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## The NCAA's Challenge in Determining NIL Market Value

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# THE NCAA'S CHALLENGE IN DETERMINING NIL MARKET VALUE

MEG PENROSE\*

## *I. Introduction — From the Death Penalty to the Wild, Wild West*

In early 1987, the NCAA imposed “death penalty” sanctions on the Southern Methodist University football program.<sup>1</sup> The offense? Players improperly accepted money and gifts from boosters.<sup>2</sup> Star running back Eric Dickerson allegedly received a gold Trans Am car, which became a symbol of SMU’s infractions.<sup>3</sup> The payments, and offers to provide other valuable items such as cars, violated the NCAA’s amateurism rules in place at the time. Prior to July 1, 2021, college athletes could not accept payment or other benefits for their name, image, or likeness (“NIL”)<sup>4</sup> and were limited solely to educational benefits.<sup>5</sup> Fast forward to today, the same actions that subjected SMU to “death penalty” sanctions are now openly

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1. Eric Dodds, *The ‘Death Penalty’ and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015, 6:00 AM EST), <https://time.com/3720498/ncaa-smu-death-penalty/>. The NCAA penalty imposed against SMU, following repeat NCAA infractions, resulted in the cancellation of SMU’s 1987 football season and four home games during the 1988 football season. Following the NCAA’s “death penalty” sanctions, SMU football “managed just one winning season from 1989 to 2008.” *Id.*

2. Chris Vannini, *How Should SMU’s Death Penalty Be Remembered in the NIL Era? Eric Dickerson and Others Reflect*, ATHLETIC (Aug. 4, 2022), <https://theathletic.com/3474787/2022/08/04/smu-football-death-penalty-ncaa-nil/>.

3. *Id.* On April 19, 2022, however, SMU Football’s official Twitter account featured the once-scandalous Trans Am in a recruiting graphic, an idea suggested by Assistant Coach Craig Naivar. *Id.*; see @SMUFB, TWITTER (Apr. 19, 2022, 9:36 AM), <https://twitter.com/SMUFB/status/1516425603901181970?ref=https://perma.cc/LY4A-MVYL>. *The Athletic* article commented, “What was once SMU’s greatest shame is now viewed through a bit of a different lens.” Vannini, *supra* note 2; see *infra* text accompanying notes 6-8.

4. NCAA, Name, Image and Likeness Policy: Question and Answer (Feb. 2023), [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_QandA.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf) [hereinafter NCAA, Question and Answer]. The NCAA defines “name, image and likeness activity” as “an activity that involves the use of an individual’s name, image and likeness for commercial or promotional purposes.” *Id.*

5. See Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>. This “interim” policy is intended to be temporary. The NCAA announcement indicated that the “temporary policy will remain in place until federal legislation or new NCAA rules are adopted.” *Id.*; see also NCAA, Question and Answer, *supra* note 4.

permitted in the form of NIL payments, cars, and through booster “collectives.”<sup>6</sup> In fact, SMU’s NIL collective, the Boulevard Collective, aimed to pay every football and men’s basketball player \$36,000 in 2022.<sup>7</sup> SMU’s official football Twitter account openly boasted about the change by prominently displaying a picture of a gold Trans Am in a bid to lure players with an edgy claim: “All roads lead to Dallas.”<sup>8</sup>

Make no mistake, NIL opportunities provide the newest—and potentially most potent—recruiting tool. My, how college athletics have changed! As one conference commissioner noted, under the pre-NIL system, “Boosters couldn’t give a ride to a guy in the rain. Now, we aren’t giving him a ride—we are giving him the car.”<sup>9</sup>

Post-NIL, the only limits on boosters paying athletes appear to be prohibitions against “pay-for-play”<sup>10</sup> and a requirement that NIL payments not exceed “fair market value.”<sup>11</sup> How the NCAA will determine fair market value for players is unknown. Surely not every SMU athlete is equally “valued” at \$36,000 in a free and competitive market.

This Article argues that every college athlete’s fair market value is, and should be under any future governing rules, whatever the market will pay. Under this approach, college sports have entered what many observers are calling the “Wild, Wild, West.” This unregulated market allows boosters

6. Vannini, *supra* note 2 (“It was a scandal at SMU when players received cars in the ’80s. Now? Texas running back Bijan Robinson is asked about his Lamborghini at Big 12 media days and Ohio State quarterback C.J. Stroud has a Mercedes.”).

7. *Id.* The SMU Collective has over \$4.5 million set aside for SMU athletes. *Id.*

8. @SMUFB, *supra* note 3; see Vannini, *supra* note 2.

9. Ross Dellenger, *The Other Side of the NIL Collective, College Sports’ Fast-Rising Game Changer*, SPORTS ILLUSTRATED (Aug. 10, 2022), <https://www.si.com/college/2022/08/10/nil-collectives-boosters-football-tennessee-daily-cover>.

10. NCAA Bylaw 12.1.2, which defines “Amateur Status,” prohibits “pay for play” incentives. NCAA, 2022-23 NCAA DIVISION I MANUAL arts. 12.1.2, 12.1.2.1, at 42 (2022) [hereinafter 2022-23 NCAA DIVISION I MANUAL], <https://www.ncaapublications.com/productdownloads/D123.pdf>. Bylaw 12.1.2.1 specifically defines “Prohibited Forms of Pay.” *Id.* art. 12.1.2.1, at 42-44.

11. See NCAA, Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement 2 (effective July 1, 2022) [hereinafter NCAA Interim NIL Guidance], [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL\\_Guidance.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf) (“NIL Agreements **must** be based on an independent case-by-case analysis of the value that each athlete brings to an NIL agreement as opposed to providing compensation or incentives for enrollment decisions . . .”). The NCAA’s interim guidance policy limited the communications a booster may have with a prospective student athlete (PSA). *Id.* at 1-2. This follows the governing NCAA Bylaws that prohibit boosters from engaging in recruiting activities. See generally 2022-23 NCAA DIVISION I MANUAL, *supra* note 10, arts. 12-13, at 39-109 (outlining recruiting structure and eligibility for amateurism under current NCAA Bylaws).

and sponsors to flood college sports with as much cash and financial incentives as possible to encourage athletes to attend a particular institution.<sup>12</sup> Or, maybe, the new NIL system literally rewards athletes for being part of a given team.<sup>13</sup> There are currently no external controls and only weak state law limits on compensation. Federal and state legislators are trying to pass NIL laws that benefit student athletes without negatively impacting competition.<sup>14</sup> But legislation takes time. Until then, something will inevitably fill the void.

The NCAA famously asserts that most of its athletes will go professional in something other than sports.<sup>15</sup> This means that for most NCAA athletes, college is the only time they will be able to cash-in on their NIL opportunities. And the cash is currently flowing and flowing and flowing. College coaches, while not permitted to entice boosters to pay athletes,<sup>16</sup> are certainly making it known that to be competitive in a post-NIL world, the school's "collectives" must be raising millions of dollars to lure the top athletes. Ryan Day, The Ohio State University's head football coach, told

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12. See Dennis Dodd, *Inside the World of 'Collectives' Using Name, Image and Likeness to Pay College Athletes, Influence Programs*, CBS SPORTS (Jan. 26, 2022, 1:03 PM ET), <https://www.cbssports.com/college-football/news/inside-the-world-of-collectives-using-name-image-and-likeness-to-pay-college-athletes-influence-programs/>. Dodd went further in remarking, "To some, all of it is about 12 highway exits past the Wild, Wild West." *Id.*; see also *NCAA NIL Update: With a Semester of NIL Opportunities in the Books, Trends Emerge and Confusion Reigns*, ROPES & GRAY (Mar. 1, 2022), <https://www.ropesgray.com/en/newsroom/alerts/2022/march/ncaa-nil-update-with-a-semester-of-nil-opportunities-in-the-books-trends-emerge-and-confusion-reigns> (providing guidance on "Surviving in the Wild West" of NIL); Jared Yaggie, *The New Wild West: An Update to the Existing NIL Environment in College Sports*, UNIV. CIN. L. REV. BLOG (Oct. 4, 2022), <https://uclawreview.org/2022/10/04/an-update-to-the-existing-nil-environment/>; Tim Tucker, *'The Wild West': College Sports' NIL Era Brings Upheaval*, ATLANTA J.-CONST. (Mar. 18, 2022), <https://www.ajc.com/sports/georgia-bulldogs/the-wild-west-college-sports-nil-era-brings-upheaval/YORTVG5VAZCMPBLMVK42QMA63E/>.

13. See Tucker, *supra* note 12. Despite the NCAA suggesting that players should be paid on a case-by-case assessment of each athlete's value, there is a growing practice of Collectives simply paying athletes for being on the roster. See *id.* (noting that the "Horns with Heart" NIL collective offered each Texas Longhorn offensive lineman \$50,000 per year).

14. Justin Whitaker, *Members, Student-Athletes Pick Up Steam on Congressional Engagement*, NCAA (July 28, 2023, 10:00 AM), <http://ncaa.org/news/2023/7/28/media-center-members-student-athletes-pick-up-steam-on-congressional-engagement.aspx>.

15. NCAA, *NCAA Recruiting Facts 2* (Fall 2022), [https://ncaaorg.s3.amazonaws.com/compliance/recruiting/NCAA\\_RecruitingFactSheet.pdf](https://ncaaorg.s3.amazonaws.com/compliance/recruiting/NCAA_RecruitingFactSheet.pdf) ("There are nearly half a million NCAA student-athletes, and most of them will go pro in something other than sports.").

16. See Dellenger, *supra* note 9.

Ohio State boosters that the collective needs \$13 million to “fund” his roster.<sup>17</sup> Not to be outdone, Florida’s head football coach Billy Napier told a Florida audience that he needed \$20 million.<sup>18</sup>

The NCAA’s no pay-for-play prohibition seems to be as irrelevant in real life as any purported “fair market value” limitations. When college coaches can go directly to boosters and encourage their collectives to raise funds, the Rubicon has been crossed. Bring on the gold Trans Ams! Poor SMU was simply ahead of the times. If only the NCAA had relented thirty-five years ago.

This Article proceeds in three parts. Part II discusses the changes that NIL has wrought in college athletics. It briefly explains collectives and their impact on NIL. Part III discusses the impossibility of limiting athletes’ “fair market value” given market value depends on what the market is willing to pay. Congress has failed to pass national legislation. Yet the mosaic of state laws is simply unfit to stand in for national legislation. And, following multiple litigation losses, the NCAA cannot be trusted to “value” the athletes themselves. Market value, if one is to be established, must be uniform and assessed by a neutral body. The NCAA is not neutral when it comes to college athletes. Finally, Part IV calls on Congress to enter the NIL dialogue if only to even out the recruiting advantages NIL is creating. While fair market value may be impossible to establish, national uniform laws can be put in place to ensure that recruiting wars depend on educational and athletic opportunities rather than the wealth of collectives. Unless Congress acts, college athletics will remain mired in the Wild, Wild, unregulated West.<sup>19</sup>

## *II. The Monetization of Name, Image, and Likeness*

### *A. The New NIL Era*

In the twenty-first century, everyone has a “brand.” Anyone can become a social media “influencer,” posting pictures on Instagram and videos on TikTok, or sharing commentary through podcasts. College students are

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17. *Id.*

18. *Id.*

19. See Mark Wogenrich, *Penn State’s James Franklin Calls NIL ‘the Wild, Wild West,’* SPORTS ILLUSTRATED (Dec. 26, 2022, 12:37 AM EST), <https://www.si.com/college/pennstate/football/penn-state-football-james-franklin-nil-wild-wild-west>. Franklin explained, “There’s just really no guardrails, not a whole lot of guidance, not a whole lot of governance. And it’s concerning.” *Id.*

particularly skilled as influencers. Social media influencers can make millions of dollars each year.<sup>20</sup>

Until July 1, 2021, college athletes were not permitted to be compensated for their NIL, even if the particular athlete was a successful influencer.<sup>21</sup> Now, following multiple legal antitrust defeats,<sup>22</sup> including a unanimous decision by the U.S. Supreme Court,<sup>23</sup> the NCAA now allows college athletes to benefit from their NIL. This is a remarkable change from the NCAA's stance when Jeremy Bloom, an Olympic Skier and University of Colorado football standout, sought permission to accept endorsement deals for ski equipment and modeling to enable him to fund his Olympic training.<sup>24</sup> The NCAA prohibited Bloom's request and successfully fought him in court.<sup>25</sup> While many credit Ed O'Bannon, a former college athlete, with opening the NIL door for college athletes, credit also goes to Bloom.<sup>26</sup> NIL did not start with the *O'Bannon* case. The battle for NIL started with Jeremy Bloom.

Several past athletes have illustrated why NIL rights should have been granted years ago. These athletes—as the NCAA knew all along—were going pro in something other than sports.

“Johnny Football” might be the best example of the inequities of missing out on NIL. Johnny Manziel, a Texas A&M legend and Heisman Trophy

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20. Sydney Bradley, *How Much Money Instagram Influencers Make*, BUS. INSIDER (June 28, 2023, 6:53 AM CDT), <https://www.businessinsider.com/how-do-instagram-influencers-make-money>.

21. See Anna Katherine Clemmons, *'A Whole Different Audience': College Athletes Are Now Online Influencers, Too*, GLOB. SPORT MATTERS (Feb. 8, 2023), <https://global.sportmatters.com/business/2023/02/08/whole-different-audience-college-athletes-online-influencers-too/>.

22. While the United States Supreme Court has not directly addressed the NIL issue, a Ninth Circuit appellate decision regarding NIL opened the door to full NIL rights. See *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

23. *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

24. *Bloom v. NCAA*, 93 P.3d 621, 622 (Colo. App. 2004).

25. *Id.* at 628.

26. For a nice overview of the Bloom case and the NCAA's amateurism rules, see Lisa K. Levine, *Jeremy Bloom v. National Collegiate Athletic Association and the University of Colorado: All Sports Are Created Equal; Some Are Just More Equal Than Others*, 56 CASE W. RESV. L. REV. 721 (2006); see also Laura Freedman, Note, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673 (2003).

winner, had a stellar college career.<sup>27</sup> Known to most as Johnny Football, Manziel went on to play football professionally.<sup>28</sup> But his professional career was short lived.<sup>29</sup> If Johnny Football had been able to capitalize on his immense college success, his college career likely would have out-earned his professional career. Only the NCAA prevented this from happening. With these modern NIL changes, nothing would.

Every athlete enters college with a fresh slate. While some athletes are considered four-star or five-star high school athletes, the college game is different and not all five-star prospects pan out. Some fizzle. Others that may not have entered highly decorated may quickly exceed expectations. For these athletes, every moment provides an opportunity to capitalize on their NIL.

Importantly, NIL is not limited to the field, court, or pitch. NIL rights include any financial benefits that are not designated as pay-for-play. An early example was Spencer Rattler's use of two Dodge cars during his 2021-22 University of Oklahoma ("OU") football season.<sup>30</sup> Rattler's use of these cars while at OU allowed Dodge Motor Company to capitalize off Rattler's fame through "advertising."<sup>31</sup> If the cars were good enough for OU's quarterback, they should be good enough for other Oklahomans.

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27. Jeff Bell, *Top 10 Moments of Johnny Manziel's College Football Career*, BLEACHER REP. (Dec. 29, 2013), <https://bleacherreport.com/articles/1904150-top-10-moments-of-johnny-manziels-college-football-career>.

28. The Cleveland Browns selected Johnny Manziel with the twenty-second overall pick in the 2014 NFL draft. Pat McManamon, *Johnny Manziel Drafted by Browns*, ESPN (May 8, 2014, 5:37 PM ET), [https://www.espn.com/nfl/draft2014/story/\\_/id/10903195/2014-nfl-draft-johnny-manziel-drafted-cleveland-browns-no-22-overall-pick](https://www.espn.com/nfl/draft2014/story/_/id/10903195/2014-nfl-draft-johnny-manziel-drafted-cleveland-browns-no-22-overall-pick). Manziel's NFL career statistics included seven touchdowns and seven interceptions through fourteen games during two seasons. *Johnny Manziel*, ESPN, [https://www.espn.com/nfl/player/\\_/id/16736/johnny-manziel](https://www.espn.com/nfl/player/_/id/16736/johnny-manziel) (last visited July 31, 2023).

29. Jordan Dajani, *Johnny Manziel Says His Formal Football Career 'In My Eyes Is Over,' Will Play Second FCF Season, Per Report*, CBS SPORTS (Mar. 25, 2022, 12:25 PM ET), <https://www.cbssports.com/nfl/news/johnny-manziel-says-his-formal-football-career-in-my-eyes-is-over-will-play-second-fcf-season-per-report/>.

30. Wajih AlBaroudi, *LOOK: Oklahoma QB Spencer Rattler Earns Two New Cars in NIL Deal*, CBS SPORTS (Sept. 17, 2021, 7:14 PM ET), <https://www.cbssports.com/college-football/news/look-oklahoma-qb-spencer-rattler-earns-two-new-cars-in-nil-deal/>. In the Twitter advertisement explaining the deal, Fowler Auto explained it "wanted to find a way to keep our boy Spencer Rattler comfortable." *Id.*

31. *See id.*

### B. Collectives

The NCAA likely envisioned that student-athletes would garner NIL deals as individuals. Instead, wealthy boosters and fans aligned with particular schools creating “collectives,” non-profits that provide NIL money to their school’s student-athletes.<sup>32</sup> One media outlet referred to collectives as “stand-alone start-up companies established to create financial opportunities for athletes.”<sup>33</sup> In practice, it appears that collectives are merely a group of boosters and fans pooling money together in hopes of “encouraging” athletes to choose their schools.<sup>34</sup> Money talks.

Collectives purportedly operate outside the university structure and are independent from schools’ athletic departments. Still, collectives influence recruiting in obvious ways. For example, think gold Trans Ams and money filled envelopes, only now without the secrecy.<sup>35</sup> All financial inducements to play at a particular school are fully out in the open. NIL collectives enable boosters to drop the pretense of strategically placed envelopes. Now, collectives are providing what appears to be a “base salary” to student-athletes. Not quite NIL, but not pay-for-play either.

In year one, NCAA athletes brought in nearly \$1 billion in NIL money.<sup>36</sup> That sum will only grow. So far, the average NCAA athlete has brought in less than \$4,000.<sup>37</sup> NCAA football and men’s basketball, however, are not average. By all accounts, most of the NIL investments are going to these two big revenue sports.

There are exceptions, for example, Texas Tech. The Matador Club, Texas Tech’s booster and fan collective, committed to providing every Texas Tech football player \$25,000.<sup>38</sup> Not to be outdone, the Texas Tech

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32. Jim Vertuno, *Latest NIL Twist: Millions Being Pledged to College Athletes*, ASSOCIATED PRESS (Dec. 14, 2021, 2:23 PM CDT), <https://apnews.com/article/college-football-sports-football-austin-texas-1578609cf8697681db5a97389a715d3c>.

33. Dodd, *supra* note 12.

34. Yaggie, *supra* note 12.

35. Vannini, *supra* note 2. Gabe Feldman, Tulane University School of Law professor, called NIL “an arms race for schools in the recruiting wars.” Vertuno, *supra* note 32.

36. Josh Schafer, *NIL: Here’s How Much Athletes Earned in the First Year of New NCAA Rules*, YAHOO! MONEY (July 1, 2022), <https://money.yahoo.com/nil-heres-how-much-ncaa-athletes-earned-185901941.html>.

37. *Id.* (noting that Between July 1, 2021, and May 31, 2022 “the average NCAA Division 1 athlete had received \$3,711” in NIL money).

38. John Riker, *Texas Tech Football’s Matador Club Partnership Continues Trend of Team-Wide NIL Deals*, BUS. COLL. SPORTS (July 22, 2022), <https://businessofcollegesports.com/name-image-likeness/texas-tech-footballs-matador-club-partnership-continues-trend-of-team-wide-nil-deals/>.



women's basketball team secured a team-wide deal to provide \$25,000 to each player as well.<sup>39</sup> Even more recently, the Matador Club agreed to pay all twenty-seven members of the Texas Tech softball team \$10,000 per year.<sup>40</sup> As a sports law colleague pointed out, the Texas Tech team payment approach makes a mockery of the concept of fair market value.<sup>41</sup>

Collectives, not individual deals, pose the clearest concern regarding both pay-for-play and fair market value.<sup>42</sup> The earliest example may be Built Brands' NIL agreement with the entire Brigham Young University ("BYU") football team.<sup>43</sup> Every player, no matter his position, experience, or talent, received NIL money. Texas Tech and other schools quickly followed, expanding the team payment approach to include their women's sports.

While Texas Tech has had its share of athletic success, none of these sports with team payment deals are currently considered national powerhouse programs. Texas Tech's women's basketball program has not finished with a winning record in the Big 12 Conference at any time from 2017-2021.<sup>44</sup> The team finished eighth in the Big 12 in 2021-2022, seventh in 2020-2021, sixth in 2019-2020, and eighth in 2018-2019.<sup>45</sup> The school's football team has likewise struggled, finishing no better than eighth in the

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39. Jelani Scott, *Texas Tech WBB Signs NIL Deal for \$25K Per Player*, SPORTS ILLUSTRATED (July 29, 2022), <https://www.si.com/college/2022/07/29/texas-tech-women-basketball-signs-nil-deal-25k-per-player-level-13-marketing>.

40. *Matador Club Offering \$10K Annual Contracts to All Tech Softball Players*, LUBBOCK AVALANCHE-J. (Sept. 29, 2022, 2:06 PM CT), <https://www.lubbockonline.com/story/sports/college/red-raiders/2022/09/29/matador-club-offering-10k-contracts-to-all-texas-tech-softball-players/69526342007/>. The annual agreements require the softball athletes to make public appearances at Matador Club events and to participate in community service projects. *Id.*

41. Riker, *supra* note 38. Cody Campbell, a former Texas Tech football player and current member of the Matador Club Board of Directors, characterized the \$25,000 payments as "kind of a base salary for the guys." *Id.*

42. Vertuno, *supra* note 32 ("With few rules governing how it all works, the push to dangle cash in front of players already in uniform and lure future stars to campus has created a new, rapidly expanding frontier in college sports with so-called 'collectives' and even nonprofits popping up to play ball.").

43. Wilton Jackson, *BYU Football Strikes NIL Deal to Pay Tuition for Walk-On Players*, SPORTS ILLUSTRATED (Aug. 12, 2021), <https://www.si.com/college/2021/08/12/byu-football-nil-deal-walk-on-tuition-built-bar>. The deal provides compensation to all 123 football team members and includes full tuition for all walk-on players. *Id.*

44. *2021-22 Women's Basketball Standings*, BIG 12 CONFERENCE, <https://big12sports.com/standings.aspx?standings=173> (last visited July 31, 2023) (to access the three previous conference records, select the year from the dropdown menu).

45. *Id.*

Big 12 from 2018-2021 and posting an overall losing record during this four-year span.<sup>46</sup> The softball team had a losing conference record over 2018-2022.<sup>47</sup> No discernible factors suggest that each individual athletes' NIL market value is \$25,000 or even \$10,000 considering each team's limited on-field success. These payments are not performance based, making it hard to evaluate individual market value.

The NCAA understands that collectives pose the greatest opportunity for exploitation of the prohibition against pay-for-play. College coaches have already made clear their hopes that collectives will give their programs adequate funding to enable them to win the recruiting wars.<sup>48</sup> Various programs are already setting the monetary standard for team payments.<sup>49</sup> While Texas Tech student athletes brought in \$25,000 annually for playing football, University of Texas offensive lineman brought in \$50,000 per year.<sup>50</sup> The growing monetary discrepancies explains the NCAA's 2022 additional NIL guidance.

On October 26, 2022, the NCAA provided "Guidance Regarding Third Party Involvement" under its Interim NIL Policy.<sup>51</sup> The NCAA made clear that emerging trends in NIL cannot violate governing rules "prohibiting improper recruiting inducements and pay-for-play."<sup>52</sup> This new policy targets collectives and other entities whose overall mission "is to promote and support a specific NCAA institution by making available NIL opportunities to prospective student-athletes and [enrolled] student-athletes."<sup>53</sup> Collectives, which are enveloped under the "booster" definition,

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46. 2021 Football Standings, BIG 12 CONFERENCE, <https://big12sports.com/standings.aspx?standings=171> (last visited July 31, 2023) (to access the three previous conference records, select the year from the dropdown menu).

47. 2022 Softball Standings, BIG 12 CONFERENCE, <https://big12sports.com/standings.aspx?standings=177> (last visited July 31, 2023) (to access the previous conference records, select the year from the dropdown menu). There were no conference games during the 2020 pandemic. During 2021, the softball program went 3-15 in the Big 12; in 2019, the team went 8-10 in conference; and in 2018, the team went 5-13. *Id.*

48. *See, e.g.*, Dellenger, *supra* note 9 (referencing comments of Ohio State football coach Ryan Day).

49. *See id.*

50. Kit Ramgopal et al., 'There's No Rules. It's Crazy': New Money in NCAA Recruiting Leaves Elite Athletes Ripe for Exploitation, NBC NEWS (Nov. 27, 2022, 7:00 AM EST), <https://www.nbcnews.com/news/us-news/star-high-school-athletes-can-now-profit-nil-deals-rcna51075>.

51. NCAA Interim NIL Guidance, *supra* note 11, at 1.

52. *Id.*

53. *Id.*

cannot engage—directly or indirectly—in recruiting activities.<sup>54</sup> The NCAA reaffirmed “existing NCAA prohibitions related to pay-for-play have not changed.”<sup>55</sup>

The new guidance regarding third party involvement confirms that neither prospective student-athletes nor any of their family members can engage with entities deemed “boosters.”<sup>56</sup> The policy likewise prohibits collectives that qualify as boosters from communicating with prospective student-athletes or their families.<sup>57</sup> NIL agreements *cannot* be made conditioned on enrollment at a particular institution.<sup>58</sup> Most relevant to this Article, and to the current collective practices:

*NIL agreements **must** be based on an independent, case-by-case analysis of the value that each athlete brings to an NIL agreement as opposed to providing compensation or incentives for enrollment decisions (e.g., signing a letter of intent or transferring), athletic performance (e.g., points scored, minutes played, winning a contest), achievement (e.g., starting position, award winner) or membership on a team (e.g., being on roster).*<sup>59</sup>

This guidance applies to both prospective and enrolled student-athletes.<sup>60</sup> Since 2022, athletic departments are on notice that the governing Bylaws still limit the recruiting role of boosters.<sup>61</sup> Now that collectives have markedly changed the recruiting game, is there any way to stop these practices?. Does the NCAA plan on assessing, on a “case-by-case basis,” the value that a particular athlete brings to an NIL agreement? This is the market value quandary.

### *III. Determining Fair Market Value in a World of Collectives: The Problem of Determining NIL Valuations*

There is no uniform definition of what constitutes “fair market value” for student-athletes’ NIL.<sup>62</sup> No entity currently calculates what that might be,

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54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 2.

59. *Id.*

60. *Id.*

61. *Id.*

62. See Karen Weaver, *Determining an Athlete’s Fair Market Value Is the Next Hurdle for NIL Rights. These Two Companies Could Solve That*, FORBES (May 25, 2021, 8:30 AM

and finding a trusted entity to do so is incredibly challenging. The NCAA could rely on companies that provide a paid subscription service to set their NIL value. This would provide external evaluations. Past practices prove that the NCAA itself has never adequately considered the value of its athletes, individually. The schools cannot be trusted; they would either try to over-inflate or undervalue their athletes' opportunities to maximize recruiting benefits. The individual states cannot be entrusted to set market values without acknowledging the recruiting advantages and disadvantages each state could manipulate.<sup>63</sup> This leaves only Congress to establish national valuations that consider local nuances, including locales with no professional sports teams to fill an NIL void. In short, it may be impossible to fairly establish an NIL valuation system that fairly compensates the athletes in a manner that does not provide competitive advantages to certain markets or schools.

Despite the difficulty of assessing fair market value, one online NIL website is doing something close. On3.com attempts to quantify incoming and current college athletes' fair market value.<sup>64</sup> The highest ranked athlete in 2022 was University of Southern California freshman Bronny James, LeBron James' son. Bronny has yet to play any basketball at the collegiate level and is already calculated by On3 to have an NIL value worth \$6.3 million.<sup>65</sup> The next highest rated individual is Livvy Dunne, the Louisiana State University gymnast with an NIL value of \$3.3 million and a vast social media presence.<sup>66</sup> Coming in third is University of Texas freshman

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EDT), <https://www.forbes.com/sites/karenweaver/2021/05/25/determining-an-athletes-fair-market-value-is-the-next-hurdle-for-nil-these-two-companies-could-solve-that/?sh=68922e8a19e2>.

63. California's Fair Pay to Play Act was the first nationwide law to get the proverbial NIL ball rolling. The law was signed by California Governor Gavin Newsom on September 30, 2019. *Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act'*, NANCY SKINNER (Sept. 30, 2019), <https://sd09.senate.ca.gov/news/20190930-gov-newsom-signs-sb-206-%E2%80%98fair-pay-play-act%E2%80%99>. This law pushed forward the conversation and undoubtedly motivated other states to pass legislation protecting its citizens and student-athletes. See Rachel Denton, Note, *The Race is On: Should Indiana Join the Legislative Race as States, Congress, and the NCAA Compete to Pass Name, Image, and Likeness Laws?*, 55 IND. L. REV. 381, 381 (2022).

64. *On3 NIL 100*, ON3, <https://www.on3.com/nil/rankings/player/nil-100/> [<https://web.archive.org/web/20230727195522/https://www.on3.com/nil/rankings/player/nil-100/>] (last updated July 25, 2023, 12:00 AM).

65. *See id.*

66. *See id.*

quarterback Arch Manning, the nephew of Peyton and Eli Manning. Manning is estimated to have an NIL value worth \$2.8 million.<sup>67</sup>

With two of the three top NIL valued athletes able to garner multi-million-dollar opportunities without having played a second of college sports, there is no limit on the future NIL opportunities for college athletes. Bronny James and Arch Manning—both of whom are spectacular athletes but also have familial ties to fame—are perhaps outliers. But NIL is new, and states that allow entities to grant NIL deals to high school athletes will likely grow. Increasingly, states will want to provide their colleges with the best competitive value for recruiting.

Arch Manning has enrolled at the University of Texas.<sup>68</sup> It is unsurprising that the Texas collective announced, before his arrival, that it would be paying its offensive lineman \$50,000 per year.<sup>69</sup> For players who utilize all five years of eligibility (including a red-shirt year), that amounts to a quarter of a million dollars made from college athletics.<sup>70</sup> Following this announcement, Texas finished with one of the top five offensive line recruiting classes in the country.<sup>71</sup>

Post-Alston, post-NIL, athletes will start to follow the money. Boosters, and the collectives they support, know this. Unless the market is regulated, boosters and their collectives will seek to gain every recruiting advantage not prohibited by the NCAA or law.<sup>72</sup> You cannot blame them. This is the new normal.<sup>73</sup> But it seems unlikely that each of the Texas lineman are equally valued at \$50,000 per year regardless of playing time. The collective approach hampers individual market assessment, which may be by design.

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67. *See id.*

68. Meghan Overdeep, *It's Official: Arch Manning Signs Letter of Intent, Commits to Texas*, S. LIVING (Dec. 21, 2022), <https://www.southernliving.com/arch-manning-officially-commits-to-texas-6951582>.

69. Ramgopal et al., *supra* note 50.

70. Dellenger, *supra* note 9; *see also Nonprofit to Offer Texas Offensive Linemen \$50,000 Annually*, ASSOCIATED PRESS (Dec. 6, 2021, 3:37 PM CDT), <https://apnews.com/article/college-football-sports-football-texas-philanthropy-f8f75f9547ca971eca11b8f2fded56b> (noting that the “Horns with Heart” collective has agreed to pay up to \$800,000 annually or enough to support up to sixteen Texas players).

71. *Texas 2022 Offensive Line Commits*, HORNS247, <https://247sports.com/college/texas/Season/2022-Football/Commits/?PositionGroup=O-LINE> (last visited July 31, 2023).

72. Vertuno, *supra* note 32.

73. *Id.* Sports law expert Gabe Feldman observed: “There’s not much limit where these deals can go. And so I think it’s sort of a natural consequence that schools and boosters, athletes and agents and sponsors are going to find ways to exploit every opportunity they can, right?” *Id.*

So how will the NCAA or states evaluate an athlete's fair market value? On3 uses three variables in assessing an athlete's Brand Value and Roster Value to arrive at an overall NIL Valuation. The site considers: (1) performance (actual game performance, with playing big games, ranking nationally, and winning national awards as carrying more weight); (2) influence (social media and name brand); and (3) exposure (market size, school's collective, position played, and media exposure).<sup>74</sup> While On3's calculations may not ultimately provide the template for fair market value, these indicators certainly help differentiate one athlete's value from another. Using the Texas model where Arch Manning is already valued at \$2.8 million,<sup>75</sup> it then makes sense that his offensive linemen will receive at least at \$50,000 each. For those that stand out among the line, perhaps they will receive additional opportunities and benefits, so the \$50,000 effectively serves as a floor for their value.

The challenge for the NCAA comes from when an entire team is paid the exact same figure from an external collective. Texas Tech and BYU provide early examples.<sup>76</sup> Since these various team deals provide an across-the-board payment for all players, the only conditions appear to be (1) being on the team, and (2) being willing to make public appearances or perform community service.<sup>77</sup> Like most collectives, neither the Texas Tech Matador Club nor the Texas Horns with Heart collective are openly relying on any of On3's variables.<sup>78</sup> The players' performance, not to mention

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74. Shannon Terry, *About On3 NIL Valuation, Brand Value, Roster Value*, ON3 (July 29, 2022), <https://www.on3.com/nil/news/about-on3-nil-valuation-per-post-value/>. On3 only publishes the NIL Valuation figures. A given "athlete's personal Brand Value Index and Roster Value Index are available only to the athlete in the 'Athlete Verified' private dashboard on the On3 Athlete Network." *Id.*

75. *On3 NIL 100*, *supra* note 64.

76. *See* Riker, *supra* note 38 (referencing the Texas Tech football team deal); Jackson, *supra* note 43 (referencing the BYU football team deal).

77. *See* Riker, *supra* note 38 (referencing the Texas Tech football team deal); Jackson, *supra* note 43 (referencing the BYU football team deal).

78. *See* Wescott Eberts, *Horns with Heart to Pay Texas OL \$50,000 Annually for Charity Work*, BURNT ORANGE NATION (Dec. 6, 2021, 1:37 PM CST), <https://www.burntorangenation.com/2021/12/6/22820911/horns-with-heart-texas-longhorns-offensive-line-nil/>; *The Matador Club – Texas Tech Red Raiders Collective*, ON3, <https://www.on3.com/nil/collectives/the-matador-club-57/> (last visited July 31, 2023). The On3.com website quotes Marc McDougal, one of the Matador Club's organizing members, as explaining its approach: "This is money that will go to every player in the locker room. So, it's not one that will go to one player over another." *Id.* This approach seems to make a mockery of NIL. The athletes are not being compensated for *their* name, image, and likeness. They are being compensated for being a member of the Texas Tech athletic program.

playing time, will undoubtedly vary. Inevitably, there will be stand outs and those that rarely see the field or court. The level of “influence” is not a constant for every athlete since not all athletes have the same social media presence or number of social media followers.

Finally, while the market size may be identical for all team members, their exposure including position played is not the same. The Texas Tech and Texas collective payment approach is an open way to induce athletes perhaps otherwise not inclined to consider these Texas schools to take note of the base financial opportunities available before a single game begins.<sup>79</sup> Even those that never see the field will capitalize on the collective’s generosity.

Some coaches openly acknowledge the collectives’ role in recruiting. Importantly, the NCAA also accepts that collectives are going to be part of the NIL landscape and that universities are going to have to work with them.<sup>80</sup> As Lane Kiffin, the University of Mississippi’s head football coach, admits, NIL has “totally changed recruiting.”<sup>81</sup> Kiffin concedes:

“I joke all the time about it: Go ahead and build facilities and these great weight rooms and training rooms, but you ain’t gonna have any good players in them if you don’t have NIL money.”<sup>82</sup>

These monetary incentives, which were a big draw for those urging NIL rights so that players could get their share of the billion-dollar sports industry, are now unsurprisingly causing great concern. These base sum

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79. Nathan Giese, *‘I Bawled My Eyes Out’: Tech Softball’s Peyton Blythe, Coach Craig Snider React to Matador Club NIL Deals*, LUBBOCK AVALANCHE-J. (Sept. 30, 2022, 1:15 PM CT), <https://www.lubbockonline.com/story/sports/college/big-12/2022/09/30/i-bawled-my-eyes-out-tech-softball-reacts-to-matador-club-nil-deals/69528809007/>. Snider acknowledged the programmatic value of the Matador Club’s \$10,000 per player offering:

“We can’t really use it in recruiting, . . . but what we can say is, ‘Hey listen. This is what our athletes are getting right now.’ As much as it’s blown up over social media, I’d like to think recruits are taking a look at this right now and going, ‘Oh, wow. That’s a big deal.’ It’s a big deal for softball and I really hope that helps us moving forward.”

*Id.* (quoting Snider).

80. See NCAA, NCAA Division I Institutional Involvement in a Student-Athlete’s Name, Image and Likeness Activities 4 (Oct. 26, 2022), [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL\\_InstitutionalInvolvementNILActivities.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf). The NCAA’s October 2022 guidance now permits Institutional Support for NIL Entities and Collectives, including helping to raise NIL funds by appearing at collective events and requesting donor funds to be given to an NIL entity. *Id.*

81. Dellenger, *supra* note 9 (quoting Kiffin).

82. *Id.*

payments are untethered to performance or individualized assessment. Collectives often do not differ from pay-for-play. These massive lump sums to all athletes appear to be out of line with the NCAA's fair market value requirement or its booster recruiting rules. Simply put, team payments should not be NCAA compliant. But surely no one ever intended they would be.

The NCAA knew this problem was coming. Thus, it always opposed NIL opportunities. The concern was altering the competitive landscape with monetary incentives, because those with the money will always win the recruiting wars. Before, as Kiffin notes, successful recruiting hinged on facilities. Athletes wanted to play at OU where the facilities rival pro teams, rather than at other schools with less impressive fieldhouses and training rooms. Now, the facilities will be important but perhaps secondary. Instead, the new question athletes will ask is: How much can I profit off my NIL during my college years as an athlete?<sup>83</sup> Those battles are increasingly taking shape at the high school level and in the transfer portal.

Spencer Rattler is an example of NIL success following the transfer portal. When his playing days at the University of Oklahoma appeared to be done, he was able to transfer to South Carolina and take advantage of a new NIL market.<sup>84</sup> Once again, Rattler was provided a car, one of the key concerns years ago when the NCAA prohibited booster payments.<sup>85</sup> In addition, the SAXX underwear company provided the entire South Carolina Gamecocks team an NIL contract to represent their products.<sup>86</sup> The reason behind this sponsorship is risqué and shows that value may be, at times, situational.<sup>87</sup> When players learn of these team-wide opportunities, it

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83. See Evan Crowell, *Spencer Rattler Inks NIL Deal with Mercedes-Benz Dealership*, SPORTS ILLUSTRATED (Dec. 21, 2022, 8:28 AM EST), <https://www.si.com/college/southcarolina/football/south-carolinas-spencer-rattler-inks-nil-deal-with-mercedes-benz-dealership>. As this article bluntly admits, “Money talks. That is the prevailing storyline in college athletics over the past year. It talks to coaches, players, recruits, and boosters.” *Id.*

84. See Chris Low, *Spencer Rattler Gets Fresh Start with Gamecocks at South Carolina*, ESPN (Apr. 15, 2022), [https://www.espn.com/college-football/story/\\_/id/33738194](https://www.espn.com/college-football/story/_/id/33738194).

85. *Id.*

86. Michael LoRé, *SAXX Underwear Signs South Carolina Football Team to NIL Deal*, FORBES (Oct. 6, 2022, 7:00 AM EDT), <https://www.forbes.com/sites/michaellore/2022/10/06/saxx-underwear-signs-south-carolina-football-team-to-nil-deal/?sh=2e7a8f9c79b3>. SAXX signed the entire Gamecocks football team to a six-figure NIL deal with hopes of raising testicular cancer awareness. *Id.* SAXX identified seven team lead ambassadors and will be providing the remainder of the team with \$1,000 in SAXX products. *Id.*

87. SAXX wanted to commodify a pun relying on South Carolina's participation in the SEC and the team's mascot (the Gamecocks) to “[SEC]ure their balls” in an edgy underwear



provides them with incentive to favor one team or market location over another in their ultimate collegiate decision. NIL rights, like all property interests in a regulated free market economy, will be evaluated by the athlete for maximum value. Rattler found his value, and it required him to transfer to cash in.<sup>88</sup>

In the current NIL scheme, small markets will need to come up with solutions to compete. For many, collectives help bridge the gap. Boosters and donors are doing everything in their power to legally entice athletes to suit up for their preferred team. But naturally large markets like California, Florida, and Texas will have entrenched advantages regardless of NIL valuations.<sup>89</sup> The NCAA transfer portal only exacerbates these inequities.<sup>90</sup> When a football player falls out of favor on one team, he can simply transfer to another program. Or, when a women's basketball player overperforms at a smaller school or in a smaller market, she can transfer to a more lucrative program to capitalize on her newfound value.<sup>91</sup>

The recent transfer of former OU quarterback Caleb Williams, who followed his former coach Lincoln Riley to the University of Southern California ("USC"), illustrates the potential rewards of the NCAA transfer

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campaign. Mike Gillespie, *SAXX Underwear Signs Six-Figure NIL Deal with Gamecocks*, ABC COLUMBIA (Oct. 6, 2022, (9:44 AM EDT)), <https://www.abccolumbia.com/2022/10/06/saxx-underwear-signs-six-figure-nil-deal-with-gamecocks/>.

88. NIL now allows college athletes to defer entering the NFL draft and still "cash[] in." Crowell, *supra* note 83. In Rattler's case, he once again secured an NIL deal with a local South Carolina car dealership. *Id.* As the article notes, those college players that don't get a favorable pro draft evaluation "can return to school and actually make more money off NIL than if they went professional." *Id.*

89. It is worth noting that neither Florida nor Texas have state income taxes. John Waggoner, *9 States with No Income Tax*, AARP (Mar. 3, 2023), <https://www.aarp.org/money/taxes/info-2020/states-without-an-income-tax.html>. And NIL income is taxable income. *Name, Image, and Likeness*, TAXPAYER ADVOCATE SERV. (Apr. 10, 2023), <https://www.taxpayeradvocate.irs.gov/get-help/general/nil/#:~:text=Any%20income%20from%20NIL%20activities,cash%2C%20is%20considered%20taxable%20income> ("Any income from NIL activities, including non-cash, is considered taxable income.").

90. *See, e.g.*, Alexa Philippou, *Cavinder Twins Take On Women's Basketball, Stereotypes and TikTok*, ESPN (Nov. 2, 2022), [https://www.espn.com/womens-college-basketball/story/\\_/id/34924829/miami-cavinder-twins-take-women-basketball-tiktok](https://www.espn.com/womens-college-basketball/story/_/id/34924829/miami-cavinder-twins-take-women-basketball-tiktok) (documenting the story of the Cavinder twins transfer to Miami and financial incentives linked to the transfer).

91. *See, e.g.*, Brian Hamilton, *Miami's Millionaire Cavinder Twins Are Avatars for a New Age of Athletes*, ATHLETIC (Nov. 10, 2022), <https://theathletic.com/3779314/2022/11/10/cavinder-twins-miami-nil/>.

portal.<sup>92</sup> Williams was quick to capitalize both on and off the field.<sup>93</sup> He performed well and won the Heisman trophy, though Heisman winners do not always cash in on professional football success.<sup>94</sup> Williams's time is now, and he plays in California's big money market. One would expect his current On3 NIL ranking (fourth at \$2.6 million)<sup>95</sup> to increase when he returns for his junior season at USC.

While athletes previously would have to sit out a year of competition if they left one school for another, college athletes can now transfer once without losing eligibility and may still immediately play.<sup>96</sup> The timing of NIL rights coincided with the opening of the transfer portal.<sup>97</sup> These changes, and their symbiotic relationship, assure chaos lies ahead. While collectives cannot actively participate in the recruiting process, college athletes know where the money and markets are.

This information is readily available and will make the Texas Tech \$25,000/\$10,000 athlete bonus a starting point for many athletes.<sup>98</sup> If a

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92. *Caleb Williams Lands Major NIL Deal, Following USC Commitment*, SPORTS ILLUSTRATED (Feb. 4, 2022, (9:40 PM EST), <https://www.si.com/college/usc/football/caleb-williams-nil-deal>; see also Pete Thamel, *Caleb Williams to USC: What the Decision Means for College Football*, ESPN (Feb. 1, 2022), [https://www.espn.com/college-football/insider/story/\\_/id/33193246/caleb-williams-usc-decision-means-college-football](https://www.espn.com/college-football/insider/story/_/id/33193246/caleb-williams-usc-decision-means-college-football).

93. See, e.g., Claudette Montana Pattison, *Caleb Williams Lands Third Massive NIL Deal*, SPORTS ILLUSTRATED (Feb. 11, 2022, 11:10 AM EST), <https://www.si.com/college/usc/football/caleb-williams-third-nil-deal>; Claudette Montana Pattison, *USC QB Caleb Williams Lands Jaw Dropping NIL Deal*, SPORTS ILLUSTRATED (Feb. 17, 2022, 6:25 PM EST), <https://www.si.com/college/usc/football/caleb-williams-real-estate>.

94. See *Recent Heisman Winners Who Were NFL Disappointments*, NFL, <https://www.nfl.com/photos/recent-heisman-winners-who-were-nfl-disappointments-0ap2000000296988> (last visited Aug. 1, 2023). The NFL reports that there are more Heisman winners that never played an NFL game (fourteen) or went undrafted (fifteen) than players who are in the Hall of Fame (nine). *Id.*; see also Ryan McCrystal, *Why Heisman Contention Does Not Guarantee NFL Success*, BLEACHER REP. (Oct. 15, 2012), <https://bleacherreport.com/articles/1372418-why-heisman-contention-does-not-guarantee-nfl-success>; *Heisman Trophy Winners: No Guaranteed Success to Canton*, PRO FOOTBALL HALL OF FAME, <https://www.profootballhof.com/news/2017/12/heisman-trophy-winners-no-guaranteed-success-to-canton/> (last visited Aug. 1, 2023).

95. *On3 NIL 100*, *supra* note 64.

96. See *NCAA Division I One-Time Transfer FAQs*, NCAA 1-2, [http://fs.ncaa.org/Docs/eligibility\\_center/Transfer/OneTime\\_Transfer.pdf](http://fs.ncaa.org/Docs/eligibility_center/Transfer/OneTime_Transfer.pdf) [<https://perma.cc/L56N-B5L7>] (last updated Sept. 2022).

97. See Meghan Durham, *Division I Board Adopts Changes to Transfer Rules*, NCAA (Aug. 31, 2022, 4:45 PM), <https://www.ncaa.org/news/2022/8/31/media-center-division-i-board-adopts-changes-to-transfer-rules.aspx>.

98. See sources cited *supra* notes 37-41 and accompanying text.

Texas Tech offer is on the table, that athlete knows whether other schools can meet the potential minimum amount of NIL money at stake. This knowledge might also explain how the Texas collective has decided to provide its offensive lineman \$50,000.<sup>99</sup> These numbers are huge and they will only grow.

The question remains how to calculate a student-athlete's fair market value? Like resale housing, name recognition matters. A house in which a famous person lived has enhanced value. Being from a family with high athletic prowess enhances your value. Bronny James is the highest rated athlete on On3.com's list at \$6.3 million.<sup>100</sup> And James hasn't played a minute in the NCAA. This is the endorsement income of an incoming college freshman! Still, this \$6.3 million pales in comparison to the endorsement income (exceeding \$90 million) his father commands.<sup>101</sup>

Perhaps the fair market value question will fade away. The NCAA wants to prohibit pay-for-play, meaning sponsors cannot take away the car they provided an athlete if he gets injured and cannot tie their "sponsorships" to athletic statistics.<sup>102</sup> Despite this intent, there is no obvious way to limit the number of individual endorsements a college athlete can receive. An individual's brand is made up of numerous variables like athletic ability, likability, relatability, and personality and not merely their success. This concept is true in both business and athletics.

Take Baker Mayfield for example. Mayfield's Progressive Insurance television commercials played regularly while he was in Cleveland.<sup>103</sup> In fact, while in Cleveland' Mayfield's endorsement value outstripped his

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99. Eberts, *supra* note 78.

100. *On3 NIL 100*, *supra* note 64. In addition, James has 7.6 million Instagram followers and 5.8 million TikTok followers. *Id.*

101. Scott Davis, *LeBron James Led All Athletes By Making \$127 Million in Salary and Endorsements: Report*, BUS. INSIDER (May 12, 2022, 1:24 PM IST), <https://www.businessinsider.in/sports/news/lebron-james-led-all-athletes-by-making-127-million-in-salary-and-endorsements-report/articleshow/91501778.cms>; see also Andrew Marquardt, *How Did LeBron James Become a Billionaire? It Wasn't Just Basketball*, FORTUNE (June 3, 2022, 12:50 PM CDT), <https://fortune.com/2022/06/03/lebron-james-billionaire-nba-endorsements/>.

102. See Hosick, *supra* note 5.

103. Ben Axelrod, *Baker and Emily Mayfield Announce New Partnership with Progressive*, WKYC (Aug. 28, 2019, 6:16 PM EDT), <https://www.wkyc.com/article/sports/nfl/browns/baker-and-emily-mayfield-announce-new-partnership-with-progressive/95-402300df-04a6-44fb-80e1-dd4e009f39cd>. This article notes that Mayfield has "been every bit a pitchman [for endorsements] as he has been a quarterback since the Cleveland Browns selected him with the No. 1 pick of the 2018 draft." *Id.*

team salary.<sup>104</sup> Mayfield is an example of an athlete's off-field persona providing higher monetary value than his on-field performance.<sup>105</sup> Mayfield is not alone; his market value might be diminished if the emphasis was limited to on-field performance. When it comes to endorsements, however, that correlation has never been the standard. "Mean" Joe Green's 1979 Coca-Cola commercial is one of the most famous television commercials ever, and he played defensive tackle, not quarterback.<sup>106</sup>

Another variable to consider is the athlete herself. Gymnasts might not seem like a big draw in every community. But in places like Norman, Oklahoma and Baton Rouge, Louisiana, gymnasts are some of the most celebrated athletes.<sup>107</sup> Livvy Dunne, a gymnast with more than 7.5 million TikTok followers, is the second ranked athlete under On3's system and has an NIL valuation of \$3.3 million.<sup>108</sup> Another gymnast, Sunisa "Suni" Lee the All-Around Olympic Champion and former Auburn Tiger, has an Instagram following of 1.6 million and raked in several valuable NIL deals while at Auburn.<sup>109</sup> LSU Women's basketball star Angel Reese, the star player on the 2023 NCAA women's basketball championship team, comes in at fifth on the NIL 100, with an NIL value of \$1.6 million.<sup>110</sup> While observers worry that female athletes are at a natural disadvantage, this is largely due to the popularity of college football. While college football takes up almost half of NIL deals, women's sports take up six out of the ten

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104. See Suyash Deep Sinha, *Baker Mayfield's Net Worth: How Much Has the Former No. 1 Draft Pick Earned While Playing in the NFL*, SPORTS RUSH (Sept. 25, 2022), <https://thesportsrush.com/nfl-news-baker-mayfield-net-worth-how-much-has-the-former-no-1-draft-pick-earned-while-playing-in-the-nfl/>.

105. In 2019, Baker Mayfield was the NFL's fourth highest "marketable" player. John Aceti, *Tom Brady Edges Patrick Mahomes As NFL's Most Marketable Player*, SPORTS BUS. J. (Aug. 28, 2019), <https://www.sportsbusinessjournal.com/Daily/Issues/2019/08/28/Marketing-and-Sponsorship/Most-Marketable.aspx>.

106. Rodney Ho, *'Mean' Joe Greene Revisits Classic Super Bowl Coca-Cola Ad from 1979*, ATLANTA J.-CONST. (Feb. 1, 2019), <https://www.ajc.com/blog/radiotv/mean-joe-greene-revisits-classic-super-bowl-coca-cola-from-1979/fE2jftxcdMEPRZ8TUru3Wl/>.

107. See, e.g., Rebecca Schuman, *College Gymnastics Is Blowing Up*, SLATE (Jan. 26, 2022, 5:50 AM), <https://slate.com/culture/2022/01/ncaa-gymnastics-popular-olympians-nil-suni-lee-ucla.html>.

108. *On3 NIL 100*, *supra* note 64. Dunne may have the most TikTok followers of any athlete at 7.5 million followers. *Id.* Dunne's "brand" is quite impressive.

109. See Sunisa Lee (@sunisalee), INSTAGRAM, <https://www.instagram.com/sunisalee/> (last visited Aug. 1, 2023). (documenting Lee's popular following and recent images of NIL brand deals).

110. *On3 NIL 100*, *supra* note 64.

most profitable NIL earnings.<sup>111</sup> Both Dunne and Reese represent two of the top five athletes in NIL valuations.<sup>112</sup> Athletes may begin to use these valuations to increase their potential income. Other athletes, both male and female, may also point to these metrics as a starting point for their NIL value.

For now, this author opposes placing any limits on an athlete's fair market value. There should be no limits to the amount of NIL income a student-athlete can generate regardless of school, sport, or athletic success. The student-athlete's brand may extend far beyond their athletic talent.<sup>113</sup> And they should be free to profit from *their* name, *their* likeness, and *their* image, however those items are valued.

#### *IV. A Third Way: Calling on Congress — Time for a National Calibration*

##### *A. No Entity Is Equipped to Set Fair Market Value for NIL Deals*

There is no one source that currently, or necessarily accurately, calculates an individual's NIL value.<sup>114</sup> Each athlete may present opportunities that are unique to the athlete's sport or personality. Two outstanding examples are the Cavinder twins, whose online presence

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111. Kaitlin Balasaygun, *In the College Sports Pay Era, Female Athletes Are Emerging as Big Economic Winners*, CNBC (Nov. 4, 2022, 3:22 PM EDT), <https://www.cnbc.com/2022/10/15/that-nike-bronny-james-nil-deal-was-a-big-deal-for-women-too.html>.

112. Dunne is ranked second, while Reese is ranked fifth as of August 2023. *On3 NIL 100*, *supra* note 64. They are the two highest ranked female athletes. *Id.* The next highest rated female athlete is Reese's teammate, LSU Women's Basketball star Flau'jae Johnson, who is ranked twenty-second in the national NIL valuations by On3. *Id.*

113. A good example of maximizing personal brand value is twins Haley & Hanna Cavinder, who transferred to the University of Miami to play basketball in 2022 before retiring after the 2022-23 season. Chris Phelan, *Viral College Basketball Stars Announce Retirement, Look Toward WWE Careers*, USA NETWORK (Apr. 14, 2023, 2:42 PM ET), <https://www.usanetwork.com/usa-insider/college-basketball-stars-haley-hanna-cavinder-ww-e-announcement>. The twins together took home around \$2 million in NIL deals during 2022. Brett Knight, *Cavinder Twins, Stars On TikTok And Basketball Court, Are Nearing \$2 Million in NIL Deals, with More Ahead*, FORBES (July 1, 2022, 6:30 AM EDT), <https://www.forbes.com/sites/brettknight/2022/07/01/haley-hanna-cavinder-twins-ncaa-nil/?sh=50c9ed2b5a41>. During college, neither appeared as a top 25 player according to ESPN. See *Women's College Basketball 2022-23: Ranking the Top 25 Players in the Country*, ESPN (Nov. 1, 2022), [https://www.espn.com/womens-college-basketball/story/\\_/id/34921136/women-college-basketball-top-25-players-country-2022-23](https://www.espn.com/womens-college-basketball/story/_/id/34921136/women-college-basketball-top-25-players-country-2022-23).

114. On3's NIL 100 is the most popular tool published today. *On3 NIL 100*, *supra* note 64. The company also has tools to help athletes evaluate their NIL valuation. But this is only one company and one approach. Currently, there is no standardized method for computing how one's NIL is truly valued.

arguably outshined their on-court presence.<sup>115</sup> The pair earned around \$2 million in NIL deals since the NCAA allowed athletes to profit off their NIL.<sup>116</sup> Their remarkable success proves that NIL valuations and marketability transcend mere athletic statistics.<sup>117</sup> The twins are successful student-athletes, influencers, and businesswomen. Yet under certain formulas which solely isolate on-court performance, the Cavinders' brand could be grossly undervalued. Their financial success proves why NIL valuations should be eschewed.<sup>118</sup>

The NCAA and states should avoid relying on any one metric to determine an athlete's fair market value. Instead, the assessment should simply be whether a payment or incentive is a pay-for-play promise. Each athlete should be permitted to maximize their value in whatever market is willing to compensate them for their NIL. If an athlete is being paid for their appearance, that falls squarely within their "image" rights and justifies whatever compensation may be provided. It is not unheard of for athletes to become models.<sup>119</sup> Similarly, if an athlete is being paid for their "persona" or "image", recall Baker Mayfield's high endorsement value,<sup>120</sup> whatever price they can command is their fair market value. For any assertion that an individual is being overpaid, there must be a high standard of proof (similar to clear and convincing evidence) and the burden of persuasion must fall on the NCAA, state, or other actor suggesting the market variance.

The NCAA NIL market is just beginning. There will be significant variations among athletes for the next several years. Businesses and boosters are getting in early on the ground level. They may be paying higher amounts now than may be commanded later, or these initial payments may open broader opportunities for future athletes. There is no way of knowing the future in the present. But these extreme market

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115. See *supra* note 116 and accompanying text.

116. Knight, *supra* note 113; Philippou, *supra* note 90.

117. Philippou, *supra* note 90.

118. *Id.* Haley Cavinder's own words explain the importance of allowing a free market approach for NIL:

We love basketball, but do I think I'm known for playing basketball like all these other well-known superstars female basketball players? No. But does that mean I don't love basketball as much? No. I love basketball. What works for me is what works for me. Doesn't have to work for you.

*Id.*

119. See Jeff Miles et al., *Female NCAA Athletes Are Earning Big Paychecks with Lucrative Modeling Gigs*, 98.7THE SPOT (July 21, 2022, 8:14 AM), <https://www.audacy.com/987thespot/latest/female-ncaa-athletes-earning-big-pay-with-modeling-gigs>.

120. See *supra* note 105 and accompanying text.

fluctuations at the beginning of the NIL market should not set the governing standards. Market participants will need time to grow, settle in, and get an idea of what the shape the enduring market takes. Now is not the time to intervene. The issues rising to the surface now were entirely predictable with the watershed NCAA change and should have been addressed before NIL rights began. Legal inertia should not be used against the athletes that are now capitalizing on their NIL. The market value of each athlete is what the market is currently paying each athlete.

Further, any attempt to limit athletes' NIL opportunities should be strictly construed. For example, Texas' NIL law prohibits endorsements by sports gambling entities, sexually-oriented businesses, or alcohol and tobacco companies.<sup>121</sup> These laws should be narrowly construed to allow student-athletes to reap the benefits of years of training to profit from their individual "brand." Athletes should not have to tow the university line when seeking their own endorsements, though certain non-compete clauses may be reasonable if strictly construed.<sup>122</sup> If coaches' contracts contain certain endorsement limitations, those same limitations might be acceptable for student-athletes. But student-athletes should not be subjected to higher standards or more limitations on available endorsement opportunities than other university personnel.

States and the NCAA should simply eliminate the fair market value limitation on NIL rights.<sup>123</sup> There is no clear, consistent method to ensure that athletes' NIL deals are for fair market value. Biases about sports and schools will undoubtedly come into play. Athletes from the Power 5 Conferences will be seen as more valuable in most circumstances. Male athletes in football and men's basketball will be seen as intrinsically more valuable. These biases will be difficult, if not impossible, to disentangle from what any entity considers fair market value. Perhaps the better

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121. S.B. 1385, 87th Leg. (Tex. 2021), <https://legiscan.com/TX/text/SB1385/id/2407682> (prohibiting NIL deals relating to "alcohol, tobacco products, e-cigarettes or any other type of nicotine delivery device, anabolic steroids, sports betting, casino gambling, a firearm the student athlete cannot legally purchase, or a sexually oriented business"); *see also State of Texas NIL Laws: What College Athletes and Sponsors Need to Know*, ICONSOURCE, <https://iconsource.com/texas-nil-laws/> (last visited Aug. 1, 2023).

122. *See Non-Compete Agreements and NIL Deals: What Student-Athletes Need to Know*, NILPA, <https://www.nilpa.com/non-compete-agreements> (last visited Aug. 1, 2023) ("For example, if you sign a NIL deal with a certain company, but your school has a non-compete agreement with a competitor of that company, you could be in violation of that agreement.").

123. California's Fair Pay to Play Act, the first state NIL law, did not contain any "fair market value" requirement.

approach is to simply let the market set the values. If a person receives a certain price, one perhaps unimaginable to an outsider, then the market value's ceiling simply goes up. Outliers, however, should never give cause for general rules.

Whatever legislation is proposed and whatever entity is selected to oversee NIL valuations, this Article recommends two approaches to regulate fair market value. First, the cleanest option is to abandon the façade that NIL rights are somehow individually based. The NCAA should eliminate any fair market value limitation for NIL.<sup>124</sup> An athlete's monetary value is inherently variable, depending on what team in each market, each region, or each conference can support. The Texas Tech and University of Texas differentials in teamwide payments are, perhaps, regionally defensible. One would expect NIL value to be high in locations where the team is valued or alumni are most supportive. It is not surprising that a state like Oklahoma, with no professional football team, places high value on college football and supports its teams.<sup>125</sup> The same is true for Alabama, Arkansas, Mississippi, Nebraska, and South Carolina, each of which do not have a professional football team but landed at least one school on the top 25 most valuable football programs list.<sup>126</sup> Similarly, states with no professional basketball team, like Connecticut, Kentucky, and Kansas may place a higher premium on college basketball.<sup>127</sup> The market, not regulators, should set NIL valuation limits.

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124. *NCAA Adopts New Constitution and Pursues NIL Violations*, DAVIS & GILBERT (Feb. 7, 2022), <https://www.dglaw.com/ncaa-adopts-new-constitution-and-pursues-nil-violations/> (noting that the NCAA's fair market value requirement is difficult to square with team-based deals).

125. See Brad Crawford, *Ranking College Football's Most Valuable Programs*, 247SPORTS (Dec. 12, 2021, 7:39 PM), <https://247sports.com/longformarticle/ranking-college-footballs-most-valuable-programs-alabama-michigan-texas-georgia-ohio-state-oklahoma-178007658/#1794459> (ranking OU as the sixth most valuable NCAA football program).

126. See *id.*

127. Christina Settimi, *College Basketball's Most Valuable Teams: March Madness May Be Canceled, but the Top Programs Are Thriving*, FORBES (Mar. 19, 2020, 7:40 AM EDT), <https://www.forbes.com/sites/christinasettimi/2020/03/19/college-basketball-most-valuable-teams-ncaa-march-madness/?sh=276a64fa285d> (noting two schools from Kentucky and the University of Kansas as top 5 most valuable NCAA basketball teams); Jeff Borzello, *UConn Completes Dominant Run, Wins 5th National Championship*, ESPN (Apr. 3, 2023, 11:41 PM ET), [https://www.espn.com/mens-college-basketball/story/\\_/id/36061720/uconn-completes-dominant-run-wins-fifth-national-title](https://www.espn.com/mens-college-basketball/story/_/id/36061720/uconn-completes-dominant-run-wins-fifth-national-title) (documenting recent success of UCONN's men's basketball program).



Creating a system that fairly values each athlete seems like a fool's errand. No person or entity is equipped to decide what a student-athlete is worth to a team or its school. For example, Alabama football players may not always receive a premium for their NIL. Duke and Connecticut basketball players may not always set the standard for other program's NIL limits. There simply is no current benchmark. Even when a student-athlete's athletic prowess is less than stellar, their personality or influence might merit a seemingly irrational NIL price.

Were the NCAA to enforce its fair market value limitation on a given NIL agreement, the NCAA should bear the burden of proof that the challenged NIL exceeds the athlete's "fair market value." This burden should include a heightened evidentiary standard akin to clear and convincing evidence. In this way, the NCAA must establish the range of permissible NIL payments for each of its athletes. At present, the NCAA has permitted team payments that seem to suspend any assessment of fair market value. This approach is one that should continue.

*B. Any Official Solution Must Be Provided Nationally by Congress*

If there are to be any regulations on student-athletes' NIL opportunities, the regulations should be uniformly imposed. Congress is the entity best suited to occupy the NIL space.<sup>128</sup> This remains true whether the topic is fair market value or NIL prohibitions. Any NIL regulations need to be uniform, consistently applied, and resolved at the national level.<sup>129</sup> The mosaic approach by the states is not sustainable.<sup>130</sup> The current playing field already leads to inconsistencies that can be leveraged to gain competitive advantages.<sup>131</sup> At some point, NIL rights will need to be regulated at the national level.

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128. See Whitaker, *supra* note 14 ("It is my opinion that the current state-by-state approach to governance is best replaced by congressional action that affirms the current relationship between student-athletes and institutions, provides protection and value to student-athletes, and holds institutions and third parties accountable for complying with a set of standardized NIL rules and policies.") (statement of Pat Chun, Washington State University Athletic Director).

129. *Id.*

130. See *id.* ("[T]he current patchwork of laws illustrated by 31 states legalizing 31 separate NIL sets of rules[] makes it nearly impossible for competitive equity to exist across sports.") (statement of Jeff Docking, Adrian University President).

131. *Id.* ("Any conference that crosses state lines has concerns over trying to maintain a level playing field for their members. It is so inequitable to have student-athletes in the same conference have differing opportunities simply based on the location of their institution.") (statement of Kari Luchowski, North Coast Athletic Conference Director).

It may feel like Congress has on some level already ceded its power to the states to regulate the NIL issue, and in the most literal sense, it has.<sup>132</sup> Congress had ample time to enter the NIL dialogue to provide guidance or guidelines. It did not.<sup>133</sup> Rather, Congress stood on the sidelines at the very time that the schools and athletes needed a proverbial “twelfth man.”<sup>134</sup> Simply put, Congress failed to act. Now the NIL landscape is a largely, inconsistently regulated universe. As one author notes, the market is “12 exits past the Wild, Wild West.”<sup>135</sup> This quote accurately captures the current NIL landscape. Rather than take a national concern and provide a national solution, Congress let—and continues to let—the states create NIL regulations that ensure variances. Congress, despite pleas from the NCAA,<sup>136</sup> opted for an unregulated market with irregular legislation and inconsistent solutions.

Even recognizing the slow nature of Congress, it alone has the power to provide a national system for protecting NIL rights. Only Congress can establish a uniform approach toward pay-for-play and the growing influences of collectives.<sup>137</sup> There is nothing unpredictable about boosters filling the NIL money void. Despite the NCAA’s prohibition on boosters paying players directly, it is unsurprising that—under the auspices of “collectives”—boosters are the ones flooding the market now that money is destined to flow directly to the players. It is the very system that cost SMU its nationally ranked football program.<sup>138</sup> Now, at \$36,000 per player,<sup>139</sup> SMU’s collective may be able to rebuild the school to its former prowess.

Congress should take up the various NIL proposals, study and debate them, and reach a national solution. College sports are a multi billion-dollar

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132. Andrew H. King, *How US Federal and State Legislatures Have Addressed NIL*, NAT’L L. REV. (July 13, 2022), <https://www.natlawreview.com/article/how-us-federal-and-state-legislatures-have-addressed-nil> (documenting state NIL laws and the lack of centralized legislation from Congress).

133. *Id.* (“Since 2019, eight federal laws have been introduced, but none has garnered enough support sufficient for passage.”).

134. *See 12th Man*, AGGIE TRADITIONS <https://www.tamu.edu/traditions/gameday/12th-man/index.html> (last visited Aug 1, 2023).

135. Dodd, *supra* note 12.

136. King, *supra* note 132.

137. Congress is currently considering a bipartisan NIL bill. *See* Dan Murphy, *Senators Offer Latest Bill Aimed at College Sports, NIL Reform*, ESPN (July 20, 2023, 7:00 AM ET), [https://www.espn.com/college-sports/story/\\_/id/38039799/senators-offer-latest-bill-aimed-college-sports-nil-reform](https://www.espn.com/college-sports/story/_/id/38039799/senators-offer-latest-bill-aimed-college-sports-nil-reform).

138. *See* Vannini, *supra* note 2.

139. *Id.*

industry.<sup>140</sup> To allow that money to flow into the game completely unregulated risks the corruption of sports. It is why direct payments are prohibited. Running those same payments, sometimes larger payments, through “collectives” does not alter the corrupting risk of money. College sports has entered a new era. Student-athletes have fought for NIL rights and they deserve the fullest opportunity to maximize those rights.

Both the athletes and the NCAA need to know the path forward. What limits, if any, will apply? What guardrails will be put in place to protect athletes from exploitation? What entity or entities are in charge and providing oversight? The future of college sports, its integrity, its competitive balance is at stake. This requires a national solution. Congress needs to step up. Congress needs to act.

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140. Andrew Zimbalist, *Analysis: Who Is Winning in the High-Revenue World of College Sports?*, PBS NEWSHOUR (Mar. 18, 2023, 7:14 PM EDT), <https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports#:~:text=The%20Facts%3A,among%201%2C100%20colleges%20and%20universities> (“Division I athletics generated \$15.8 billion in revenues in 2019, according to the National Collegiate Athletic Association (NCAA), which regulates student athletics among 1,100 colleges and universities.”).