule of Reason analysis to determine whether the procompetitive effects outweighed the anticompetitive effects. The Rule of Reason includes three steps. First, the NCAA’s rules must have anticompetitive effects on the college education market. Second, the NCAA must offer procompetitive purposes for its rules. Third, the court considers whether there is a substantially less restrictive alternative.

The plaintiff has the initial burden of showing significant anticompetitive effects. The plaintiffs argued that had the regulations not existed, other NCAA schools would compete to offer recruits compensation for their NIL and the regulations fix part of the price the schools pay to win over a player.

The NCAA then had the burden of showing the procompetitive effects. The NCAA offered four procompetitive purposes including (1) preserving amateurism, (2) promoting competitive balance in men’s football and basketball, (3) integrating academics and athletics, and (4) increasing student output in college education. Courts have recognized preserving amateurism as a procompetitive purpose to maintain public interest in college athletics. In the appeal, the NCAA focused its argument on the promotion of amateurism. The NCAA provided data showing consumers favor amateur sports, and

84. Id.
85. Id.
86. Zimbalist, supra note 60, at 343.
87. O’Bannon, 802 F.3d at 1070.
88. Id. at 1057.
89. Id.
90. Id. at 1060.
91. Id. at 1070.
92. Id. at 1058.
93. Id. at 1070.
94. Id. at 1058.
96. O’Bannon, 802 F.3d at 1072.
68.9% of consumers opposed paying men’s football and basketball players.\footnote{Matthew J. Mitten, Why and How the Supreme Court Should Have Decided O’Bannon v. NCAA, 62 Antitrust Bull. 1, 32 (2017).} In a similar case, \textit{NCAA v. Board of Regents}\footnote{104 S. Ct. 2948 (1984).}, the United States Supreme Court held the NCAA plays a “critical role” in maintaining the tradition of amateurism in college sports.\footnote{NCAA v. Board of Regents, 104 S. Ct. 2948, 2970 (1984).} While the \textit{O’Bannon} court did not endorse the procompetitive justifications put forth by the NCAA, the lack of a nationwide rule leaves room for argument.

Lastly, the plaintiff had the burden of proving less restrictive alternatives under the Rule of Reason.\footnote{\textit{O’Bannon}, 802 F.3d at 1070.} The court found a valid less restrictive alternative, capping the permissible amount of payment at the cost of attendance, and rejected a different alternative proposed by the plaintiffs, allowing students to receive cash compensation for their NIL untethered to their education.\footnote{\textit{Id.} at 1076.}

\section*{2. Case Law Areas of Concern}

\textit{O’Bannon} most closely addresses the issues surrounding college athletes’ NIL, but the case leaves many areas unsettled and fails to address the issues presented in the proposed Fair Pay to Play Act.\footnote{\textit{Id.} at 1076.} First, a noncommercial regulation, which would be exempt from antitrust law, can still have a commercial effect under the \textit{Adidas America} framework.\footnote{Zimbalist, supra note 60, at 343.} The line between eligibility regulations and commercial regulations remains unsolved. \textit{O’Bannon} failed to clarify how this attenuated effect should be resolved.

Second, while \textit{O’Bannon} held schools can compensate their athletes to comply with antitrust laws, the situation at issue in \textit{O’Bannon} differs from that regulated by the new legislation.\footnote{\textit{Id.} 802 F.3d at 1053.} Under the proposed Fair Pay to Play Act,\footnote{\textit{Fair Pay to Play Act, CA} \textit{L. EDUC. CODE }\$ 67456 (2019).} compensation does not come from the schools but instead comes from third parties. This is not resolved under \textit{O’Bannon}, where the court decided the NCAA can restrict payment to full cost of attendance but does not address payment from third parties.\footnote{\textit{Id.}}

Third, amateurism serves a justifiable procompetitive purpose.\footnote{\textit{Bd. of Regents}, 104 S. Ct. at 2970.} Regulations put in place by the NCAA are often justifiable means of
maintaining competition.108 These regulations may include rostering only full-time students, minimum initial academic eligibility, progress towards degree, cap athletic eligibility, cap scholarship, and restrict economic benefits.109 Proposed law conflicts with NCAA’s standards of amateurism, which is that payment is only allowed to cover legitimate educational expenses.110 The NCAA may impose some commercial restraints if the purpose does not create unfair economic benefits for the NCAA.111 The question remains if the restraint against athletes profiting from their NIL creates unfair economic benefits for the NCAA.

Lastly, courts lack uniformity in the rulings on NCAA regulations. The United States Supreme Court has recognized the need to allow the NCAA to superintend college athletics.112 There are disagreements between circuits on cases involving the NCAA and proposed reasons for regulations.113 The lack of legal reasoning should instill little confidence in the O’Bannon case.114

The case law leading to this legislation has questionable applicability. Adidas America leaves questions about whether something is commercial in nature. O’Bannon fails to address this unresolved area of law. While O’Bannon held schools can compensate players, this is foundationally different from players being paid for their NIL from third parties. Although these are the only cases available to apply to future NIL legislation, there is a lack of uniformity.

IV. IF YOU’RE NOT FIRST YOU’RE LAST; NIL APPLIED TO NCAA TODAY

A. FAIR PAY TO . . . PLAY?

It would be naive to address the controversy of college athletes profiting off their “Name, Image, and Likeness” (“NIL”) without addressing the reality of where society is today. Through discussion of the history of the National Collegiate Athletic Association (“NCAA”) and NIL, we can now see the roadmap that led us to society’s position today. While argument around college athletes being paid has been passionately debated for years, one actor began walking the walk instead of simply just talking the talk, forcing a response from the NCAA.

108. Id. at 2968.
110. O’Bannon, 802 F.3d at 1075.
111. Id. at 1066.
112. Id. at 1074.
113. Id. at 1064.
114. Zimbalist, supra note 60, at 342.
California took the burden of being the first state to propose change on the issue of college athletes being paid for their NIL. The Fair Pay to Play Act, which is the bill the California legislature proposed, would allow student athletes attending California colleges to profit off their NIL without regulation from the NCAA. Notably, the bill would still prohibit schools from paying their student athletes. Proponents of student athletes being paid can throw out the argument that a school is selling the jersey of a player and the player is not profiting off the jersey because the source of that payment would be from the school. Athletes would be able to profit off endorsement deals from third parties. These endorsements could include advertising on billboards, commercials, or social media.

Not only does the bill allow players to profit from third parties, but also prohibits the institution from reneging on a student's scholarship as a result of earning compensation for their NIL. The bill will require representatives of student athletes (agents) to only be those licensed by the state. Not only does your starting quarterback receive a full ride scholarship, but he also makes more money from sponsorships. The offensive line would never leave their quarterback out to dry, but it seems the possibility of money would not hold the converse true.

While California proposed the first bill, many other states followed suit. There are commonalities between the states' bills. One similarity is the right to obtain an agent and the ban on athletes signing contracts that conflict with a university's ongoing contractual obligations. Many state bills include a variety of differences. Some include trust funds or remedies for a violation by an institution. These differences will be problematic for the NCAA and for member institutions.

While the NCAA seemingly agrees with the principles of the California bill, there are areas the NCAA will attempt, and possibly suc-
ceed, to de-escalate or destroy, which may be key features of the California bill and others. First, the NCAA argues this issue is better regulated at a national level. Second, the NCAA wants to ensure uniformity and a level playing field. Third, the NCAA wants to avoid repeat costly litigation by ensuring this legislation would not turn athletes into employees. Lastly, the NCAA strives to uphold the student athlete ideal that the NCAA holds to ensure academics continue to be of importance to the athletes, with the goal of playing sports while earning a degree.

B. NCAA’s Response

The NCAA responded to California’s proposed legislation by seeking recommendations from each of the NCAA’s three divisions to create flexibility in NIL rule changes. These recommendations included proposals to amending bylaws and policies in response to this legislation, to be reviewed by the NCAA after submitted. The NCAA’s Board of Governors held a meeting in April of 2020 to address some changes from a macro perspective. The NCAA claimed to support third party endorsements of student athletes. These endorsements would allow student athletes to hire agents and sign sponsorship deals without losing their amateur status. However, questions still remain as to how the Fair Pay to Play Act will play out. For example, the California bill requires representatives of student athletes to be licensed by the state, a higher threshold than the NCAA’s recognition of agents. This has not been addressed in this discussion by the NCAA. One cannot help but won-

126. Id.
127. Taking Action, supra note 122.
128. Id.
131. McCann, supra note 54.
132. Id.
der if California’s guidelines on state licensed agents would be adopted, rejected, or further constrained. A second determination from the meeting was that student athletes would be allowed to be identified by sport and school, however, the use of conference or school logos or trademarks would not be permitted.133 Third, and perhaps the most important, yet confusing for those with casual interests in this arena, is the idea that universities NEVER pay the student athlete.134 As emphasized before, to understand compensation for NIL, the differences between payment for NIL and Pay for Play must be understood. A further restriction is the assurance that boosters of a university cannot use NIL for recruitment purposes.135 But where is this line drawn? What happens if a booster owns an automotive shop that wants to sponsor a player? Is this pay for play or paying for NIL?

In April of 2020, the Board of Governors for the NCAA discussed allowing student athletes to profit off their NIL. The April meeting had a tone that was seemingly forward looking; however, it was not without the NCAA addressing the hurdles the divisions would be forced to overcome in order to establish a system of payment for NIL. These challenges include ensuring federal preemption over state NIL laws, a possible “safe harbor” for NCAA against lawsuits for NIL, safeguarding non-employment status, distinction between college and professional athletics, and upholding NCAA’s values including diversity, inclusion, and gender equality.136 Even those excited over the progress have to admit the final product will likely not be a free market.137 Committees will review current rules and suggest changes, which the membership will vote on in January of 2021.138

V. COMMODIFICATION CONCERNS: COSTS TO COLLEGE ATHLETICS IF ATHLETES ARE PAID FOR NIL

The commodification of college athletes “Name, Image, and Likeness” (“NIL”) introduces a series of harmful consequences.139 Coercion relies on the notions of autonomy, consent, and inequality.140 Every school, and state, will be coerced into allowing athletes to profit off their NIL. Corruption is the idea “that an exchange ‘corrupts,’

133. Student-Athlete Compensation, supra note 129.
134. Id.
135. McCann, supra note 54.
136. Student-Athlete Compensation, supra note 129.
137. McCann, supra note 54.
taints,’ or ‘denigrates’ the things being exchanged.” 141 Corruption happens when exchanges cause harm to our judgment. 142 Both academics and the student body of institutions will be corrupted by allowing players to profit off their NIL. 143 If sponsorship money is allowed to pass over the schools straight to the athletes, this will lead to a reduction in college athletics. By acknowledging these harmful consequences could occur, the implementation of legislation could attempt to address and mitigate this impact.

A. Anything You Can Do I Can Do Better: Coercion

“Recruiting is the lifeline to your program.” 144 Sonya Locke, head coach of Southern Illinois University volleyball, states the thoughts of all successful college athletic programs. If schools start at different thresholds with recruitment resources, the upper hand would be an insurmountable obstacle. The recruitment resource here is whether the state where the college is located would allow student athletes to profit off their NIL. Imagine you are a top football recruit graduating from high school. Schools in California offer you a full ride scholarship. A list of companies also contact you and mention that if you live in California, they will offer you sponsorships to their clothing company. Your other option, Oregon, can only (“only”) offer you a full ride scholarship. Do we even pretend to entertain the idea that the majority of students would not choose the extra cash? The National Collegiate Athletic Association (“NCAA”) spans America, yet the laws concerning NIL now vary by state. As mentioned, California was the first state to propose a bill allowing students to profit off their NIL. 145 In order for all other schools to remain competitive, all other states will have to create laws to compete against the bill proposed in California.

This behavior is a textbook case of coercion known as the College Arms Race. The College Arms Race is the extreme lengths colleges will go to in order to compete with one another in terms of amenities, ranging from stadiums to college coaches’ salaries to training complexes. 146 Within the first month after California proposed their bill,

141. Cohen, supra note 138, at 691.
142. Id. at 692.
143. Sandel, supra note 139 at 60-61.
146. Benford, supra note 28, at 10.
ten other states added legislation. As of September 2020, at least twenty states have either passed or considered passing NIL laws. This pressure on states boils down to a state having two options: pass a law or be a loser.

Coercion focuses on unequal access to an opportunity, given an unfair distribution of the opportunity. The opportunity with unequal access is recruiting the top athletes coming out of high school. The unfair distribution equates to the states that approve a bill versus the states that do not approve a bill to allow players to profit off their NIL. If some states are in the position to allow players to profit off their NIL and some states are not in the position to pass a bill of this type, the schools in the states which allow athletes to profit will have a competitive edge in recruiting higher valued players. Therefore, all states will be coerced to passing this law or forfeit their competitive edge, and revenue, for their schools.

This scenario has played out in college sports before. Overturning the Sanity Code was an early example of this. Southern schools, in an attempt to compete with wealthy Eastern and Midwest schools, gave out unrestricted subsidies to student athletes. Southern schools were giving aid to all student athletes, whereas Midwest and West schools forbid athletic scholarships. Eventually, the southern schools forced the rest of the member institutions’ hands and scholarships are now the norm, and in fact expected, for most student athletes.

B. NOT EVERYONE’S A WINNER: CROWDING OUT

Allowing college athletes to profit from their NIL also risks crowding out other sports and athletes—causing detrimental effects for schools, athletic programs, and individual athletes. Sponsorship money goes somewhere other than the players right now and propo-

149. Cohen, supra note 138, at 690.
151. Id.
152. CHUDACOFF, supra note 31, at 8.
153. Id. at 10.
154. Id. at 11.
ments of players’ ability to profit are arguing this money should be
going to the players as the owners.

Chancellor Rebecca Blank of the University of Wisconsin offers an insight into what money means for the NCAA. She wrote, “‘[t]he business model for college athletics is greatly misunderstood by the public . . . We’re not running sports to primarily make money.’”

A peek into the NCAA finances shows the amount of money it takes to run a system this complex. A 2016 study on FBS program finances including all sports found the University of California Berkeley carried a total debt load of $445 million, the Clemson University program has $225 million in debt, and the University of Michigan has more than $200 million in debt. These programs at this time are receiving capital from media revenues and sponsors, and this debt will only increase without that additional revenue.

Take March Madness for example. The NCAA only receives about 4% of the revenue it makes from that tournament and puts it towards the organization’s operating expenses. This revenue is distributed to each of the individual teams and respective conference. This money is not going to the big bad NCAA. Instead, the money the NCAA keeps is used only to continue to have a national college sports system. Understanding the financial structure of the NCAA shows the money being demanded for NIL by student athletes will throw a ripple effect through the whole NCAA in terms of money needed by schools to keep the NCAA’s operations afloat.

While certain basketball and football programs are in the positive for the amount of revenue earned, these resources from sponsors and other revenue sources are also funneled to keeping other sports alive. These include other men’s sports, women’s sports, and Olympic sports which universities are training athletes for. In response to the question of “what happens when car dealerships and restaurants start putting their dollars toward paying a school’s point guard for endorsements instead of donating those funds to the athletics program,” Rod Smith, Director of the Center for Constitutional Studies at Utah Valley University, responded that “it could result in less money for lower-profile women’s and Olympics sports.”

156. Zimbalist, supra note 60, at 340.
158. Id.
159. Zimbalist, supra note 60, at 342.
160. Jag, supra note 149.
Cutting Olympic sports programs has impacts which would be felt by the whole school. For example, the University of California, Los Angeles ("UCLA") was forced to cut men’s swimming and men’s gymnastics, even though several Olympians had competed for UCLA.\textsuperscript{161} In fact, the U.S. Olympic and Paralympic Committee reported 88% of Summer Olympians in 2016 played their sport in college.\textsuperscript{162} In 2019, 141,483 collegiate athletes were also Olympians.\textsuperscript{163} These sports can bring in millions of dollars and fill classrooms with athletes who are paying tuition.\textsuperscript{164} According to the Intercollegiate Coach Association Coalition, in 2019, Olympic sports athletes brought in $3.6 billion in tuition for their universities.\textsuperscript{165} If schools lost revenue from sponsors, sports producing Olympians would inevitably be cut, crowding out certain sports, Olympians, other athletes, and ultimately hurt colleges financially.

C. It’s Just Not the Same: Corruption

Creating a space for the commodification of NIL in college sports would corrupt the academic institutions as well as the college sports themselves.

1. Academics

Many critics of college sports argue that college sports contaminate our higher education institutions. While some argue that student athletes’ focus on academics is insufficient,\textsuperscript{166} the athletic programs are still founded through universities that focus on education.\textsuperscript{167} Maintaining high academic integrity is a goal of the NCAA and encouraging athletes to shift focus to profiting off their NIL will not only sever the connection between college athletes and higher education but will actually diminish the academic institutions themselves.\textsuperscript{168}

These ideas are not inherently incompatible with one another. Studies of athletes’ brains compared to those in the general public show that athletes have greater mental processing and learning abili-

\textsuperscript{162} Id.
\textsuperscript{164} Dellenger & Forde, supra note 161.
\textsuperscript{165} Id.
\textsuperscript{167} McCann, supra note 54.
\textsuperscript{168} Benford, supra note 28, at 13.
ties that apply in contexts other than sports. Exercise helps keep a person’s brain sharp in a number of ways from improving memory to creating new brain cells.

College sports have already touched the academics of universities with the commercial focus of the NCAA. Some argue the “integrity and reputation of our universities” have already been threatened by college sports. The combination of college sports at academic universities, also called the “edutainment industry,” has many critics who are not impressed with the commercial growth in this area. The NCAA has undertaken many reforms to address these concerns, but the money flowing through the commercialization can’t be stopped.

Written in the Carnegie Foundation’s reports from as early as 1929, the authors described how college football has changed into a commercial sport. The report states, “[t]he athletes who take part in it have come up through years of training; they are commanded by professional coaches; little if any initiative of ordinary play is left to the player. The great matches are highly profitable enterprises.” This perspective recognized the problems with commercializing college athletics as early as the 1920s. This was even before the first televised NCAA football game. The Carnegie Foundation found that the commercialization was causing a diminishing of education and intellectual values with the victim being the student athlete. Allowing students to be paid for their NIL would not lessen this, in fact it would worsen the issue of contaminating our higher institutions.

2. Student Body

While the NCAA Constitution unambiguously states the student athlete is to be integrated into the general student body, having players earning hundreds of thousands or millions of dollars would create

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174. Id.
upper and lower classes of students at the school.\textsuperscript{177} Any eighteen-year-old has experienced the popularity hierarchy in any high school, which is only exaggerated in college, of athletes being at the top of the food chain. Discipline for harassment is not foreign to jocks.\textsuperscript{178} Athletes are often deemed as part of an “exclusive group that is perceived as a conceited elite.”\textsuperscript{179} In fact, athletes are already exposed to superior opportunities through preferential class enrollment, private tutors, on-staff doctors, shoes, and apparel.\textsuperscript{180}

Commodification of NIL in college sports would corrupt the academic institutions because it would encourage the division between student athletes and the general student population and further sex and party culture in college athletics. Identifying as an athlete pressures the stereotypical expectations including substance abuse and unsafe sex.\textsuperscript{181} Additionally, some college athletes use illegal performance enhancing drugs and alcohol.\textsuperscript{182} Athletes tend to be more sexually active and may practice risky sexual behaviors including more partners and less contraceptive use.\textsuperscript{183}

An athlete having different values than the rest of the student body could be harmful because it may diminish interactions with non-athletes and support the idea of “athletic subculture,” which involves more partying and less time attending cultural events.\textsuperscript{184} The issue is not the physical money, but the power that comes along with the money.\textsuperscript{185} Large sums of money would divide student athletes and others on campus.\textsuperscript{186} When people have different sized bank accounts, this causes social discomfort and injures relationships.\textsuperscript{187}

Children even recognize athletes as more popular among their peers.\textsuperscript{188} A study of high school students’ attitudes in the 1950s found

\begin{itemize}
\item \textsuperscript{177} Zimbalist, \textit{supra} note 60, at 339-40.
\item \textsuperscript{178} \textit{About Jocks as a Youth Subculture}, CTR. FOR MENTAL HEALTH SCH. UCLA 1 http://smhp.psych.ucla.edu/pdf/docs/youth/jocks.pdf (last accessed Dec. 15, 2020).
\item \textsuperscript{179} Id.
\item \textsuperscript{180} Dan Levy, \textit{Paying College Athletes is Possible, if the NCAA System gets Broken (or Fixed)}, BLEACHER REP. (Sept. 12, 2013), https://bleacherreport.com/articles/1771951-paying-college-athletes-is-possible-if-the-ncaa-system-gets-broken-or-fixed.
\item \textsuperscript{181} \textit{About Jocks as a Youth Subculture}, \textit{supra} note 178, at 2.
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Anette M. La Greca et al., \textit{Adolescent Peer Crowd Affiliation: Linkages with Health-Risk Behaviors and Close Friendships}, 26 \textit{J. PEDIATRIC PSYCHOL.}, 131, 132 (2001).
\item \textsuperscript{184} Elizabeth Aries et al., \textit{A Comparison of Athletes and Nonathletes at Highly Selective Colleges: Academic Performance and Personal Development}, 45 \textit{RES. HIGHER EDUC.}, 577, 597-98 (2004).
\item \textsuperscript{186} Beal, \textit{supra} note 59, at 788.
\item \textsuperscript{187} Yabroff, \textit{supra} note 185.
\item \textsuperscript{188} See generally Hugh Troy Buchanan et al., \textit{Academic and Athletic Ability as Popularity Factors in Elementary School Children}, 47 \textit{Rss. Q.}, 320 (2013) (examining
the students valued sports, dating, and cars more than education because good grades don’t translate into popularity.189 A second study conducted from the 1970s-2010s found that being a good athlete has remained the most telling characteristic of being popular in high school.190 Blame it on stereotypes, blame it on the media, blame it on the patriarchy. But the fact is that it exists and permeates the minds of young children through adults. Money would further divide the hierarchy of the students within the school.

3. Bigger Doesn’t Always Mean Better

Corruption occurs when goods that should be placed in different spheres, for example, professional athletes being paid compared to amateur student athletes, are forced to be valued the same way.191 To determine why these goods should be placed in separate spheres, one can look to either prevailing social norms (conventionalism) or by inquiring into the “essence” of the good.192 Both paths reiterates the differences between professional athletes who are paid and amateur athletes who are not paid.

Conventionalism is the idea that society recognizes differences between two ideas (in this case, college and professional sports) and making it for sale changes how we value it.193 Conventionalism is used to determine which exchanges should not be allowed relative to a specific society at a specific time.194 Two areas that highlight society’s recognition of the differences between college and professional sports are first, society’s preference for college sports over professional sports and second, the history of society’s preference to drawing a line between the two. These two displays of society’s preference between amateur and professional sports through athletes profiting off their NIL is harmful to how we value amateur sports because it blurs and essentially eliminates the line between college and professional sports, which we value differently.

Society’s actions show people recognize differences between amateur sports and professional sports. The appreciation for college football is much broader than professional football.195 The fans prove this. The NCAA Division I football league, the FBS, had a total at-

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190. Id. at 70-71.
192. Id. at 693.
tendance of 37,913,238 people in the year 2014. To compare, the National Football League’s (“NFL”) total attendance was 17,606,643 people in attendance. In 2015, the Dallas Cowboys had the highest average attendance of the NFL with 91,459 average attendees. Very impressive numbers, but amateur (pun intended) to the eight NCAA teams with a higher average attendance in 2015 including the University of Michigan (110,168), Ohio State University (107,244), Texas A&M (103,622), Louisiana State University (102,004), University of Alabama (101,112), University of Tennessee (100,584), Penn State University (99,799), and the University of Georgia (92,746).

What makes college athletics different and more appealing for fans as compared to professional sports?

As opposed to professional sports, more Americans have personal ties with the programs offered by the school, whether they be former players, alumni of the school, parents of students, or, most significantly, students who attend the schools for their academic programs or libraries or to tailgate in front of the roaring college stadiums. In professional sports, excitement only comes from winning because the focus is on the sports as a business.

The second way society recognizes differences between college and professional sports is by acknowledging the historical path college sports took. Amateurism was originally invented by elite British to hold themselves higher than those in a lower social class. This idea was translated to America for collegiate athletes to appear to be above the “crass commercialism and professionalism” in professional sports. The history of amateurism puts students above professional athletes. Additionally, claiming amateur status had federal and state tax exemptions and workers’ compensation exemptions. Proponents of players profiting off their NIL argue there are already many similarities between college and professional sports.

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196. Jeffrey A. Mankin et al., The Effectiveness of College Football Recruiting Ratings in Predicting Team Success: A Longitudinal Study, 14 Res. Bus. and Econ. J. 1, 3 (Feb. 5, 2015).
197. Id.
200. Looney, supra note 195.
201. Id.
203. Id.
204. Id. at 96-97.
205. Id. at 96.
206. Mitten, supra note 96 at 3.
college and professional sports are entertainment products and both have great commercial value based on consumer popularity. The similarities between college and professional sports are undeniable, however a line still has to be drawn to maintain the difference between amateur and professional sports. The history of amateur sports show society intended a division of sports separate from professional sports. By allowing further commodification of players’ NIL, we move away from society’s historical preferences for a division between amateur and professional sports.

Disregarding the historical preference for amateur sports over professional sports would mean schools would end academic centered college athletics and form a minor league. These new professional leagues would not be a part of the educational universities and would become just as popular to America’s fans as minor leagues are today. If you aren’t familiar with minor leagues in America, there’s a reason for that. It has been projected that consumers would lose interest if athletes received NIL payments, based on the way Americans have historically valued amateur status. Allowing the commodification of athletes’ NIL would change the way society values it.

Essentialism is the idea there is something objective in the good that requires a particular way of valuation. The good in this scenario, college athletics, has something objective about it which requires us to value college athletics a particular way. The essence of college athletics is more similar to the essence of other competitions involving amateur athletes than to the essence of professional athletics.

Auslaut, erysipelas, bougainvillea, aiguillette, pendeloque, palama, cernuous, and odylic. These eight words made up the final eight contestants’ given words to be a part of the eight-way tie in the Scripps National Spelling Bee in 2019. Ranging from twelve years old to fourteen years old, these eight students can spell words even the most highly educated people can’t pronounce. In fact, the competition actually “ran out” of challenging words for these genius children to spell, leading to the eight-way tie. Although these kids can spell

207. Id.
208. Benford, supra note 28, at 11.
210. Id. at 344.
211. Cohen, supra note 138, at 693.
213. Id.
words ranging from medical terms to political jargon, picturing them to be at the same place in their sports’ (yes, it’s technically a sport) careers as Tiger Woods or Megan Rapinoe is a stretch. Yet there are similarities. Any person can place a prop bet on anything ranging from gender, ethnic background, and even physical appearance (braces or no braces, glasses or no glasses) on these children who range from six to fifteen years old. So what is the difference between placing them as synonymous athletes with the Professional Golfers’ Association (“PGA”) legend and United States Women’s National Team (“USWNT”) world champion? There is something essentially special about a six-year-old spelling bee participant which we want to preserve, which is why betting on these whiz children might rub you the wrong way.

Amateur. A-M-A-T-E-U-R. Amateur. These spelling champions would have no problem spelling that word in their sleep. Maybe after asking for a definition first to buy some time. An amateur is, “one who engages in a pursuit, study, science, or sport as a pastime rather than as a profession.” Some may argue these kids are not amateurs in the Spelling Bee, and, actually, have more similarities to Tiger Woods and Megan Rapinoe. In fact, the 2004 Spelling Bee champion studied months upon months, seven days a week. However, there is still something essentially different between these amateur contestants and professional athletes. This is shown by the nature of the prop bet.

Prop bets are the only betting options available for sofa spuds to make while snickering as these kids’ dreams are crushed when they can’t spell the word “tettigoniid” and walk off the stage crying. Prop bets are those which do not bet on an outright winner of the event. A similar prop bet in professional sports would be betting on how long the National Anthem would take before a game or if the coin toss will be heads or tails. Around the world, in every society, the only bets allowed on the Spelling Bee are prop bets. It is the essence of the good, amateur children spellers, which show why we only allow prop bets.


218. Id.

219. Id.
bets. These contestants are children. A child ranging from just learning to tie their shoes and beginning kindergarten to a child who can spell unthinkable words but can’t yet drive a car. These contestants are children who are not capable of dealing with pressure from betters who wagered far more money than the kids receive in allowance each week, on them winning the whole championship.\footnote{Id.}

You might be wondering why I am comparing this six-year-old little girl in pigtails in a spelling bee and an eighteen-year-old playing college sports who has been the head of his household since the end of his adolescence. The essence of the goods in both circumstances exhibit why placing them in the same sphere as professional sports is corrupting the good. We value college athletics in a unique way because we want to protect student athletes from exploitation by commercial businesses.\footnote{Mitten, supra note 96, at 5.} We value Spelling Bee participants in a unique way (by only allowing prop bets) because we want to protect these competitors from exploitation by commercial businesses.\footnote{Spelling Bee Betting Guide, supra note 215.} Amateur competitors have something objective that requires a particular way of valuation. A different example, more similar to college athletics, may help to show the essence of the Spelling Bee participants and college athletes are similar.

Essentialism claims the good requires the specific valuation of a good objectively, which means unchanging over place and time.\footnote{Cohen, supra note 138, at 693.} College athletics require a specific valuation based on the essence of amateur athletics. A similar path was taken by the Olympic games. A key feature of essentialism is the value of the good is objective, meaning it doesn’t change among different societies.\footnote{Id.} The Olympics embody this because it involves participants from around the world.

The debate of whether the Olympics should involve only amateurs has been a heated one since the mid 1900s.\footnote{Ross Andrews, Push to Allow Professional Athletes Took Hold in 1968 Olympic Games, GLOB. SPORT MATTERS (Oct. 15, 2018), https://globalsportmatters.com/mexico/2018/10/15/professional-athletes-1968-olympic-games/.} In 1955, International Olympic Committee (“IOC”) President Avery Brundage stated, “[w]e can only rely on the support of those who believe in the principles of fair play and sportsmanship embodied in the amateur code in our efforts to prevent the Games from being used by individuals, organizations or nations for ulterior motives.”\footnote{Bob Greene, What Changed the Olympics Forever, CNN (July 23, 2012), https://www.cnn.com/2012/07/22/opinion/greene-olympics-amateurs/index.html.} Revenue generated outgrew
the value of amateur athletics, however, both remained distinct values.\textsuperscript{227}

The IOC recognizes 205 countries around the world as participants in the Olympics, making the value of the Olympic Games not dependent on certain societies’ valuations.\textsuperscript{228} In the year 2000, the IOC saw the need to establish anti-gambling rules to avoid corruption such as preventing athletes from betting on themselves.\textsuperscript{229} Keba Mbaye, Chairman of the IOC Ethics Commission from Senegal, described betting on Olympic athletes as being in contradiction with ethical principles of Olympism.\textsuperscript{230} Proponents of gambling argued it could be used in some nations to pay for Olympic athletes.\textsuperscript{231} However, this source of financing is hypocritical to the amateur principles of the Olympics. “In the current market where large amounts are wagered and often poorly-funded athletes have a chance to land endorsements, corruption ranks equally with doping in the sense of having the potential to destroy the fundamental integrity of [the] sport.”\textsuperscript{232} The obsession with two different teams proves the difference in essence between amateur and professional Olympic teams.

In 1992, the United States put forward the Dream Team to compete in men’s basketball at the Barcelona Olympics.\textsuperscript{233} This team won by an average of forty-four points without a single timeout during the whole Olympic tournament.\textsuperscript{234} This spread was not a surprise to anyone in the world. Instead, people are much more enamored by the 1980, “Do you believe in miracles?” hockey team.\textsuperscript{235} This team was admired by the public because the players had the status of true amateurs against a not-so-amateur Soviet Union.\textsuperscript{236} The movie created about this game summed it up. “A few years later, the U.S. began using professional athletes at the Games – Dream Teams. I always found that term ironic because now that we have Dream Teams, we seldom ever get to dream.”\textsuperscript{237} It is worthy to note the thrilling game celebrated around the world was not even the Olympic finals, yet it is

\begin{itemize}
\item\textsuperscript{227} Andrews, supra note 225.
\item\textsuperscript{229} Sally Melissa Gainsbury, Gambling on the Olympics, 2 INT’L GAMBLING STUD. 1, 2 (2010).
\item\textsuperscript{230} Id. at 3.
\item\textsuperscript{231} Id.
\item\textsuperscript{232} Id.
\item\textsuperscript{233} Greene, supra note 226.
\item\textsuperscript{234} Id.
\item\textsuperscript{235} Id.
\item\textsuperscript{236} Id.
\item\textsuperscript{237} Miracle (Walt Disney Pictures 2004).
\end{itemize}
one of the most recognized games in Olympic history. A team full of amateurs fully encompasses the essence of the Olympic spirit over the NBA-player filled Dream Team.

Disregarding the essence of amateur sports and requiring them to have the same valuation as professional sports corrupts the existence of college sports. While professional sports are strictly profit-driven commercial enterprises, amateur athletes are motivated by educational, physical, mental, and social benefits from playing college sports. Opponents will argue this is a scam the NCAA claims in order to use the athletes for school profit. However, we have seen the unique essence of amateur athletes in other competitions not involving the NCAA as explained above. Placing elementary school children in the same sphere as professional athletes corrupts the sympathy we have for these children as they strive to win the championship they have trained months for. Putting money on whether the winner will have glasses takes away from the fact a fifteen-year-old is more brilliant than the spell-check we all are reliant on in our emails. Rostering a professional-filled team in basketball corrupted the excitement the world could have experienced if we rostered a second Miracle team, just this time in basketball. Disregarding the essence of amateur sports will corrupt college sports by valuing them the same as professional sports.

There are athletes who recognize the essence of amateur athletics as well. The NCAA has a student-advisory committee, consisting of undergraduate athletes, who indicate their concerns over the unknowable consequences of allowing students to sell their NIL. Exploitation is a major concern of current student athletes. By placing college athletics in the same sphere as professional sports, similar to placing child spellers and underdog Olympians in the same sphere as professional athletes, it corrupts the way we value college athletics.

VI. IF LEGALIZED, HOW TO REGULATE?

College athletes profiting off their “Name, Image, and Likeness” (“NIL”) is a dynamic area with both predictable and unpredictable

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239. Mitten, supra note 96, at 5.
241. Branch, supra note 2.
243. Id.
challenges along the way.244 Addressing specific solutions to implement endorsements for college athletes is beyond the scope of this Article; however, the following are a few concerns to consider before and while changes in college athletics are made.

There will be many questionable legal relationships between the individual athlete, the sponsor companies, the schools, the compliance officers, and the NCAA. One concern is determining which endorsements athletes could take. Compliance officers would be expected to take the role of an agent, approving or disproving the sponsorship opportunity or offering advice.245 The compliance officer would rely on a university’s general counsel to evaluate many deals and accept or reject endorsements.246 For example, the NCAA would prohibit endorsements inconsistent with NCAA values, such as alcohol, tobacco, and gambling.247 On an individual level, private or religious schools might have different values than a public university.248 Additionally, other antitrust considerations could arise, such as banning businesses who have been involved in recruiting infractions from compensating athletes for NIL.249 There are plenty of opportunities for legal challenges.

A second major concern is the need to ensure payment for NIL is not a cover-up for pay for play.250 This would include boosters using NIL payments as a recruiting tool.251 Relying on individual schools to enforce recruiting violations would not have much teeth to it considering most schools are cheerleaders for these athletes and don’t typically give donors a hard time.252 Drawing the line on what is pay for play and what is a permissible endorsement will be difficult to keep consistent across schools.

A third concern is determining how to regulate athletes receiving endorsements. States are proposing their own legislation currently. In order for this movement to be successful, a federal law must be implemented to ensure uniformity, fairness, and compliance.253 Agent certification is another area to be watched. Agents would somehow have to be regulated and governed to ensure agents don’t abuse

244. McCann, supra note 54.
246. Id.
247. McCann, supra note 54.
248. Id.
249. Id.
250. Id.
251. Id.
252. Smith, supra note 30, at 91.
253. Id. at 88-89.
their young clients. Nick Saban, University of Alabama’s head football coach, even referred to agents as “pimps.” Federally-regulated agent certification would be a proposed way to address this concern. A federal law would ensure regulation is consistent and federally-based agent certification will be an area of concern to ensure the college athletes are not exploited.

VII. CONCLUSION

Moves are being made and legislation is being passed. It’s not a matter of if, but rather a matter of when. There are other concerns, in addition to the “how” of implementation, that should be taken notice of. The commodification concerns relating to college athletes’ “Name, Image, and Likeness” (“NIL”) is dynamic and will not be sorted out anytime soon. This is a necessary conversation before state laws are passed and colleges, states, and the National Collegiate Athletic Association (“NCAA”) start backtracking after implementing NIL laws. The lack of case history does not direct the conversation to one obvious path or the other. States are moving quickly after the spark from the California proposed bill; however, this momentum should not disregard the accompanying commodification concerns. How will states that do not pass NIL legislation compete? How will colleges maintain non-revenue generating sports and Olympic sports? How will the NCAA be able to maintain the academic focus that they have been criticized of disregarding? Will this further the divide between student athletes and the rest of the student population? The proposed legislation and regulations should address these concerns prior to college athletes being paid for NIL.

254. Branch, supra note 2.
255. Id.
256. Agent Certification, NCAA, http://www.ncaa.org/enforcement/agents-and-amateurism/agent-certification (last visited Dec. 15, 2020) (showing federally regulated agent certification has been used to ensure athletes’ best interests are met for the National Basketball Association draft and college purposes).