FROM THE "WILD WEST" TO FAIR PLAY: HOW CONFERENCES CAN BRING STABILITY AND EQUAL OPPORTUNITY TO NIL IN COLLEGIATE ATHLETICS

*Sofia M. Giamartino**

The past twenty years have witnessed a steady dismantling of the National Collegiate Athletic Association's (NCAA) restrictions on college athletes' labor rights. As athletes celebrated small victories, both in the courtroom and in state legislatures, the NCAA continued its attempts to restrict benefits granted to its athletes in the name of "amateurism." Certain restrictions ended on June 30, 2021, with the NCAA continuing to prohibit direct pay and pay from collectives. With its hand forced, the NCAA abandoned its Name, Image, and Likeness (NIL) restrictions, opening the door to long unavailable opportunities for college athletes.

These opportunities particularly benefited underrepresented athletes. In fact, some of the highest grossing college athletes are female athletes who have built a brand and following on social media. Over the last few years, the 2024 women's NCAA March Madness, the 2023 women's NCAA Volleyball Championship, and the 2026 women's softball College World Series have drawn the largest total viewership—when combining television and attendance—since these competitions began, sometimes surpassing their male counterparts.

The NIL era of college sports has marked a time of athlete empowerment through the strongest free market proponent: antitrust law. But it also has brought far more questions than answers. With sparse case law on whether certain licensing activities are unreasonable restraints of trade, college athletes must navigate unsettled law and unsettled regulations.

This Note argues that it is up to the conferences, rather than the NCAA, to articulate clear rules regarding the bounds of athlete NIL licensing and to work with athletes to maximize their value. NIL has presented college sports with the opportunity to become not just about the athlete but for the athlete, to work in tandem and for the benefit of the very individuals who are the backbone of the billion-dollar industry of college sports. College sports are

* J.D. Candidate, 2027, Fordham University School of Law; B.S., 2024, Northeastern University. I would like to thank Professor Marc Edelman for his invaluable guidance and knowledge throughout the process. Thank you to Jackson Howell and the entire *Fordham Law Review* staff for their feedback and mentorship. Finally, a special thank you to my friends and family for their endless support and encouragement.

on the precipice of a monumental shift in how the industry treats its athletes; this Note simply offers one legal approach to accomplish this task.

INTRODUCTION 771
I. ANTITRUST LAW AND THE NCAA'S COMPENSATION REGIME 774
A. A Brief Overview of § 1 774
1. Establishing a § 1 Violation 775
2. The Governing Standard for § 1 Challenges: The Rule of Reason 776
B. The Historical Development of the NCAA's Compensation Restrictions 777
1. The Creation of the NCAA and Early Efforts to Police Amateurism 777
2. NCAA Compensation Restrictions and Bylaws 778
3. The Beginning of the End: *Board of Regents* and the Recognition of NCAA Activity as Concerted Action 779
4. The Post–*Board of Regents* Erosion of the NCAA's Amateurism Model 781
II. WHAT IS THE LAW: THE BOUNDS OF GROUP LICENSING IN SPORTS 784
A. American Needle *and When Coordination Becomes a Conspiracy* 785
1. The Case That Could Have Decided It All 785
2. What Counts as Cooperation and Why Does the Rule of Reason Apply? 787
B. MLB Properties v. Salvino *and Why Internal Profit Sharing Is Not Price-Fixing* 788
1. The Case That Blessed Internal Profit Sharing 788
2. Market Power, Profit Sharing, and Direct Licensing: Is It Enough? 791
C. Broadcast Music *and the Necessity Argument in Licensing Markets* 792
1. The Case That Transformed Price Fixing into a Necessity Defense 793
2. Economic Efficiencies of Collective Licensing 795
3. What Qualifies as Necessary? 797
III. A PRO–COLLEGE ATHLETE PATH FORWARD 799
A. The Proposed Structure: Conference-Level Joint Licensing Agencies 800

1. Necessary Guardrails for a Conference-Level Licensing Arm 800
2. A Hybrid Governance Model 801
B. Why Conference-Level Licensing Agencies Pass Muster Under § 1 803
C. Why Collective Licensing Better Serves Collegiate Athletics than Individualized Alternatives 805
CONCLUSION 808

INTRODUCTION

"We should move past the question of 'should we allow student-athletes to be paid for their non-game related [Name, Image, and Likeness (NIL)]' to 'how should we allow student-athletes to be paid for their non-game related NILs.'"[1] In the past decade, courts and state legislatures have dismantled longstanding restraints on college athlete compensation.[2] In July 2021, the National Collegiate Athletic Association (NCAA) waded into uncharted territory[3] when it announced its Interim NIL Policy.[4] The policy, however, offered little guidance regarding the permissible bounds of NIL activity, leaving conferences and universities to navigate a rapidly evolving and largely unregulated market.[5]

The first year of the NIL era saw some college athletes immediately reap the benefits of this newfound power to profit from their NIL.[6] Importantly, excluding football players, "52.8% of all remaining endorsements [were]

1. GABE FELDMAN, THE NCAA AND "NON-GAME RELATED" STUDENT-ATHLETE NAME, IMAGE, AND LIKENESS RESTRICTIONS 1–2 (2016), https://www.knightcommission.org/wp-content/uploads/2008/10/feldman_nil_white_paper_may_2016.pdf [https://perma.cc/LZ7Y-8DNE].

2. *See* NCAA v. Alston, 141 S. Ct. 2141, 2164–66 (2021) (affirming a district court's injunction on education-related compensation benefits for "student-athletes"); *see also* CAL. EDUC. CODE § 67456 (2019) (lifting NIL restrictions for California colleges and universities); John T. Holden, Marc Edelman & Michael McCann, *A Short Treatise on College-Athlete Name, Image, and Likeness Rights: How America Regulates College Sports' New Economic Frontier*, 57 GA. L. REV. 1, 34–35 (2022) (describing the various provisions included in state NIL laws prior to the issuance of the NCAA Interim NIL Policy).

3. *See* Stewart Mandel, *NIL Turned 5 Years Old This Week. Where on Earth Do We Go from Here?*, N.Y. TIMES (July 2, 2026), https://www.nytimes.com/athletic/7414814/2026/07/02/nil-fifth-anniversary-college-sports-athletes/ (on file with the *Fordham Law Review*).

4. NCAA, INTERIM NIL POLICY (2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf [https://perma.cc/6MHU-EAUL].

5. Holden, Edelman & McCann, *supra* note 2, at 32, 35–37; *see also Beyond the NCAA: The Rise of Conference-Led NIL Regulations*, WEARENIL (Mar. 17, 2025), https://www.wearenil.com/resources/beyond-ncaa-conference-led-nil-regulations/ [https://perma.cc/TP3P-7CY6]; Mark Wogenrich, *Penn State's James Franklin Calls NIL 'the Wild, Wild West,'* SPORTS ILLUSTRATED (Dec. 26, 2022, at 12:37 ET), https://www.si.com/college/pennstate/football/penn-state-footballjames-franklin-nil-wild-wild-west [https://perma.cc/NV6U-T9CT].

6. *See* Elizabeth Karpen, *Players Getting Paid: Here's Who Signed NIL Deals on Policy's First Day*, N.Y. POST (July 1, 2021, at 16:30 ET), https://nypost.com/2021/07/01/here-are-players-who-signed-nil-deals-on-policys-first-day/ [https://perma.cc/W62N-FBRS].

with female athletes,"[7] reflecting a monumental shift in media consumption and commercial relevance toward women's sports.[8] This shift, coupled with the growing use of social media, has allowed female athletes to use their four (or five)[9] years playing college sports to maximize their NIL value.[10]

As the NIL landscape continues to take shape, group licensing of athletes' NIL has risen,[11] in large part due to the resurrection of the NCAA football video game, trading cards, and jersey programs.[12] Under the existing market, third-party licensing agencies compete on a nonexclusive basis to aggregate

7. Marc Edelman, *Name, Image, and Likeness Rights in College Sports: Evaluating Year One of Much Overdue Reforms*, 76 OKLA. L. REV. 1, 11 (2024).

8. *See, e.g.*, Lindsey Darvin, *Women's Sports 2024: From 'The Caitlin Clark Effect' to Record Interest and Viewership*, FORBES (Dec. 18, 2024, at 09:51 ET), https://www.forbes.com/sites/lindseyedarvin/2024/12/18/womens-sports-2024-review-from-the-caitlin-clark-effect-to-a-new-industry-benchmark/ (on file with the *Fordham Law Review*); Holden, Edelman & McCann, *supra* note 2, at 39.

9. Old NCAA eligibility rules required athletes to complete four years of college sports within a five-year period. *What is the NCAA Age Limit?*, NCSA, https://www.ncsasports.org/ncaa-eligibility-center/age-limit [https://perma.cc/C3PL-VFWK]. In June 2026, the NCAA voted to amend these rules to provide five years of eligibility to all athletes. *See* Meghan Durham Wright, *Division I Adopts Age-Based Eligibility Model*, NCAA (June 23, 2026), https://www.ncaa.org/division-i-adopts-age-based-eligibility-model/ [https://perma.cc/K4S2-DEDV].

10. *See* Kaitlin Balasaygun, *In the College Sports Pay Era, Female Athletes Are Emerging as Big Economic Winners*, CNBC (Oct. 15, 2022, at 09:30 ET), https://www.cnbc.com/2022/10/15/that-nike-bronny-james-nil-deal-was-a-big-deal-for-women-too.html (on file with the *Fordham Law Review*); Tom O'Connell, *Student v. Student Athlete: How the New NIL Legislation Could Change the Game*, HARV. J. SPORTS & ENT. L. (Aug. 31, 2020), https://journals.law.harvard.edu/jsel/2020/08/student-v-student-athlete-how-the-new-nil-legislation-could-change-the-game/ [https://perma.cc/U4HG-M5ZD].

11. Alicia Jessop, *Fool Me Once, Shame on You; Fool Me Twice, Shame on Me: Why Congress Must Grant NCAA Athletes Group Licensing and Organization Rights in Name, Image and Likeness Legislation*, HARV. J. SPORTS & ENT. L. (Aug. 31, 2020), https://journals.law.harvard.edu/jsel/2020/08/fool-me-once-shame-on-you-fool-me-twice-shame-on-me-why-congress-must-grant-ncaa-athletes-group-licensing-and-organization-rights-in-name-image-and-likeness-legislation/ [https://perma.cc/F6F3-WFH7] ("In fact, for many NCAA athletes, group licensing presents the greatest opportunity to generate the highest NIL income."); *see also* Taylor P. Thompson, Note, *Maximizing NIL Rights for College Athletes*, 107 IOWA L. REV. 1347, 1382–85 (2022) (outlining the benefits of group licensing for college athletes); Kristi Dosh, *Group Licensing Opportunities Continue to Grow for Student Athletes*, FORBES (May 19, 2023, at 10:45 ET), https://www.forbes.com/sites/kristidosh/2023/05/19/group-licensing-opportunities-continue-to-grow-for-student-athletes/ (on file with the *Fordham Law Review*) (same).

12. *See* Hailey Rissinger, *Six Schools Team Up with New NIL Licensing Group for Video Game Rights*, BUS. OF COLL. SPORTS (Feb. 15, 2025), https://businessofcollegesports.com/football/six-schools-team-up-with-new-nil-licensing-group-for-video-game-rights/ [https://perma.cc/ADJ9-NKK2]; Michael Smith, *OneTeam, Fanatics Building Major College Group Licensing Business, but 'Nobody is Getting Rich off Jerseys,'* SPORTS BUS. J. (Jan. 30, 2023), https://www.sportsbusinessjournal.com/Journal/Issues/2023/01/30/Upfront/collegiate-licensing/ [https://perma.cc/WM4A-VC4P]; *Upper Deck Announces NIL Trading Cards for College Athletes*, LICENSE GLOB. (Aug. 8, 2024), https://www.licenseglobal.com/sports/upper-deck-announces-nil-trading-cards-for-college-athletes [https://perma.cc/MM4T-KLNM].

and license athletes' NIL, enabling athletes to simultaneously participate in multiple licensing opportunities.[13]

Although the absence of centralized regulation has raised concerns about athlete protection,[14] such a structure has two important consequences: (1) increased competition for the right to license college athletes' NIL, and (2) reduced antitrust risk for joint licensing activity.[15] These dynamics place NIL group licensing squarely within the framework of § 1 of the Sherman Act,[16] which prohibits "contract[s], combination[s] . . . or conspirac[ies]" that unreasonably restrain trade—i.e., harm competition.[17] Although group licensing has long faced legal scrutiny under § 1 because of the anticompetitive effects of exclusivity and collective pricing,[18] such restraints have not been evaluated as per se unlawful[19] and are frequently upheld in the professional sports context.[20]

---

13. *See* Dosh, *supra* note 11; *see also* ONETEAM, GROUP LICENSING FAQS (2022), https://s3.us-east-2.amazonaws.com/sidearm.nextgen.sites/georgemason.sidearmsports.com/documents/2023/8/8/1._Group_Licensing_FAQs.pdf [https://perma.cc/5C2X-LX5D].

14. *See* Michael Feblowitz, *Sharing the Wealth: Considerations for Crafting Effective NIL Legislation*, HARV. J. SPORTS & ENT. L. (Aug. 31, 2020), https://journals.law.harvard.edu/jsel/2020/08/sharing-the-wealth-considerations-for-crafting-effective-nil-legislation/ [https://perma.cc/9MQP-D4AY] (highlighting that a deregulated NIL system makes it more challenging for athletes whose "value of their publicity rights [is] inextricably intertwined with their status on a college team. If athletes are to truly share in the value they are helping to create, they must then be allowed to leverage this status").

15. *See infra* Part II.

16. 15 U.S.C. §§ 1–7; *see id.* § 1.

17. *Id.* § 1; Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 86–87 (1911) ("It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act.").

18. *See, e.g.*, United States v. Sealy, Inc., 388 U.S. 350, 352–54, 356–57 (1967) (joint trademark licensing); United States v. Topco Assocs., Inc., 405 U.S. 596, 601–02, 612 (1972) (territorial licenses); *see also* U.S. DEP'T OF JUST., *Antitrust Consent Decree Review–ASCAP and BMI 2014* (Dec. 16, 2015), https://www.justice.gov/atr/ascap-bmi-decree-review [https://perma.cc/82VZ-GCUK] (identifying when the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) entered into consent decrees for collective licensing); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8–10, 19–20 (1979) ("[I]n characterizing this conduct under the per se rule, our inquiry must focus on whether . . . the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978))).

19. Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 149–51 (3d Cir. 1981) (explaining that accumulating exclusive licenses alone is not a per se violation of § 1); *see also* Fraser v. Major League Soccer, LLC, 284 F.3d 47, 59 (1st Cir. 2002) (applying the rule of reason standard to Major League Soccer's player selection system); Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (identifying the test for evaluating allegedly anticompetitive behavior under § 1).

20. *See Fleer Corp.*, 658 F.2d at 152–53; Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 318–20, 334 (2d Cir. 2008); *see also* Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 620 F.2d 930, 939 (2d Cir. 1980) (affirming the district court's finding that the blanket license did not unreasonably restrain competition in the music licensing industry), *cert. denied*, 450 U.S. 970 (1981).

This Note explores two unresolved issues: (1) the legality of joint licensing for college athletes' NIL and (2) how to best structure such programs. This Note's proposed solution, conference-specific exclusive licensing arms, supports all college athletes—particularly female and underrepresented college athletes—while increasing competition and faithfully adhering to the Sherman Act's goals. Part I situates the NCAA's compensation rules within the framework of § 1 of the Sherman Act, tracing the evolution of judicial scrutiny from *NCAA v. Board of Regents of the University of Oklahoma*,[21] through *O'Bannon v. NCAA*,[22] *NCAA v. Alston*,[23] and the 2019 California Fair Pay to Play Act,[24] all of which helped end amateurism as a justification for college athlete compensation restrictions. Part II discusses three seminal group licensing cases—*American Needle, Inc. v. NFL*,[25] *Major League Baseball Properties, Inc. v. Salvino, Inc.*,[26] and *Broadcast Music, Inc. v. CBS*[27]—and outlines the contours of both when and how the rule of reason, one standard of review for an alleged anticompetitive practice, applies to joint ventures and how these three cases can operate as precedents if applied to the NCAA. Part III argues that multiple conference-wide NIL licensing agencies, which combine elements of the professional players associations and performance rights organizations, provide a legally tenable and highly effective path forward for female and underrepresented athletes to reach their full monetization capabilities and best support the collective of collegiate athletics.

I. ANTITRUST LAW AND THE NCAA'S COMPENSATION REGIME

This part situates the NCAA's compensation restrictions within the framework of § 1 of the Sherman Act. Part I.A outlines the Sherman Act, including the standards courts apply when analyzing allegedly anticompetitive conduct. Part I.B traces the NCAA's evolution as an association that collectively restricted athlete compensation in violation of the Sherman Act.

A. A Brief Overview of § 1

The Sherman Act was enacted in 1890 as the first federal consumer-protection statute aimed at dismantling and discouraging activity that can be referred to, simply, as "bullying and ganging up."[28] Section 1 of

21. 468 U.S. 85 (1984).
22. 802 F.3d 1049 (9th Cir. 2015).
23. 141 S. Ct. 2141 (2021).
24. CAL. EDUC. CODE § 67456 (2021).
25. 560 U.S. 183 (2010).
26. 542 F.3d 290 (2d Cir. 2008).
27. 441 U.S. 1 (1979).
28. *See* Richard M. Steuer, *The Simplicity of Antitrust Law*, 14 U. PA. J. BUS. L. 543, 543–44 (2012); *see also* John O. McGinnis & Andrew M. Meerkins, *Dworkinian Antitrust*, 102 IOWA L. REV. 1, 18–20 (2016) (explaining the introduction and rise of the consumer welfare standard in antitrust); *see also* Brown Shoe Co. v. United States, 370 U.S. 294,

the Sherman Act reads: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[29] Although a literal reading of § 1 would declare every contract illegal because it in some way restrains trade,[30] the longstanding interpretation is that only contracts or conspiracies that *unreasonably* restrain trade will be declared illegal.[31]

1. Establishing a § 1 Violation

In determining whether an alleged restraint violates § 1 of the Sherman Act, courts apply a three-step test.[32] Initially, a court will consider two threshold issues: "(1) whether there is an effect on trade or commerce among more than one state, and (2) whether there is a sufficient agreement among two or more parties to constitute a 'contract, combination . . . or conspiracy.'"[33]

If these elements are met, courts will apply one of three sanctioned tests to determine whether an agreement is a "prima facie antitrust violation."[34] First, per se condemnation is reserved for restraints—such as price fixing, wage fixing, group boycotts, or market allocations—that are almost always anticompetitive.[35] Most restraints, however, are evaluated under the rule of reason,[36] which requires courts to assess a restraint's actual economic effects.[37] In between these two tests is the quick look test which considers

319–20 (1962) (describing section 7 of the Clayton Act—which regulates mergers—as being about "protection of *competition*, not *competitors*").

29. *See* 15 U.S.C. § 1.

30. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 687–88 (1978) ("One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that 'every' contract that restrains trade is unlawful.").

31. *See, e.g.*, *id.* at 688 ("The Rule of Reason . . . . give[s] the Act both flexibility and definition . . . . [I]t focuses directly on the challenged restraint's impact on competitive conditions."); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007); State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

32. Marc Edelman, *Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts?: Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 CATH. U. L. REV. 631, 640 (2009); *see also* Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 469 (6th Cir. 2005).

33. Edelman, *supra* note 32, at 640 (alteration in original) (citing 15 U.S.C. § 1).

34. *Id.*

35. *See* Edelman, *supra* note 32, at 640 n.55; *see also Leegin Creative Leather Prods., Inc.*, 551 U.S. at 886–87 (describing when the per se test is applicable); Denver Rockets v. All-Pro Mgmt. Inc. 325 F. Supp. 1049, 1063 (C.D. Cal. 1971) (identifying behaviors subject to the per se test).

36. The U.S. Supreme Court, in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), determined that despite its literal language, the Sherman Act is to be evaluated in "light of reason," giving rise to the rule of reason test as the standard mode of analysis under § 1. *Id.* at 63. Other sanctioned tests, such as the per se test, arose as courts became familiar with the negative economic effects of certain behaviors like group boycotts. *See Denver Rockets*, 325 F. Supp. at 1063 (collecting cases).

37. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 689 (1978).

the economic effects based only on a "rudimentary understanding of economics."[38]

If a plaintiff establishes a prima facie violation, the burden shifts to the defendant to justify the restraint through procompetitive rationales or an applicable exemption.[39] The most frequently argued defense in the professional sports context is the nonstatutory labor exemption.[40]

2. The Governing Standard for § 1 Challenges: The Rule of Reason

The default standard for analyzing an agreement under § 1 of the Sherman Act is the rule-of-reason test.[41] Under the rule of reason, a plaintiff must show three elements: "(1) market power; (2) net anticompetitive effects; and (3) harm."[42] Market power is the "power to control prices or exclude competition" in a relevant market.[43] The relevant market is composed of both product and geographic elements.[44] The presence of market power within that relevant market is often determined by in-depth economic evidence.[45] Net anticompetitive effects exist when the anticompetitive effects outweigh the procompetitive benefits.[46] The final requirement under

38. Edelman, *supra* note 32, at 640–41; Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999); United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993) ("The abbreviated rule of reason . . . . applies in cases where *per se* condemnation is inappropriate, but where 'no elaborate industry analysis is required to demonstrate the anticompetitive character' of an inherently suspect restraint." (quoting NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 (1984))).

39. Edelman, *supra* note 32, at 641, 647.

40. *See id.* at 641; NBA v. Williams, 45 F.3d 684, 688 (2d Cir. 1995) ("[A]ntitrust laws do not prohibit employers from acting jointly in bargaining with a common union."). The nonstatutory labor exemption is inapplicable to collegiate athletics because college athletes are not unionized, so any collective decisions would not require a resolution of whether to apply antitrust law or labor law. *See* Mackey v. NFL, 543 F.2d 606, 611–12 (8th Cir. 1976).

41. Kamron Cox, *Exploring Key Antitrust Implications of Conference Consolidation in College Football*, 89 MO. L. REV. 567, 580 (2024); *see also* Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RSRV. L. REV. 61, 71–75 (2013) (explaining the threshold requirements for a § 1 analysis).

42. Edelman, *supra* note 32, at 645.

43. *Id.* Some courts have defined market power as "the ability to raise prices above those that would prevail in a competitive market." *Brown Univ.*, 5 F.3d at 668; *see also* Banks v. NCAA, 746 F. Supp. 850, 858 (N.D. Ind. 1990) defining market power as the "ability to raise prices above [a] competitive level by restricting output").

44. Edelman, *supra* note 32, at 645.

45. *See id.* Courts may also look to market share to determine whether market power exists. *See id.*

46. *See* Edelman, *supra* note 32, at 646. This prong incorporates a burden shifting framework where the plaintiff must show the presence of anticompetitive effects in the relevant market prior to the defendant offering its procompetitive justifications. *See id.*; *see also* Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 469 (6th Cir. 2005) (outlining the burdens of proof in a rule-of-reason analysis). In the 1970s, the Supreme Court clarified that procompetitive benefits are those that relate to the agreement's *economic effects*, not social effects. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 681, 688 (1978) ("Contrary to its name, the Rule [of Reason] does not open

a rule-of-reason analysis is that the alleged anticompetitive arrangement results in harm.[47]

B. The Historical Development of the NCAA's Compensation Restrictions

This section outlines the origins of the NCAA's compensation restrictions, concluding with the passing of the 2021 Interim NIL Policy. In tracing this history, this section highlights how a set of eligibility rules gradually evolved into a comprehensive framework designed to regulate the economic value generated by college athletes. It also situates those rules within the NCAA's stated commitment to amateurism and academic priorities, while previewing how antitrust litigation and state legislation ultimately eroded the NCAA's ability to maintain those restraints.

1. The Creation of the NCAA and Early Efforts to Police Amateurism

From the early days of college sports, players were compensated for their athletic abilities.[48] However, the use of "tramp athletes" and athlete compensation led to concerns that athletics were prioritized over academics.[49] These concerns led to the creation of the Intercollegiate Athletic Association of the United States in 1906, which became the NCAA in 1910.[50] From its inception, the NCAA declared that "[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession,"[51] a rule that would later draw sustained scrutiny under § 1.

---

the field of antitrust inquiry to any argument in favor of a challenged restraint . . . . Instead, it focuses directly on the challenged restraint's impact on competitive conditions.").

47. *See* Edelman, *supra* note 32, at 653; *see also* Chi. Pro. Sports Ltd. P'ship v. NBA, 961 F.3d 667, 670 (7th Cir. 1992) (collecting cases that require proof of consumer harm or output reduction); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 99 & n.19 (1984) (collecting cases).

48. *See* Holden, Edelman & McCann, *supra* note 2, at 23–24; Anthony W. Miller, *NCAA Division I Athletics: Amateurism and Exploitation*, THE SPORT J., https://thesportjournal.org/article/ncaa-division-i-athletics-amateurism-and-exploitation/ [https://perma.cc/X7XP-CYGD] ("In order to lure athletes, colleges started in the 1870s to offer both graduates and undergraduates financial assistance in the form of room and board, jobs, and even small cash considerations in exchange for their athletic services.").

49. *See* Rodney K. Smith, *Little Ado About Something: Playing Games with the Reform of Big-Time Intercollegiate Athletics*, 20 CAP. U. L. REV. 567, 570 (1991); Seth Emerson, *College Football's Unlimited Transfers Policy is Shaking the Sport—But Isn't Anything New*, THE ATHLETIC (Apr. 19, 2024), https://www.nytimes.com/athletic/5426724/2024/04/19/college-football-transfer-history/ (on file with the *Fordham Law Review*) (describing the history of tramp athletes and transfer rules in college football).

50. *See* W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 213 n.2, 217 (2006).

51. NCAA v. Alston, 141 S. Ct. 2141, 2148 (2021) (quoting THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES, PROCEEDINGS OF THE FIRST ANNUAL MEETING 34 (1906)). However, colleges continued to compensate and financially support their athletes under the table. *See, e.g.*, *id.* at 2149 ("More than two decades later, the Carnegie Foundation

2. NCAA Compensation Restrictions and Bylaws

The NCAA has focused on distinguishing college athletes from their professional counterparts through compensation restrictions.[52] Early efforts to regulate athlete compensation reflected increasing coordination among NCAA member institutions, particularly with the creation of terms like "student-athlete" and "grant-in-aid."[53] In the 1930s, a set of regulations proposed by University of North Carolina President Frank Porter Graham (the Graham Plan) hoped to promote consistency across collegiate athletics by creating eligibility and compensation standards.[54] Although the Graham Plan ultimately backfired,[55] it represented an initial attempt to articulate limits on athlete compensation.[56]

Following the demise of the Graham Plan, the NCAA adopted the Sanity Code in 1948, which sought to eliminate athletic scholarships but retained the ability for athletes to qualify for need-based financial aid.[57] When enforcement of the Sanity Code proved challenging,[58] the NCAA revised its enforcement structure in 1951 by establishing the Committee on Infractions.[59]

---

produced a report on college athletics that found them still 'sodden with the commercial and the material and the vested interests that these forces have created.'" (quoting *Carnegie Report*, DARTMOUTH ALUMNI MAG., Dec. 1929, at 138, 138–40 (1929))).

52. *See infra* notes 54–64 and accompanying text.

53. *See infra* notes 64–66 and accompanying text.

54. *See* Rob Christensen, *UNC Used to Be a Leader in Reining in Big-Time Sports. Not Anymore*, NEWS & OBSERVER (Oct. 21, 2017, at 13:17 ET), https://www.newsobserver.com/news/politics-government/politics-columns-blogs/robchristensen/article180030841.html (on file with the *Fordham Law Review*). The Graham Plan was a "public crusade to purify intercollegiate athletics of what Graham regarded as widespread and rampant professionalism." Richard Stone, *The Graham Plan of 1935: An Aborted Crusade to De-Emphasize College Athletics*, 64 N.C. HIST. REV. 274, 276 (1987).

55. *See* Stone, *supra* note 54, at 279–82.

56. The Graham Plan contained eleven regulations that were promoted to institutions and conferences to supplement existing regulations. *See* Frank P. Graham, President of Univ. of N.C. Chapel Hill, Standards of Athletic Eligibility, Office of the President (Nov. 21, 1935) (on file with Univ. N.C. Library, Office of President Frank Porter Graham Records 1932–1949, Folder 102, Scan 15–16).

57. *See* Holden, Edelman & McCann, *supra* note 2, at 25–27; *see also* John T. Holden, Marc Edelman, Thomas A. Baker III & Andrew G. Shuman, *Reimagining the Governance of College Sports After* Alston, 74 FLA. L. REV. 427, 432–33 (2022) (discussing how the Sanity Code was adopted to codify and strengthen the prohibition on compensating athletes based on their athletic prowess).

58. *See* Marc Edelman, Michael A. McCann & John T. Holden, *The Collegiate Employee-Athlete*, 2024 ILL. L. REV. 1, 8. The Sanity Code's only enforcement power was expelling schools from the NCAA, which proved to be a poor deterrent when seven schools violated NCAA rules without expulsion. *See id.* ("When a vote was held on these schools' expulsion, however, the vote failed to pass, as numerous southern schools voted against sanctions, believing that schools should determine what compensation athletes receive and not the NCAA.").

59. *See id*.

The NCAA's strongest attempt at regulating athlete compensation came through its first executive director, Walter Byers.[60] Byers's impact was quickly felt in response to concerns over athletes' status when they were injured while playing their sport.[61] Following a case in the Colorado Supreme Court—*University of Denver v. Nemeth*[62]—Byers crafted the term "student-athlete" and began referring to teams as "college football" and "college basketball" in an effort to influence societal perspectives on college athletes.[63] This semantic change was influential enough that four years later, the same Colorado Supreme Court denied the spouse of a college football player from receiving workers' compensation because there was no "contractual obligation to play football" and thus the absence of an employment relationship.[64]

The NCAA also formalized the "grant-in-aid" model, which enabled schools to provide for the cost of room and board and any other expenses beyond tuition.[65] In 1975, payments for expenses beyond tuition ceased, ushering in the nearly fifty-year prohibition on athlete compensation in collegiate athletics.[66]

3. The Beginning of the End: *Board of Regents* and the Recognition of NCAA Activity as Concerted Action

For the last forty years, the NCAA bylaws and regulations have been challenged as unreasonable restraints of trade under § 1 of the Sherman Act.[67] These challenges emerged as NCAA revenues soared while athletes

60. *See* Edelman, McCann & Holden, *supra* note 58, at 8–10; Associated Press, *Walter Byers Dies at 93, First NCAA Executive Director*, L.A. TIMES (May 28, 2015, at 12:56 PT), https://www.latimes.com/local/obituaries/la-sp-walter-byers-ncaa-executive-director-dies-20150528-story.html (on file with the *Fordham Law Review*).

61. *See* Holden, Edelman & McCann, *supra* note 2, at 30 (explaining that whether the athlete is considered an employee matters for workers' compensation claims); *see also* Edelman, McCann & Holden, *supra* note 58, at 10–12 (same).

62. 257 P.2d 423 (Colo. 1953) (holding that Nemeth was an employee for purposes of workers' compensation because he was paid for services performed and football participation fell within the scope of that employment).

63. *See* Edelman, McCann & Holden, *supra* note 58, at 11. The advent of the term "student-athlete" entrenched amateurism as the heart of college athletics by the 1950s. *See* Holden, Edelman & McCann, *supra* note 2, at 29–30.

64. State Comp. Ins. Fund v. Indus. Comm'n, 314 P.2d 288, 289 (Colo. 1957). The Colorado Supreme Court was also influenced by two NCAA rule changes. *See* Edelman, McCann & Holden, *supra* note 58, at 12. The first was the decision to enable college athletes to "receive tuition, fees, room and board, and fifteen dollars per month." *Id.* The second was that athletes could earn scholarships for the full four years; however, the award was not "tied to continued participation in a sport." *Id.*

65. *See* Holden, Edelman & McCann, *supra* note 2, at 27.

66. *Id.*

67. *See* Sarah Traynor, Note, *California Says Checkmate: Exploring the Nation's First Fair Pay to Play Act and What it Means for the Future of the NCAA and Female Student-Athletes*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 203, 206 (2020); Richard E. Kaye, Annotation, *Application of Federal Antitrust Laws to Collegiate Sports*, 87 A.L.R. Fed. 2d 43 (2014).

received little compensation.[68] The "disparities between the realities of undercompensated college athletes versus every other member of the college community"[69] became apparent for the first time in *NCAA v. Board of Regents of the University of Oklahoma*.[70]

In *Board of Regents*, the NCAA devised and implemented a television plan that restricted the number of college football games and the frequency with which individual teams could be televised in a season.[71] The U.S. Supreme Court held that these restrictions constituted a horizontal restraint of trade because they limited the manner in which member institutions could compete in the market for televised college football.[72] Although such restraints are often per se illegal, the Court applied the rule of reason by recognizing that some coordination is necessary for the existence of sports leagues.[73] Applying that framework, the Court concluded that the plan was inconsistent with "the Sherman Act's command that price and supply be responsive to consumer preference" and thus was an unreasonable restraint of competition.[74] Although *Board of Regents* invalidated the television plan,[75] the NCAA continued to rely on language in the case to justify its compensation restraints in the name of amateurism.[76]

---

68. *See* Holden, Edelman & McCann, *supra* note 2, at 27–29.

69. *See id.* at 6.

70. 468 U.S. 85, 120 (1984) (holding that the limitations placed on college football broadcasts violated § 1).

71. *See id.* at 90.

72. *See id.* at 99 ("By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created . . . an agreement among competitors on the way in which they will compete with one another.").

73. *See Bd. of Regents*, 468 U.S. at 99–101 ("[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."); *see also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212–14 (1940) (explaining the dangers of price-fixing). Of note, the Supreme Court in *Board of Regents* actually employed the quick look test despite using the "Rule of Reason" label. *See Bd. of Regents*, 468 U.S. at 109–10.

74. *Bd. of Regents*, 468 U.S. at 110, 120. The Court also rejected all three of the NCAA's justifications for the restraint—the NCAA assists in the marketing of broadcast rights, the plan maintains competitive balance among the teams, and the plan protects live attendance. *Id.* at 113–20.

75. *See* Alicia Jessop, NCAA v. Board of Regents *2.0: Potential Antitrust Law Claims Arising from the NCAA's Regulation of College Athletes' NIL*, 76 OKLA. L. REV. 75, 81–82 (2023).

76. *See id.* Although the concept of amateurism has faced immense backlash in the face of soaring NCAA revenues, it was not until 2014 when the then–Power Five conferences—SEC, ACC, Big-12, Pac-12 and Big Ten—were granted the latitude to offer college athletes more benefits that a policy shift favoring athlete compensation took hold. Holden, Edelman & McCann, *supra* note 2, at 30–32; *see also* Liz Clarke, *The NCAA Coined the Term "Student-Athlete" in the 1950s. Its Time Might Be Up.*, WASH. POST. (Oct. 28, 2021), https://www.washingtonpost.com/sports/2021/10/27/ncaa-student-athlete-1950s/ (describing the rising animus toward the term "student-athlete") (on file with the *Fordham Law Review*); NCAA v. Alston, 141 S. Ct. 2141, 2150–51 (2021) (explaining how NCAA revenues have soared and that "[a]t the center of this thicket of associations and rules sits a massive business").

4. The Post–*Board of Regents* Erosion of the NCAA's Amateurism Model

More than three decades later, the NCAA's compensation restrictions were directly challenged in *O'Bannon v. NCAA*.[77] Former Division I football and men's basketball players alleged that prohibitions on monetization of college athletes' NIL violated § 1 of the Sherman Act.[78] The U.S. District Court for the Northern District of California "identified two relevant product markets affected by the NCAA's restraints related to student-athlete NIL: (i) the college education market and (ii) the group licensing market."[79] With respect to the education market, the court noted that colleges and universities are sellers of "unique bundles of goods and services to elite football and basketball recruits,"[80] intimating that the product is a market in and of itself—i.e., there are no reasonable substitutes.[81] In the end, the U.S. Court of Appeals for the Ninth Circuit affirmed that restrictions on education-related compensation violated § 1.[82] This holding treated the NCAA's amateurism rules not as presumptively lawful eligibility standards, but as commercial restraints subject to ordinary antitrust scrutiny.[83] In doing so, *O'Bannon* narrowed the justifications and arguments the NCAA embraced after *Board of Regents* and laid the groundwork for later challenges.

The Supreme Court again weighed in on NCAA restrictions on in-kind education-related benefits (tuition, room and board, free books, etc.) in

77. 802 F.3d 1049 (9th Cir. 2015).

78. *See id.* at 1055.

79. Cox, *supra* note 41, at 593 (citing *O'Bannon*, 802 F.3d at 1056–57). The district court held, and the Ninth Circuit affirmed, that the NCAA rules did not have an anticompetitive effect in any of the three submarkets for the group licensing market: "(1) live game telecasts, (2) sports video games, and (3) game rebroadcasts, advertisements, and other archival footage." *O'Bannon*, 802 F.3d at 1057–58. Although neither the district court nor the Ninth Circuit analyzed the rules in the context of the group licensing market, *O'Bannon* emphasizes a crucial point for this Note—rule of reason is the proper analytical framework for the two relevant product markets. *O'Bannon*, 802 F.3d at 1057. *See also* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 994–99 (N.D. Cal. 2014) (evaluating a group licensing market under the rule of reason), *aff'd in part, vacated in part, rev'd on other grounds*, 802 F.3d 1049 (9th Cir. 2015).

80. *O'Bannon*, 7 F. Supp. 3d at 965–66 (highlighting that the court considered tuition, room and board, textbooks, athletic facilities, coaching, and the "opportunity to compete at the highest level of college sports" as part of the bundle offered to "student-athletes").

81. *Id.* at 967–68.

82. *O'Bannon*, 802 F.3d at 1079 ("[T]he NCAA is not above the antitrust laws . . . . In this case, the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market. The rule of reason requires that the NCAA permit its schools to provide *up to the cost of attendance* to their student athletes." (emphasis added)).

83. *See O'Bannon*, 802 F.3d at 1063–64 ("[T]he NCAA is not asking us to find merely that its amateurism rules are procompetitive; rather, it asks us to hold that those rules are essentially exempt from antitrust scrutiny. Nothing in *Board of Regents* supports such an exemption. To say that the NCAA's amateurism rules are procompetitive, as *Board of Regents* did, is not to say that they are automatically lawful."); *see also* Jessop, *supra* note 75, at 87 (describing why the Ninth Circuit engaged in a rule of reason analysis in *O'Bannon*).

NCAA v. Alston.[84] *Alston* was a class action lawsuit brought by current and former Division I men's and women's basketball players and Football Bowl Subdivision (FBS) players,[85] arguing that the restrictions for in-kind educational benefits violated § 1.[86] The Supreme Court in *Alston* upheld an injunction prohibiting limits on in-kind educational benefits, emphasizing the voluminous economic testimony analyzed by the lower court regarding the anticompetitive effects of caps on recruitment compensation.[87] At the same time, the Court declined to invalidate other compensation restrictions[88] and noted that conference-level limitations on benefits may fall outside the scope of antitrust law.[89]

Although the *Alston* majority resolved the case on narrow grounds, the decision reflected a broader shift in the Court's treatment of NCAA compensation rules.[90] Justice Kavanaugh wrote separately to question the legality of the entire NCAA model.[91] Notably, he stated that "[t]he NCAA is not above the law."[92] The shift in tone and language from *Board of Regents* to both the majority and concurring opinions in *Alston* signaled that the NCAA would no longer receive the same "ample latitude" in its compensation regulations.[93]

---

84. 141 S. Ct. 2141 (2021).

85. *Id.* at 2151. The FBS is the premier level of Division I football in the United States. *See Football Bowl Subdivision*, KNIGHT-NEWHOUSE COLL. ATHLETICS DATABASE, https://knightnewhousedata.org/fbs (on file with the *Fordham Law Review*). Each school in the FBS is allocated eighty-five scholarships and is required to play in a bowl game. *See* Signing Day Sports, *FBS vs. FCS Explained*, THE WIRE (Oct. 7, 2022), https://thewire.signingdaysports.com/articles/fbs-vs-fcs-explained/ [https://perma.cc/TL3N-KYEB].

86. *Alston*, 141 S. Ct. at 2151.

87. *Id.* at 2151–54, 2162; *see also In re* NCAA Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1067 (N.D. Cal. 2019) ("Class members cannot obtain the same combination of a college education, high-level television exposure, and opportunities to enter professional sports other than from Division I schools.").

88. *Alston*, 141 S. Ct. at 2163–65.

89. *See id.* at 2165–66; *see also In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d at 1068 ("[I]f each conference were free to set its own compensation limits in competition with other conferences, the market concentration would decrease from highly or perfectly concentrated, to 'moderately concentrated' for FBS football and 'unconcentrated' for Division I basketball."). The Court made clear that "individual conferences remain free to reimpose every single enjoined restraint tomorrow." *Alston*, 141 S. Ct. at 2164.

90. Cox, *supra* note 41, at 596; *see also Alston*, 141 S. Ct. at 2166–69 (Kavanaugh, J., concurring).

91. *Alston*, 141 S. Ct. at 2167 ("The NCAA's business model would be flatly illegal in almost any other industry in America.").

92. *Id.* at 2169.

93. Cox, *supra* note 41, at 596 (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984)); *see also Bd. of Regents*, 468 U.S. at 120 ("The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role."). *See generally* Michael A. Carrier & Christopher L. Sagers, *The* Alston *Case: Why the NCAA Did Not Deserve Antitrust Immunity and Did Not Succeed under a Rule-of-Reason Analysis*, 28 GEO. MASON L. REV. 1461 (2021) (arguing that antitrust immunity should not be extended to the NCAA and that the rule of reason is the proper standard for analyzing the NCAA's anticompetitive behavior).

As judicial scrutiny increased, state legislatures simultaneously began fighting back against NCAA restrictions. Four years after the Ninth Circuit's decision in *O'Bannon*, California passed Senate Bill 206—known as the Fair Pay to Play Act.[94] Authored by Senators Nancy Skinner and Steve Bradford, the Fair Pay to Play Act was intended to expand the rights of college athletes[95] by preventing postsecondary schools, athletic conferences, and associations from prohibiting third-party compensation for the use of a college athlete's NIL.[96] The Fair Pay to Play Act also prohibits conferences and the NCAA from declaring a school ineligible for "intercollegiate athletics" if its athletes accept compensation for the use of their NIL.[97] For the coauthors of the Fair Pay to Play Act, the issue of college athlete pay was about restoring the equities between athletes and the colleges and NCAA.[98] By July 2021, over twenty-five states had followed California's lead and prevented colleges, universities, and conferences from prohibiting college athlete compensation within their respective states.[99] These statutes further signaled that protecting college athletes now took priority over protecting the NCAA's amateurism model.[100] Despite controversy surrounding various states' decisions to lift NIL restrictions,[101] the NCAA's hand was forced and

94. CAL. EDUC. CODE § 67456 (2019). The bill was originally slated to take effect in 2023, but the *Alston* decision led California to effectuate the Act in September 2021. *See* Simon Lockard, *The Fair Pay to Play Act and How California Led the Way to College Athlete Pay Reform and the Development of NIL*, USC GOULD'S BUS. L. DIGEST (Apr. 27, 2024), https://lawforbusiness.usc.edu/the-fair-pay-to-pay-act-and-how-california-led-the-way-to-college-athlete-pay-reform-and-the-development-of-nil/ [https://perma.cc/8B4P-ZA3N].

95. *See* Traynor, *supra* note 67, at 211.

96. CAL. EDUC. CODE § 67456; *see also* Traynor, *supra* note 67, at 211.

97. CAL. EDUC. CODE § 67456; *see also* Traynor, *supra* note 67, at 211.

98. Nancy Skinner (@NancySkinnerCA), X (Sep. 30, 2019, at 12:17 ET), https://x.com/NancySkinnerCA/status/1178705336619786241 [https://perma.cc/A4A2-M9F8] ("For decades, college sports has generated billions for all involved except the very people most responsible for the wealth. That's wrong.").

99. *See* Holden, Edelman & McCann, *supra* note 2, at 34–35 (describing the various provisions included in state NIL laws prior to the issuance of the NCAA's Interim NIL Policy).

100. *See* Traynor, *supra* note 67, at 212; *see also* O'Bannon v. NCAA, 802 F.3d 1049, 1059 (9th Cir. 2015) ("The [district] court first concluded that consumers are primarily attracted to college sports for reasons unrelated to amateurism, such as loyalty to their alma mater or affinity for the school in their region of the country."); NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring) ("Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product.").

101. The NCAA commissioner criticized the Fair Pay to Play Act and other similar statutes as the end of the current NCAA model. *See* Press Release, NCAA, *NCAA Responds to California Senate Bill 206* (Sep. 11, 2019), http://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206 (on file with the *Fordham Law Review*); *see also* Traynor, *supra* note 67, at 212–13. The Pac-12 commissioner also expressed concerns that such legislation reduces opportunities for female college athletes. *See* ESPN News Services, *Pac-12's Larry Scott Expresses Concern with Fair Pay to Play Act*, ESPN (Oct. 7, 2019, at 15:00 ET), https://www.espn.com/college-sports/story/_/id/27792901/larry-scott-pac-12-commissioner-expresses-serious-concerns-fair-pay-play-act [https://perma.cc/ZDJ7-CMF2]. Importantly, neither of these concerns appear to have materialized. In fact, female athletes have seen increased opportunity for endorsement deals. *See* Holden, Edelman & McCann, *supra* note 2, at 39; Dosh, *supra* note 11.

in July 2021, it issued its Interim NIL Policy, effectively ending the prohibition on athlete compensation for the use of their NIL.[102]

II. WHAT IS THE LAW: THE BOUNDS OF GROUP LICENSING IN SPORTS

The unanswered question that this Note explores—whether central and exclusive licensing in collegiate athletics violates § 1 of the Sherman Act—has never been addressed in the collegiate context and has only been addressed a few times since the creation of professional sports leagues.[103] Each case resulted in a settlement or remedy that left this question largely unanswered.[104] Today's case law establishes an unsettling and unclear reality for college athletes as they attempt to navigate the best path forward in the age of NIL.

The uncertainty surrounding joint NIL licensing lies at the intersection of two well-established yet conflicting antitrust principles: (1) the dangers of concerted action among economic competitors and (2) the understanding that collaboration is necessary to produce a viable procompetitive joint product. In sports and entertainment, courts have long wrestled with the question of when joint licensing of intellectual property is a § 1 violation, yet no case has clearly drawn the line. The following three cases, although foundational, resolve only a piece of the puzzle. *American Needle* defines concerted action, *Salvino* discusses internal revenue sharing, and *Broadcast Music* explores when a restraint is necessary to produce a new product. These cases illuminate but do not resolve the conflict that college athletes now face. Regardless, they can serve as useful guides. This part explores each case and applies its principles to the NCAA.

---

102. *See* Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx (on file with the *Fordham Law Review*).

103. *See generally* Am. Needle, Inc. v. NFL, 560 U.S. 183 (2010) (centralized licensing in the NFL); Dang v. S.F. Forty Niners, 964 F. Supp. 2d 1097 (N.D. Cal. 2013) (same); Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139 (3d Cir. 1981) (centralized licensing in the MLB); Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290 (2d Cir. 2008) (same).

104. *See, e.g.*, Matthew Perlman, *NFL, Reebok to Pay $4.75M to Settle Apparel Antitrust Suit*, LAW360 (Feb. 26, 2016, at 15:36 ET), https://www.lw.com/admin/upload/SiteAttachments/NFL%20Reebok%20To%20Pay%20$4.75M%20To%20Settle%20Apparel%20Antitrust%20Suit.pdf (on file with the *Fordham Law Review*); Marc Edelman, Nathanial Grow & John Holden, *The Re-Monopolization of the U.S. Sports Trading Card Industry*, 2025 U. ILL. L. REV. 63, 76; Marc Edelman, *American Needle Settles Antitrust Lawsuit with the NFL, Preventing an Important Sports Law Trial*, FORBES (Mar. 3, 2015, at 11:14 ET), https://www.forbes.com/sites/marcedelman/2015/03/03/american-needle-settles-antitrust-lawsuit-with-the-nfl-preventing-an-important-sports-law-trial/ (on file with the *Fordham Law Review*). Although such a narrow question may appear to have narrowly defined consequences, the uncertainty of such joint practices leads to questions around many of the professional sports leagues' collective behavior and, now, the behavior of college athletes in a highly commercialized industry. *See* Edelman, *supra*; *see also infra* Parts II.A–D (outlining the uncertainty of collective licensing).

A. American Needle *and When Coordination Becomes a Conspiracy*

In professional sports, centralized licensing exists in two forms: players association licensing and league-controlled licensing. Under the first structure, professional athletes provide the rights to their NIL to a central licensing agency, typically their players association.[105] The players association then issues a group license to third-party companies—sometimes exclusively and other times nonexclusively—with the players receiving some share of the profit from sales of the third-party company's products.[106] Although the number of players varies by collective bargaining agreement, the players association mandates the issuance of a group license when the third party seeks to license over a certain number of players.[107] *American Needle* challenged the other form of collective licensing, league-controlled licensing, specifically within the National Football League (NFL).[108]

1. The Case That Could Have Decided It All

In *American Needle*, the plaintiff was a former licensee of NFL team trademarks.[109] When the NFL decided to grant an exclusive license to Reebok, American Needle was prohibited from manufacturing headwear

105. *See Major League Baseball Player's, Inc.*, MAJOR LEAGUE BASEBALL PLAYERS ASS'N, https://www.mlbplayers.com/mlb-players-inc [https://perma.cc/M4LT-TNJ5] (last visited July 5, 2026) (discussing how the Major League Baseball Players Association acts as the exclusive licensor for MLB players' NIL rights). The other three major professional sports organizations in the United States—NBA, NFL, and NHL—have programs that work in similar ways, but each association may distribute revenue to the players differently. *See, e.g.*, Kurt Badenhausen, *Mahomes, Kelce Earned Combined $6M From NFLPA Last Year*, SPORTICO (June 1, 2024, at 07:00 ET), https://www.sportico.com/personalities/athletes/2024/mahomes-kelce-earnings-nflpa-licensing-1234782480/ [https://perma.cc/P6F9-W3F7] ("Players get paid royalties based on sales of items like jerseys."). The one exception to the general practice of players associations controlling the NIL rights of its members is the NBA. *See* Amber Jorgensen, *Why Collegiate Athletics Could Have the NCAA, et al. Singing a Different Tune*, 33 CARDOZO ARTS & ENT. L.J. 369, 394 n.140 (2015) ("[T]he NBA controls the group-licensing rights of its players pursuant to a licensing 'buyout' agreement between the NBA and NBPA, the terms of which are confidential.").

106. *See* Jorgensen, *supra* note 105, at 394 n.144 ("By way of example, the MLBPA distributes group-licensing revenues on a pro rata basis in accordance with the number of 'dues-paying' days accrued by active players during the applicable season.").

107. *Id.* at 393 n.141 ("For reference, in the NFL licensing the rights of six (6) or more players requires a group license, and in the MLB, licensing three (3) or more players requires a group license."); *Licensing*, NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, https://nflpa.com/partners/licensing [https://perma.cc/4HTE-GA2C] (last visited July 5, 2026).

108. *See* Am. Needle, Inc. v. NFL, 560 U.S. 183, 187 (2010).

109. Complaint at 2, Am. Needle, Inc. v. New Orleans La. Saints, No. 04-CV-07806, 2004 WL 3123822 (N.D. Ill. Dec. 1, 2004); *see also* Joint Appendix: Volume II at 262, Am. Needle, Inc. v. NFL, 560 U.S. 183 (2010) (No. 08-661) (stating that "American Needle is a family business that has been in continuous operation since 1918" and serves as a manufacturer and distributor of headwear products). By the 1950s, American Needle obtained licensing agreements from all thirty-two NFL teams. *See* Anna Marie Kukec, *Buffalo Grove Firm Could Change the Way NFL Does Business*, CHI. DAILY HERALD (Jan. 13, 2010), https://www.dailyherald.com/20100113/business/buffalo-grove-firm-could-change-way-nfl-does-business/ (on file with the *Fordham Law Review*).

bearing NFL logos.[110] Although the U.S. District Court for the Northern District of Illinois denied the NFL's motion to dismiss for failure to allege a restraint of trade,[111] it did order discovery on the issue of whether the NFL "is a single economic enterprise."[112] Following discovery, the NFL moved for and was granted summary judgment on the grounds that the complaint alleged a "single exclusionary agreement between the NFL and Reebok rather than an ongoing conspiracy in the area of trademark licensing . . . [thus] the NFL and its 32 teams are, in the jargon of antitrust law, acting as a single entity."[113] On appeal, the U.S. Court of Appeals for the Seventh Circuit affirmed, emphasizing that the "record amply establish[ed] that since 1963, the NFL teams have acted as one source of economic power—under the auspices of NFL properties—to license their intellectual property collectively and to promote NFL football."[114]

The Supreme Court granted certiorari to determine whether "the alleged activity by the NFL . . . 'must be viewed as that of a single enterprise for purposes of § 1.'"[115] The Court definitively answered this question in the negative[116] because each NFL team is an independently owned and managed business that competes with one another for the sale of their trademarks.[117] Rather than determining whether the NFL's licensing practices unlawfully restrained trade, the Court remanded the case so that the district court could

110. *See* Am. Needle, Inc. v. NFL, 560 U.S. at 187.

111. Marc Edelman, *Upon Further Review: Will the NFL's Trademark Licensing Practices Survive Full Antitrust Scrutiny?: The Remand of* American Needle v. National Football League, 16 STAN. J.L. BUS. & FINANCE 183, 190 (2011); *see also* Chi. Pro. Sports Ltd. P'ship v. NBA, 95 F.3d 593, 599–600 (7th Cir. 1995) (stating that courts should review professional sports leagues on a league-by-league basis because "[u]nlike the colleges and universities that belong to the National Collegiate Athletic Association, . . . [a professional sports league] has no existence independent of sports").

112. *Am. Needle*, 560 U.S. at 187–89.

113. Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007) ("There is no sudden joining of independent sources of economic power previously pursuing separate interests . . . [because] NFL Properties has been making the decisions unilaterally or jointly since 1963."), *aff'd sub nom.* American Needle Inc. v. NFL, 538 F. 3d 736 (7th Cir 2008), *rev'd,* 560 U.S. 183 (2010).

114. Am. Needle Inc. v. NFL, 538 F.3d 736, 744 (7th Cir. 2008).

115. Am. Needle, Inc. v. NFL, 560 U.S. at 189 (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984)).

116. *See id.* at 196 ("The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action.").

117. *Id.* at 191–92 (citing United States v. Sealy, Inc., 388 U.S. 350 (1967)). In *United States v. Sealy*, 388 U.S. 350 (1967), a group of independent manufacturers were selling mattresses under the same brand name—Sealy. *Id.* at 351. The Court held that despite selling the same products under the same brand name, the agreement was subject to scrutiny under § 1 because they were still independently owned and managed businesses that compete with one another. *See id.* at 352–54; *see also* Edelman, *supra* note 111, at 196 (discussing the Court's analogy to *Sealy*). In the same vein, all colleges and universities in the NCAA are separate economic entities that compete with one another for sale of trademarks, ticket sales, and broadcast revenues, among others. *See, e.g.*, *In re* NCAA Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1097 (N.D. Cal. 2019) (describing competition among schools for athlete labor).

conduct a full rule-of-reason analysis.[118] The parties ultimately settled on remand, leaving the question of § 1 liability unresolved.[119]

In reaching its decision, the Court identified two principles relevant to determining when coordinated behavior triggers a rule-of-reason review. First, combining "independent centers of decisionmaking" can reduce competition by replacing separate market actors with a single decisionmaker.[120] Second, when that coordination is "essential if the product is to be available at all," the conduct is evaluated under the rule of reason rather than condemned outright.[121] These two factors directly relate to two separate considerations: (1) whether there is an agreement among two or more parties,[122] and if yes, (2) whether the challenged behavior should be analyzed under the rule of reason.[123]

2. What Counts as Cooperation and Why Does the Rule of Reason Apply?

For college sports, the significance of *American Needle* lies in its insistence that cooperative licensing agreements among independent economic actors are properly analyzed under the rule of reason when they simultaneously restrain trade and facilitate the creation of a new product.[124] Athletes, conferences, and universities are independent economic actors, with distinct interests, yet the aggregation of NIL rights is highly beneficial to successfully produce and market certain products—such as trading cards, jerseys, and full-roster video games.[125] However, the question of whether such coordination for NIL licensing is necessary to produce a marketable product is slightly more complicated at the collegiate level. To date, NIL group licensing for college athletes has developed without a central licensing agency.[126] Nonetheless, the collective decisions of the conferences, athletes,

118. *See Am. Needle*, 560 U.S. at 199–203.
119. *See* Edelman, *supra* note 104.
120. *Am. Needle*, 560 U.S. at 197.
121. *Id.* at 203.
122. *See id.*
123. *See id.* at 200–04 (determining whether there are multiple parties that can conspire and identifying why their actions fall under the more flexible standard of review).
124. *See* Texaco v. Dagher, 547 U.S. 1, 6 (2006) ("When 'persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market.'" (quoting Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 356 (1982))).
125. The term "successful" here references both the profitability of a product but also the ability to provide the public with the goods that they want at the lowest possible cost to them. A player that holds out may make more on an individual basis from licensing their NIL to a third-party company, but the efficiencies of aggregation in a single licensing agency and the draw of trading card sets, jersey programs, and video games is that they include players from an entire team, players across teams, or players across different sports belonging to the same university. *See* Dosh, *supra* note 11.
126. In other words, the current NIL system is perhaps the least restrictive way to achieve the same outcome. However, a court would have to balance and explore the benefits of a single licensing agent based on the anticompetitive and procompetitive effects, should the opportunity present itself. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1075–76 (9th Cir. 2015)

and the member institutions "depriv[e] the marketplace of independent centers of decisionmaking"[127] and fall squarely within the ambit of § 1.[128]

American Needle can best be understood not as a prohibition on collective licensing, but as a clarification for when coordinated conduct triggers § 1 scrutiny. By rejecting the single-entity defense, the Court established that joint licensing arrangements among distinct economic actors fall under § 1. Applied to collegiate athletics, *American Needle* forecloses arguments that conferences or athletes are a single entity for antitrust purposes. More importantly, it confirms that coordinated NIL licensing—particularly for products that cannot be created by individual economic actors, such as full-roster video games or conference-wide merchandise—is subject to the rule of reason.[129]

B. MLB Properties v. Salvino *and Why Internal Profit Sharing Is Not Price-Fixing*

The NFL's licensing agent is not the only professional licensing arm to face antitrust litigation. Much as the NFL teams formed a joint venture to license team logos and trademarks, Major League Baseball (MLB) teams created a centralized licensing agent for their respective trademarks.

1. The Case That Blessed Internal Profit Sharing

In 2008, Salvino, Inc. challenged the licensing activities of Major League Baseball Properties, Inc., the licensing arm for MLB, as a per se violation of § 1.[130] Salvino produced and sold figurines of baseball players in uniforms that featured MLB marks.[131] The company decided to develop a line of plush bears called "Bammers," successfully obtaining licenses for the players' names and numbers from the Major League Baseball Players Association; however, Major League Baseball Properties did not provide a license for

(explaining that courts can provide relief in the form of replacing a restraint with a less restrictive alternative to the one challenged).

127. *Am. Needle*, 560 U.S. at 197.

128. *Id.* at 198–201.

129. *See id.* at 202–03. See also *infra* Part II.C for further discussion on when restraints are necessary.

130. *See* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 295 (2d Cir. 2008); *see also* Gregory J. Pelnar, *Section 1 Challenges to the Properties Arms of Sports Leagues: The Single-Entity Defense, Market Definition, and the Rule of Reason from* Dallas Cowboys *to* American Needle *and Beyond*, GCP: ONLINE MAG. FOR GLOB. COMPETITION POL'Y, May 2009, at 1, 12 (noting that Salvino, in the alternative, claimed that Major League Baseball Properties' licensing activities would be unreasonable restraints of trade under a quick-look analysis).

131. *See Salvino*, 542 F.3d at 294 ("Salvino obtained licenses from MLBP to use Club marks and other MLB marks on figurines of baseball players in uniform. In the license agreements Salvino promised not to use the marks in any manner other than as licensed.").

Salvino to use MLB club logos on the bears.[132] Despite this, Salvino sold Bammers to the Arizona Diamondbacks bearing the club's logo.[133]

The U.S. District Court for the Southern District of New York (SDNY) granted summary judgment to Major League Baseball Properties, reasoning that its licensing activities were subject to a rule-of-reason analysis[134] and that Salvino could not show any adverse effect on competition as a result of the licensing agreement.[135] On appeal, the U.S. Court of Appeals for the Second Circuit affirmed SDNY's dismissal of Salvino's claims.[136] The Second Circuit reasoned that Major League Baseball Properties was not engaged in price fixing but rather profit sharing among the thirty MLB clubs, and that there was no evidence that the licensing arrangement restricted or reduced output.[137]

The Second Circuit's decision in *Salvino* provides a set of fact-intensive inquiries when evaluating collective licensing under the rule of reason, including: (1) how to define the market,[138] (2) why a centralized profit-sharing model is not necessarily price fixing or an unreasonable restraint of trade, and (3) whether it matters that economic actors retain the ability to directly license their NIL.[139]

On market definition, the economists for both plaintiff and defendant identified submarkets for trading cards, jerseys, and broadcasting of games, all of which contribute to the broader market of professional baseball or even premier professional sports in the United States.[140] The economic evidence highlighting the economic efficiencies of one-stop shopping for licenses[141] and the substitutability of professional sports merchandise led the Second

132. *Id.* at 295.

133. *Id.*; *see also* Pelnar, *supra* note 130, at 12.

134. Major League Baseball Props., Inc. v. Salvino, Inc., 420 F. Supp. 2d 212, 220 (S.D.N.Y. 2005), *aff'd*, 542 F.3d 290 (2d Cir. 2020).

135. *Id.* at 220–21.

136. *Salvino*, 542 F.3d at 294.

137. *Id.* at 307–09. *But see id.* at 335–37 (Sotomayor, J., concurring) (disagreeing with the majority's characterization that the agreement is not a price-fixing scheme).

138. *Id.* at 306–07, 332, 334 (majority opinion) (explaining the standard applied by the district court and why rule of reason is appropriate in the case of a joint venture by professional sports leagues).

139. *See id.* at 298, 318–20, 326–28, 331 (discussing output, price, consumer demand and preference, procompetitive justifications, and revenue sharing as relevant to the rule-of-reason analysis); *see also* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23–24 (1979) (identifying feasibility of direct licensing as relevant to the rule-of-reason analysis).

140. *See id.* at 329–31 (noting the dueling economists' market definitions—one economist defined the relevant market as that of "club marks used in conjunction with plush toys and similar products," but another defined the market as that of intellectual property for sports and entertainment).

141. *See id.* at 323, 328–30 (explaining that the ease of licensing that accompanies a single licensing agency provides a competitive advantage in the marketplace); Edelman, *supra* note 111, at 207–09; *see also* Thomas A. Baker III, Marc Edelman & Nicholas M. Watanabe, *Debunking the NCAA's Myth That Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661, 677 (2018) (reciting the Northern District of California's finding in *O'Bannon* that what attracts consumers to college sports is "loyalty to their alma mater or affinity for the school in their region of the country," which suggests a lack of substitutability in the sports licensing market).

Circuit to find that MLB logos compete in a broader relevant market, rather than a narrowly defined MLB-only market.[142] This contrasts with *Board of Regents*, where the Court identified a separate market for college football broadcasts.[143] Regarding profit sharing, the Second Circuit focused on whether the record showed the hallmarks of a price-fixing[144] or an output-restriction scheme,[145] particularly evidence of reduced output or anticompetitive prices.[146] Finally, Major League Baseball Properties argued on appeal, and it was not disputed, that other professional leagues, including the MLB, use centralized marketing groups that act as the exclusive licensor for the trademarks and logos of teams or the NIL of the athletes.[147] The Second Circuit spent little time directly addressing the economic effects of exclusive versus nonexclusive licensing.[148] Instead, the court addressed the economic efficiencies of centralized licensing agencies such as the benefits of one-stop shopping, increased output of licenses and consumer products, and oversight functions, all favoring college athletes' collective licensing.[149] Although the court did not dwell on exclusive versus nonexclusive licensing in the abstract, its analysis suggests that a centralized licensing arm can be lawful where the structure produces cognizable efficiencies, a point that may have far-reaching impacts for group licensing by college athletes.

142. *See Salvino*, 542 F.3d at 330; Baker, Edelman & Watanabe, *supra* note 141, at 677; Edelman, *supra* note 111, at 207–11.

143. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109–12 (1984) (finding a separate market for broadcasts of college football). At least one scholar has cast doubt on the Court's decision to consider college football broadcasts a stand-alone market. Jodi S. Balsam, *Fumbling Antitrust: Fallacies in the NFL Sunday Ticket Litigation*, 16 HARV. J. SPORTS & ENT. L. 235, 272–76 (2025) (describing two sports-related court decisions that adopted "single brand market definitions" and how both conflated brand loyalty and product interchangeability, further complicating antitrust inquiries in sport); *see also* Choh v. Brown Univ., 753 F. Supp. 3d 117, 135 (2024) (stating that the Ivy League comprises a unique and single brand, but that does not mean it is a stand-alone relevant market for antitrust purposes).

144. *See Salvino*, 542 F.3d at 319–21. The Second Circuit determined that "what Salvino means by 'a uniform fixed price' is in actuality 'an equal share of the [licensing] revenues.'" *See id.* at 320 (quoting Brief for Defendant at 26, Major League Baseball Props., Inc. v. Salvino Inc., 542 F.3d 290 (2d Cir. 2008) (No. 06-1867)). Further, there was no argument by Salvino that the clubs agreed on a price to charge licensees, thus "the so-called 'price' restriction is not in fact an agreement on 'price' but rather an agreement for the sharing of profits." *Id.* Interestingly, the U.S. Court of Appeals for the Second Circuit noted that Major League Baseball Properties (MLBP) receives higher revenues from some clubs compared to others, but that does not matter when the clubs agreed to share the profits equally and when the licensee pays a percentage of their revenue from products bearing the relevant intellectual property. *See id.* at 326–27.

145. *See id.* at 323 ("[S]ince MLBP became the Clubs' exclusive licensing agent for all retail products bearing Club intellectual property, the number of licenses granted has multiplied.").

146. *See id.* at 319–21, 323, 326–27.

147. *Id.* at 300.

148. *Id.* at 321–23.

149. *Id.* at 318–19, 323.

2. Market Power, Profit Sharing, and Direct Licensing: Is It Enough?

Although *Salvino* provides important guidance, its holding rests on a fact-intensive inquiry into the relevant market and anticompetitive effects.[150] The Second Circuit's analysis highlights that centralized licensing schemes are most defensible when they do not foreclose competition or concentrate market power in a single entity.[151] Thus, defining the relevant market is critical to analyzing the legality of collective action.[152]

In collegiate athletics, these inquiries take on added complexity. Although the NCAA may exercise market power in the context of restraints on the whole of collegiate athletics,[153] universities do not.[154] The more salient question is whether any Division I conferences have market power.[155] As noted above, this question turns on market definition, substitutability, and cross elasticity of demand—factors that may differ from professional sports.[156]

At the same time, recent developments in collegiate NIL licensing further complicate the inquiry. The reintroduction of the NCAA football video game occurred without a single, centralized licensing agent, with all athletes receiving an equal amount of money.[157] This presents the question of whether a central licensing agency is necessary to increase output and

150. *See supra* notes 135–39 and accompanying text.

151. *See supra* notes 135–39 and accompanying text.

152. *See Salvino*, 542 F.3d at 301–02, 328–30 (adopting Major League Baseball Properties' economic expert's opinion that it lacks power in the relevant market); *see also* Balsam, *supra* note 143, at 273–74.

153. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 111 (1984).

154. *See* Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063–64 (9th Cir. 2001) (noting that multiple schools from across the country recruited Tanaka); *see also* Cox, *supra* note 41, at 581–88 (describing how to perform a market analysis and how courts have applied this analysis to sports cases).

155. See *supra* Part I.B for a discussion of *Alston* where the Court states that the conferences do not have market power. *See also* Choh v. Brown Univ., 753 F. Supp. 3d 117, 132–33 (D. Conn. 2024) (refusing to find a relevant market for Ivy League institutions).

156. Edelman, *supra* note 111, at 207–11; *see also* Baker, Edelman & Watanabe, *supra* note 141, at 677 (reciting the Northern District of California's finding in *O'Bannon* that what attracts consumers to college sports is "loyalty to their alma mater or affinity for the school in their region of the country"); *Bd. of Regents*, 468 U.S. at 109–12 (finding that college football telecasts were a separate market). *But see* Balsam, *supra* note 143, at 273 (cautioning against conflating brand loyalty and product interchangeability in a relevant market analysis).

157. *See* Michael Rothstein & Dan Murphy, *Everything You Need to Know About the Return of EA Sports' College Football Video Game*, ESPN (Feb. 2, 2021, at 11:59 ET), https://www.espn.com/college-football/story/_/id/30820886/everything-need-know-return-ea-sports-college-football-video-game [https://perma.cc/G6MQ-ZVWD]; Chris Vannini, *EA Sports Raises Payments to $1,500 for Players Appearing in College Football 26*, THE ATHLETIC (Apr. 17, 2025), https://www.nytimes.com/athletic/6213494/2025/03/18/ea-sports-college-football-26-nil-payments/ (on file with the *Fordham Law Review*). OneTeam Partners has a multiyear deal with EA Sports for negotiating the college football video game's group-licensing rights, but a new entrant, Pathway Sports & Entertainment, began earning athletes' NIL rights by paying an increased sum of money to the players. *See* Vannini, *supra*.

produce cognizable economic efficiencies in college sports.[158] Additionally, it invites a related comparison to professional models: whether an equal-revenue-sharing model that does not restrict output aligns with the profit-sharing models upheld in professional sports licensing.[159]

Taken together, *Salvino* supports the proposition that internal revenue sharing among college athletes is not necessarily an unreasonable restraint of trade in violation of § 1. Although the structure of college sports introduces distinct considerations, *Salvino* provides a doctrinal foundation for structuring conference-level NIL licensing agencies in a legally tenable manner.

C. Broadcast Music *and the Necessity Argument in Licensing Markets*

Long before plaintiffs began challenging the group licensing arrangements of professional sports leagues, the music and entertainment industry's licensing practices faced extensive litigation directly translating to the change seen in today's licensing market.[160] The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) are two of the largest performance rights organizations (PROs) in the country.[161] They "pool the copyrights held by their composer, songwriter, and publisher members or affiliates and collectively license public performance rights to music users such as radio and television stations, streaming services, concert venues, bars, restaurants, and retail establishments."[162] The most common form of licensing by PROs is blanket licensing, where music users pay a fee for the right to play any and all of the music held by BMI and/or ASCAP.[163] When both organizations first began,

158. In the case of the most successful sports video games—MLB: The Show, NBA 2K, Madden NFL, and NHL—players' associations preceded the creation of the video games. *See, e.g.*, *Top Baseball Video Games*, YAMAHA (Mar. 30, 2026), https://hub.yamaha.com/audio/gaming/top-baseball-video-games/ [https://perma.cc/ZGY5-BJL5]; *Top 25 Features in EA Sports Madden NFL History*, EA (Feb. 1, 2014), https://www.ea.com/en-gb/news/top-25-features-madden-nfl-history [https://perma.cc/89LT-ZZGR].

159. *See* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 319–21 (2d Cir. 2008). It appears that, under the rule of reason, pro rata distribution of NIL royalties that do not directly restrict the number of products created or licenses issued would survive antitrust scrutiny. *See id.* at 324–27.

160. *See* United States v. Broad. Music, Inc., 275 F.3d 168, 171–74 (2d Cir. 2001).

161. Leah Scholnick, *Licensed to Rock the Campaign Trail: Are the ASCAP and BMI Political Campaign Licenses Violating Their Antitrust Consent Decrees?*, 43 CARDOZO L. REV. 1243, 1250 (2022); Brontë Lawson Turk, Note, *"It's Been a Hard Day's Night" for Songwriters: Why the ASCAP and BMI Consent Decrees Must Undergo Reform*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 493, 507–08 (2016).

162. *See* Scholnick, *supra* note 161, at 1249 (quoting Press Release, U.S. Dep't of Just., Department of Justice Opens Review of ASCAP and BMI Consent Decrees (June 5, 2019), https://www.justice.gov/archives/opa/pr/department-justice-opens-review-ascap-and-bmi-consent-decrees (on file with the *Fordham Law Review*)).

163. *See id.* at 1248–49; *see also* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 227 (10th ed. 2019) (explaining how PROs act as intermediaries for artists); *ASCAP Payment System*, ASCAP, https://www.ascap.com/help/royalties-and-

they held the exclusive rights to license their members' public performance rights and restricted direct licensing arrangements by the composers, musicians, or artists.[164] Over concerns about anticompetitive behavior, the U.S. Department of Justice (DOJ) began investigating these organizations.[165] By the 1960s both were regulated by near-identical consent decrees where they agreed to offer a per-program license, grant membership to all who wanted to join, and acquire only nonexclusive public performance rights.[166] This system left the individual artists free to directly license their compositions.[167] In essence, the consent decrees transformed the licensing system from one of exclusive licensing to that of nonexclusive licensing. However, despite the consent decrees, BMI and ASCAP continued to face challenges to their blanket licensing practice.

1. The Case That Transformed Price Fixing into a Necessity Defense

In 1975, CBS sued both ASCAP and BMI.[168] The district court concluded that "direct negotiation with individual copyright owners is available and feasible" and thus "there is no undue restraint of trade."[169] On appeal, the Second Circuit reversed, finding that the blanket license was a form of price fixing that was per se illegal under § 1.[170] The Supreme Court granted certiorari to resolve the question of whether the per se rule was applicable to BMI and ASCAP's licensing practices.[171]

The Supreme Court rejected per se condemnation because there was a "unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to

payment/payment (on file with the *Fordham Law Review*) (describing ASCAP's payment scheme).

164. Scholnick, *supra* note 161, at 1250; Turk, *supra* note 161, at 508.

165. Scholnick, *supra* note 161, at 1250; Paul H. Sukenik, *The Earth Belongs to the Living, or at Least It Should: The Troubling Difficulty of Modifying Antitrust Consent Decrees*, 97 N.C. L. REV. 734, 735 (2019); *see also* Turk, *supra* note 161, at 508–10. A consent decree is a common way for the Federal Trade Commission to settle antitrust litigation with a target company by providing ways for them to remedy the violation. *See* Turk, *supra* note 161, at 496 n.15.

166. *See* Scholnick, *supra* note 161, at 1253–54; *see also* Mary Katherine Kennedy, *Recent Development, Blanket Licensing of Music Performing Rights: Possible Solutions to the Copyright-Antitrust Conflict*, 37 VAND. L. REV. 183, 189–90 (1984) (describing ASCAP's consent decrees). Although the consent decree terms regulated ASCAP and BMI beginning in 1941, BMI was not required to offer per-program licenses until 1966. *See* Scholnick, *supra* note 161, at 1255; Turk, *supra* note 161, at 510.

167. *See* Kennedy, *supra* note 166, at 194–95.

168. *See* Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 400 F. Supp. 737, 737 (S.D.N.Y. 1975), *rev'd* 562 F.2d 130 (2d Cir. 1977), *rev'd* 441 U.S. 1 (1979).

169. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 6 (1979) (citing *Columbia Broad. Sys.*, 400 F. Supp. at 781–83).

170. *See* Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 562 F.2d 130, 140 (2d Cir. 1977), *rev'd* 441 U.S. 1 (1979).

171. *See Broad. Music*, 441 U.S at 7.

be in vain."[172] The Court explained that the license emerged out of a situation in the marketplace—large numbers of individual composers, musicians, and artists—which "accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use."[173] The Court therefore remanded the case to the Second Circuit to analyze the blanket licensing practice under the rule of reason.[174] On remand, the Second Circuit held that the blanket license did not unreasonably restrain trade because broadcasters retained a realistic, albeit economically burdensome, ability to directly license with copyright owners.[175]

Although the music industry provides a close substitute for the realities that face college sports (like the large number of athletes that seek to license their NIL), the two largest PROs (BMI and ASCAP) are closely and highly regulated through consent decrees.[176] Nonetheless, the case remains instructive for evaluating collective licensing arrangements involving large numbers of rights holders in a market.[177]

Broadcast Music helps answer two questions central to collegiate group licensing. First, to what extent does a single NIL licensing agency mirror a PRO? Second, and perhaps more importantly, when is a restraint on competition sufficiently necessary to make a product available at all? The latter question can be analyzed through the lens of then-Judge William Howard Taft's opinion in *Addyston Pipe & Steel Co.*,[178] which articulates the

172. *Id.* at 13; *cf.* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977).

173. *Broad. Music*, 441 U.S. at 20–21 ("[A] bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established."). The Court further remarked that "ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material." *Id.* at 22; *see also* Matthew J. Mitten, *From* Dallas Cap *to* American Needle *and Beyond: Antitrust Law's Limited Capacity to Stitch Consumer Harm from Professional Sports Club Trademark Monopolies*, 86 TUL. L. REV. 901, 930 (2012) (opining on the economic efficiencies of certain licensing behaviors).

174. *See Broad. Music*, 441 U.S. at 24–25.

175. *See* Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors and Publishers, 620 F.2d 930, 935–39 (2d Cir. 1980); *see also Broad. Music*, 441 U.S. at 20–22 (outlining the economic efficiencies of the blanket license). *But see* Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180, 211–16 (S.D.N.Y. 2014) (holding that SESAC's alleged agreements with under 1 percent of its affiliate composers to restrict direct licensing was an unreasonable restraint of trade and that there was no viable alternative to the blanket license). In October 2014, SESAC and the local television stations entered into a settlement agreement that required SESAC to offer a viable per-program license (PPL) as an alternative to the blanket license. *See* Turk, *supra* note 161, at 512; Meredith Corp. v. SESAC, LLC, 87 F. Supp. 3d 650, 657 (S.D.N.Y. 2015).

176. *See* Turk, *supra* note 161, at 511; *Broad. Music*, 441 U.S. at 15–16 ("[W]e note that Congress itself . . . has chosen to employ the blanket license and similar practices . . . . Though these provisions are not directly controlling, they do reflect an opinion that the blanket license, and ASCAP, are economically beneficial in at least some circumstances."); *see also* Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 744 F.2d 917, 924–33 (2d Cir. 1984) (holding that the blanket license survives a § 1 challenge because viable alternatives, such as per-program licenses and direct licensing, exist).

177. *See infra* Part III.

178. 85 F. 271 (6th Cir. 1898).

ancillary restraints doctrine.[179] Under that doctrine, a restraint is considered ancillary, and subject to the rule of reason, when it reasonably relates to a legitimate joint venture that furthers the venture's primary objective.[180] For example, a PRO exists for the sole purpose of providing, managing, and policing the licensing rights of its members; a flat fee for a blanket license can be understood as advancing the PRO's legitimate objectives and is ancillary to the main purpose of the venture.[181]

Regarding when a restraint on competition is sufficiently necessary to make a product available, a single licensing arm provides the same economic efficiencies—namely reduced transaction costs—that PROs provide in the music industry.[182] These reduced transaction costs manifest themselves in the form of increased merchandise production;[183] protection of trademark laws, if applicable;[184] and quality control of the merchandise produced.[185] Such cost savings are then passed on to licensees and, by extension, consumers, all of which help achieve the primary goal of antitrust law: consumer welfare.[186]

2. Economic Efficiencies of Collective Licensing

A central justification for applying the rule of reason to collective licensing is the ability to reduce transaction costs in markets with numerous rights holders.[187] In *Broadcast Music*, the Court outlined that the blanket license emerged from the impracticability of direct licensing;[188] thus, centralization removed the uncertainty as to who managed, issued, and controlled the NIL rights.[189] More importantly, centralized licensing agencies can eliminate some of the "free rider" problem, a collective action concern in which individual actors benefit from the shared investment in a product without

179. *See* Gregory J. Werden, *The Ancillary Restraints Doctrine After* Dagher, 8 SEDONA CONF. J. 17, 17 (2007).

180. *See Addyston Pipe*, 85 F. at 281–83 (explaining various contractual situations where restraints of trade are considered valid because they are ancillary to the main purpose of the contract), *aff'd*, 175 U.S. 211 (1899).

181. *See Broad. Music*, 441 U.S. at 20; *see also* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 339–41 (2d Cir. 2008) (Sotomayor, J., concurring) (analyzing why the ancillary restraints doctrine is a more appropriate lens to view exclusive licensing arrangements).

182. *See Salvino*, 542 F.3d at 303–04 (majority opinion).

183. *Id.* at 303.

184. *Id.* at 304.

185. *Id.* at 304–05.

186. *Id.* at 305; *see also* McGinnis & Meerkins, *supra* note 28, at 18–20; Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7, 10 (1966); Edelman, *supra* note 32, at 653.

187. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 14–15 (1979).

188. *Id.* at 20.

189. *See* Jeffrey F. Brown, James Bo Pearl, Jeremy Salinger & Annie Alvarado, *A Proposal for Group Licensing of College Athlete NILs*, 12 HARV. J. SPORTS & ENT. L. 1, 20–21 (2021).

contributing to its costs.[190] In the context of merchandised goods, centralized licensing also encourages quality control, brand development, and enforcement.[191]

Relatedly, centralized licensing agencies help enhance the product offerings because of the ability to "one-stop shop[]."[192] One-stop shopping increases the opportunity for group licensing as it lowers barriers to entry for licensees and facilitates product creation that directly relies on aggregation like full-roster merchandise.[193] Such efficiencies may enhance competition by expanding the availability of licensed products, further supporting the legality of collective licensing.[194]

These economic efficiencies do not, standing alone, render collective licensing lawful, but they inform the rule-of-reason analysis by articulating why a restraint may be necessary for a product's existence and actually procompetitive. As discussed in Part III.C, group licensing, particularly when managed by a single licensing arm, bridges the gap among all of the individual rights holders, providing both the same competitive opportunities and equal abilities to compete in the market to sell their products.[195]

The Court's reasoning in *Broadcast Music* extends beyond the efficiencies produced by a blanket license. The Court emphasized that the blanket license did not eliminate competition among licensors because they retained the ability to directly license their compositions.[196] Although BMI (and

190. Garrett Cullity, *The Free Rider Problem*, STAN. ENCYCLOPEDIA PHIL. (July 4, 2025), https://plato.stanford.edu/archives/fall2025/entries/free-rider/ (on file with the *Fordham Law Review*) ("The free rider problem can be defined as that particular kind of collective action problem that arises when the efficient collective production of a good is jeopardized by the incentive each agent has not to contribute towards its production."). In the case of merchandise production, licensees can build a reputation with the public based on the quality or price of the product as well as the efforts of the athletes themselves, which other manufacturers can take advantage of by producing merchandise without a license. *Cf.* Bos. Pro. Hockey Ass'n Inc. v. Dall. Cap & Emblem Mfg., Inc., 510 F.2d 1004, 1011 (5th Cir. 1975) ("[T]he major commercial value of the emblems is derived from the efforts of plaintiffs."). Centralizing athlete NIL licensing reduces the costs of managing and enforcing licensing rights, protecting the value of athletes' NIL. *See Salvino*, 542 F.3d at 303–05; *id.* at 340 (Sotomayor, J., concurring).

191. *See Salvino*, 542 F.3d at 304–05 (majority opinion).

192. *Id.* at 303–04 ("In the absence of one-stop shopping, licensees would incur substantial additional transaction costs . . . . Clubs would also incur greater expenses in the form of additional personnel costs to handle the added licensing functions for which they currently rely on MLBP and its centralized administration. Thus, *the absence* of one-stop shopping may well reduce output in the markets in which those licensees compete.").

193. *See* Zachary Flagel, *Collegiate Group Licensing: A New Frontier in the NIL Wild West*, JD SUPRA (Sep. 6, 2022), https://www.jdsupra.com/legalnews/collegiate-group-licen sing-a-new-2799339/ [https://perma.cc/X63Q-5L2F]; *see also* Jessop, *supra* note 11 ("In fact, for many NCAA athletes, group licensing presents the greatest opportunity to generate the highest NIL income. This is especially true for women's sport athletes, as group licensing has helped increase women's professional sport athletes' income.").

194. *Salvino*, 542 F.3d at 303, 308–09, 319 (evaluating why, on the facts, Salvino had not alleged an adverse effect on competition).

195. *See* Brown et al., *supra* note 189, at 14–15; Bruce H. Kobayashi, *Opening Pandora's Black Box: A Coasian 1937 View of Performance Rights Organizations in 2014*, 22 GEO. MASON L. REV. 925, 930–31 (2015).

196. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 11, 23–24 (1979).

ASCAP) established a centralized licensing mechanism, this did not eliminate individualized competition in the market.[197] Rather, these two licensing mechanisms coexisted, with the blanket license providing certain efficiencies that direct licensing did not.[198] This distinction informs a rule-of-reason analysis by demonstrating that collective licensing does not necessarily supplant competition among rights holders.[199] Rather, preserving opportunities for individualized licensing may diminish the anticompetitive effects ordinarily associated with centralized licensing arrangements.[200]

3. What Qualifies as Necessary?

In college sports, certain products—such as full-roster video games, trading card sets, or a conference- or team-wide jersey program—are best produced using a group license.[201] Although direct licensing is feasible, the value of these products is the inclusion of numerous athletes, making individual licensing impractical.[202] Under both the Court's view in *Broadcast Music* and the ancillary restraints doctrine, a group license by a single licensing arm for athletes' NIL rights is subject to the rule of reason.[203]

At the same time, *Broadcast Music* highlights the limits of a necessity-based justification for restraints on trade in the context of college sports.[204] Whether a restraint is necessary turns on whether collective licensing meaningfully expands output and produces economic efficiencies

197. *Id*.

198. *Id.* at 14–15, 19–23.

199. *Id.* at 23–24; *see also Salvino*, 542 F.3d at 323 (noting that clubs still retained limited rights to directly license).

200. *See Broad. Music*, 441 U.S. at 20–24 (describing the availability of direct licensing and its effect on competition); *see also* Am. Needle, Inc. v. NFL, 560 U.S. 183, 190 (2010) (highlighting the anticompetitive concerns of concerted action).

201. *See, e.g.*, Jessop, *supra* note 75, at 110. One could argue that just as in *Broadcast Music*, the creation of a single agency who issues group licenses, like a blanket license, is an entirely distinct and new product from a direct license that can only be available when there is a joining of interests. *See Salvino*, 542 F.3d at 323 (comparing Major League Baseball Properties' centralized licensing scheme to the centralized licensing scheme in *Broadcast Music*).

202. Another argument is that a single licensing agency that is capable of issuing a group license would reduce a company's transaction costs in producing such a product. *See Broad. Music*, 441 U.S. at 20–21.

203. Any restraints on competition—e.g., a royalty fee for the use of athlete NIL—would be ancillary to the main purpose of the joint venture, which is to more efficiently manage and issue group licenses. Under the ancillary restraints doctrine, a court must determine whether the allegedly anticompetitive conduct is reasonably necessary to achieve efficiency-enhancing benefits. *See Salvino*, 542 F.3d at 339–40 (Sotomayor, J., concurring). Similar to the profit-sharing and exclusivity provisions in *Salvino*, the PROs' blanket license is reasonably necessary to achieve the reduction of transaction costs and eliminate the free rider problem (the essence of the efficiency-enhancing benefits of the centralized licensing agency). *See id.*; *Broad. Music*, 441 U.S. at 21–24 (explaining that the economic efficiencies of a PRO coupled with a choice between the blanket license and direct licensing justifies analysis of the allegedly anticompetitive conduct under the rule of reason).

204. See *supra* Part II.B.2 for a discussion of how the college football video game exists in the absence of a central licensing agency.

similar to PROs.[205] Furthermore, in the face of an NIL landscape that has operated in the absence of a single licensing arm, it is unclear if the creation of one would be "necessary" even with the economic efficiencies accompanying aggregation.[206]

Accordingly, the Court's treatment of "necessity" offers both a doctrinal framework and a constraint for joint NIL licensing. Collective action may be justified when it is reasonably necessary to create a viable product and when athletes retain meaningful opportunities to independently license their NIL. This latter point encapsulates the importance of the DOJ consent decrees, particularly in assuaging the anticompetitive effects of centralization of licensing rights. The harder question is where to draw the line: At what point is coordination no longer "reasonably necessary," but rather an anticompetitive restraint? That balance informs how conference-level licensing arms can be structured to align with antitrust principles. Nonetheless, in college sports, where direct licensing is feasible, but often impractical, the boundary of "necessity" remains uncertain.

* * *

Taken together, *American Needle*, *Salvino*, and *Broadcast Music* emphasize the doctrinal gray zones at the intersection of joint licensing and § 1. Courts acknowledge that joint licensing both enables and restrains competition.[207] However, they repeatedly decline to articulate clear boundaries.[208] This leaves college athletes—without the same statutory protections as their professional counterparts—in an untenable position as they navigate NIL compensation. Part III proposes a framework to resolve this uncertainty: conference-level NIL licensing arms.

205. To align with the structure of BMI and ASCAP more closely, the license should be structured using some combination of the following. First, it would have to be nonexclusive. Second, it could be for a short duration (e.g., under ten years). Third, it may rely on a usage index or revenue-sharing structure for royalty payments (e.g., licensee pays a percentage of the sales of the product to the licensing agency and the revenue is distributed equally among the players). Finally, it could allow for partial licensing (e.g., license just players on the Oklahoma football team). *See* Turk, *supra* note 161, at 497–511 (describing the structure of BMI and ASCAP); Scholnick, *supra* note 161, at 1253–60 (describing the BMI and ASCAP consent decrees); *see also* Brown et al., *supra* note 189, at 31–32 (describing a royalty structure similar to BMI and ASCAP).

206. *See Broad. Music*, 441 U.S. at 22; *see also* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984) ("[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."); *see also supra* Part II.B.2 (explaining that the college football video game operates without any central licensing agency).

207. *See supra* Part II; *see also Salvino*, 542 F.3d at 306–07 (majority opinion).

208. *See supra* Part II.

III. A PRO–COLLEGE ATHLETE PATH FORWARD

Together, the above three cases highlight that group licensing should be analyzed under the rule of reason,[209] turning on factors such as necessity, market structure, market power, and output, among others.[210] No single case directly addresses the unique context of college sports, but each supplies principles for future cases. For example, *American Needle* clarifies the test for determining when a sports league or agreement in the context of sport is subject to § 1 and should be analyzed under the rule of reason.[211] *Salvino* describes when and how the rule of reason applies, protecting and advocating for internal profit-sharing models.[212] *Broadcast Music* illustrates how horizontal agreements that are necessary—i.e., the least restrictive way to provide the product to the public—can justify ancillary restraints on competition.[213]

Courts have long explained that coordination in sport is necessary for the product itself to exist,[214] but have failed to clearly delineate the boundaries of when coordination becomes an illegal "contract, combination . . . or conspiracy."[215] Currently, college athletes can individually profit from their NIL,[216] but as group licensing opportunities continue to grow, collective action without stable and reliable law may violate § 1.[217]

This part proposes a framework that fills the void: conference-level NIL licensing arms.[218] By centralizing group NIL rights at the conference level—

209. If there were ever any doubt as to whether such collective behavior should be analyzed under the rule of reason, *Texaco v. Dagher*, 547 U.S. 1 (2006), put those doubts to rest. *See id.* at 5–6. Indeed, nearly every group licensing or allegedly anticompetitive practice by the NCAA or professional sports leagues has been evaluated under the rule of reason. *See, e.g.*, Am. Needle, Inc. v. NFL, 560 U.S. 183, 196–97, 200 (2010) (exclusive licensing for NFL teams' trademarks); Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 148 (3d Cir. 1981) (exclusive licenses for trading cards). *But see Bd. of Regents*, 468 U.S. at 110 (holding that NCAA broadcast restrictions were a § 1 violation under what courts later termed the quick look or abbreviated rule of reason).

210. *See supra* Part II.

211. *See Am. Needle*, 560 U.S. at 196–97. There is an interesting argument that in the context of college sports when athletes jointly license their NIL there is more of a collective interest than in the case of independently owned professional teams. *See id.* at 196, 198. However, this argument will not be thoroughly explored in this Note.

212. *See Salvino*, 542 F.3d at 319–21.

213. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20–21 (1979).

214. *See Bd. of Regents*, 468 U.S. at 101–02; *see also* NCAA v. Alston, 141 S. Ct. 2141, 2156 (2021) (explaining that some coordination in sport is required).

215. *See* 15 U.S.C. § 1; *supra* Part II.

216. *See Alston*, 141 S. Ct. at 2147, 2151–54, 2164–66.

217. *See supra* Part II (analyzing the current § 1 law as it relates to licensing).

218. It is worth noting that some scholars advocate for unionization of college athletes. *See generally* Edelman, McCann & Holden, *supra* note 58 (outlining a paradigm shift where college athletes are classified as employees); Roberto Corrada, *College Athlete Unionization*, 11 TEX. A&M L. REV. 829 (2024) (outlining how unionization in college athletics could function). The downside to this approach is that in certain situations, individuals will give up their right to sue under the antitrust laws. *See* Edelman, McCann & Holden, *supra* note 58, at 44–45; *see also* Mackey v. NFL, 543 F.2d 606, 612, 614 (8th Cir. 1976) (discussing when

rather than through the NCAA or at the university level via boosters or collectives—collegiate athletics can create a transparent, equitable, and procompetitive NIL market that puts athletes first.[219]

A. The Proposed Structure: Conference-Level Joint Licensing Agencies

This Note advocates for a novel middle-ground approach, modeled after lawful joint ventures in professional sports and the music industry. Although no one has explored or advocated for conference-level NIL licensing agencies, this structure provides the ideal approach to ensuring stability for college athletes in the so-called "wild west" of NIL.[220]

1. Necessary Guardrails for a Conference-Level Licensing Arm

A conference-level licensing arm would be subject to important guardrails, notably absent in the current NIL landscape. The following would be crucial limitations supporting the group licensing agency's legality.

First, athletes would retain the right to directly license their NIL, just as musicians retain such rights alongside the existence of PROs.[221] This preserves athlete choice, but more importantly, reduces foreclosure concerns, critical aspects of judicially blessed collective licensing.[222]

---

labor law trumps antitrust law); Clarett v. NFL, 369 F.3d 124, 135 (2d Cir. 2004) (applying a different test from *Mackey* in determining whether labor law trumps antitrust law).

219. The author is aware that college athlete unionization is another pathway that attempts to provide stability for college athletes in the NIL landscape. *See* Michael Marino & Milo Young, *Back Between the Lines: Can Collective Bargaining Provide a Playbook to Frame the NIL Moneyball?*, NYSBA (Mar. 3, 2026), https://nysba.org/back-between-the-lines-can-collective-bargaining-provide-a-playbook-to-frame-the-nil-moneyball/ [https://perma.cc/N6BD-2VFA]. However, unionization has been unsuccessful at the collegiate level, in large part because of opposition from colleges and the NCAA. *See id.* Therefore, this Note advocates for an approach that draws on athletes' strongest tool in their arsenal: antitrust law.

220. *See* Maureen A. Weston, *Money on the Table: Reconsidering College Sports Video Games and Athlete Publicity Rights Post NCAA Student-Athlete Likeness Litigation*, 5 MISS. SPORTS L. REV. 1, 30 (2015) (proposing shifting power from the NCAA to the power conferences for negotiating rights for the NCAA video game); *id.* at 30–31 (proposing a voluntary players association for negotiating group licensing deals for college athletes). The phrase "wild west" has caught on among coaches, fans, commentators, and the like. *See* Wogenrich, *supra* note 5; David Hale, *Charlie Baker Hopes NCAA Settlement Creates Stability for Schools*, ESPN (May 13, 2024, at 17:56 ET), https://www.espn.com/college-sports/story/_/id/40140633/charlie-baker-hopes-ncaa-settlement-creates-stability-schools [https://perma.cc/GS3Z-NGHS]. This Note uses the phrase "wild west" not as an expression of any opinion, but to emphasize that a deregulated free market, while beneficial in many ways, does not serve the interests of the players or collegiate athletics.

221. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 5, 10–12 (1979). Retaining the ability to directly license their NIL leads to increased competition among merchandising companies. *See supra* note 157 and accompanying text (discussing how competition prompted EA Sports to match the NIL compensation offered to college athletes for inclusion in the college football video game); Hosick, *supra* note 102.

222. *Broad. Music*, 441 U.S. at 11, 20–25; *see also supra* note 221. For a more in-depth foreclosure analysis, see Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9–16 (1984).

Second, the conference-level licensing arm would charge a royalty based on a percentage of the revenue from sales of the merchandise or product bearing the licensed NIL.[223] This ensures the price for the license is responsive to consumer demand for licensed products.[224] The revenue will then be distributed to athletes equally,[225] which was seemingly blessed by the Second Circuit in *Salvino*.[226]

Third, the conference-level licensing arm should offer licenses at all desired levels of aggregation—e.g., football players at the University of Texas at Austin, softball players at the University of Oklahoma, women's volleyball players at Stanford University, etc. Providing licenses in this way reduces output concerns and similarly ensures licenses are responsive to consumer demand, a point the Second Circuit deemed important in *Salvino*.[227]

Finally, the decision to grant a centralized agency the right to license one's NIL should not be a requirement when an athlete commits to play college sports. Just as professional athletes can opt out of the licensing program offered by their players association, so too should college athletes. This guardrail also reduces foreclosure concerns by increasing competition for athlete NIL at the individual level.[228]

2. A Hybrid Governance Model

The aforementioned guardrails place the proposed licensing arm within judicially blessed limitations for centralized licensing.[229] However, these limitations are only meaningful if the proposed agency is governed in a way that sufficiently accounts for athlete and institutional interests. Functionally, the conferences could administer the licensing programs directly or establish legally distinct agencies akin to the professional players associations.[230] This

223. *See Breaking Down a Licensing Deal*, SPORT BUS. J. (July 6, 2003), https://www.sportsbusinessjournal.com/Journal/Issues/2003/07/07/Special-Report/Breaking-Down-A-Licensing-Deal/ [https://perma.cc/E9PN-LMY3].

224. *See* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 326, 332 (2d Cir. 2008).

225. *See* Vannini, *supra* note 157; *Athletes*, ONETEAM, https://oneteam.com/college/athletes/ [https://perma.cc/9A74-LKC2] (last visited July 5, 2026) (stating that OneTeam sends biannual royalty payments to athletes); Nicoleas Mayne, *Deal Structure Options for NIL Collectives*, NIXON PEABODY (Sep. 13, 2024), https://www.nixonpeabody.com/insights/articles/2024/09/13/deal-structure-options-for-nil-collectives [https://perma.cc/VD7C-EV5B]; *see also Salvino*, 542 F.3d at 326.

226. *See Salvino*, 542 F.3d at 326–27, 331–33.

227. *See id.* at 326–27.

228. *See supra* notes 221–21; *see also supra* Part II.C.

229. *See supra* Part II.

230. *See How the NFLPA Works*, NFLPA, https://nflpa.com/about [https://perma.cc/6KCL-SBGF] (last visited July 14, 2026) (describing the NFL Players Association's governance structure); *see also* News Release, Univ. of Utah, University of Utah and Its Foundation Finalize Deal to Form Crimson Brand Partners (June 12, 2026), https://attheu.utah.edu/facultystaff/university-of-utah-and-its-foundation-finalize-deal-to-form-crimson-brand-partners/ [https://perma.cc/P62H-7LJZ] (announcing the first private equity partnership to manage a university's licensing).

Note principally argues for a hybrid governance model that gives meaningful roles to institutional and athlete representatives.

Institutional representation on the governing board ensures that group licensing deals align with institutional interests. This is particularly important because the value of certain products, like jersey programs, lies in the inclusion of athlete NIL *and* institutional trademarks. As such, a licensing arm governed in part by institutional stakeholders facilitates the inclusion of university and conference trademarks in NIL deals.[231]

Equally important, if not more so, is athlete representation. The collective value of NIL deals, and conference success, lies in the athletes that participate in the athletic contests. The governing body should therefore include athletes from revenue- and nonrevenue-generating sports to ensure that NIL deals best account for the interests of all athletes. Indeed, the principal advantage of collective licensing is its ability to expand commercial opportunities to athletes who have historically received less attention in the NIL market.[232]

The governing board would have authority on strategic decisions, namely what joint licensing deals to pursue and negotiate. Day-to-day operations—e.g., monitoring third-party compliance with licensing terms and administering royalty distributions to participating athletes—should be delegated to professionals with intellectual property and sports marketing experience. This division ensures athletes retain a meaningful say in what deals their NIL is used in while simultaneously delegating operations to those best equipped to manage compliance and revenue distribution.

Finally, the licensing arm should be subject to meaningful transparency and accountability requirements. As discussed, the lack of transparency surrounding the negotiation of NIL agreements and the compensation generated by those agreements is the principal concern with the current NIL system.[233] A conference-wide licensing arm should therefore publish annual reports detailing its licensing revenue, royalty distributions, and categories of licensed products. Upon request, athletes should receive accounting statements identifying the agreements in which their NIL was used, the revenue associated with each deal, and the method by which that royalty was calculated. These requirements would provide greater transparency into how athlete NIL is licensed and how revenue is distributed.

A hybrid governance model preserves institutional oversight while simultaneously ensuring athletes retain a meaningful role in decisions concerning the use of their NIL. This proposed structure attempts to align

231. *See* Amanda Christovich, *The Current Group Licensing Reality in the NCAA*, FRONT OFF. SPORTS (Oct. 04, 2021), https://frontofficesports.com/the-current-group-licensing-reality-in-the-ncaa/ (on file with the *Fordham Law Review*) (identifying the Pac-12's group licensing deal for use of game footage and highlights).

232. *See* Dosh, *supra* note 11; Lindsey Darvin, *Women Athletes Are Reshaping College Sports' Financial Landscape Through NIL Success*, FORBES (Oct. 28, 2024, at 11:42 ET), https://www.forbes.com/sites/lindseyedarvin/2024/10/28/women-athletes-are-reshaping-college-sports-financial-landscape-through-nil-success/ (on file with the *Fordham Law Review*).

233. *See supra* Part I.B.4.

the interests of all stakeholders, foster confidence in a system in desperate need of centralization, and preserve and protect all athletes.

B. Why Conference-Level Licensing Agencies Pass Muster Under § 1

Using existing precedent, this Note proposes a conference-level agency that draws from and implements many of the structures and rationales that courts have already treated as consistent with § 1. This section explains why *Broadcast Music* supports conference-wide coordination and applies *American Needle* to show that, although such an agency would likely constitute concerted action, it can still survive rule-of-reason scrutiny. This section then uses *Salvino* to address market definition and the procompetitive efficiencies that make centralized licensing more likely to prevail under § 1.

Broadcast Music instructs that coordination may be lawful when it is reasonably necessary to produce a product that individual market actors cannot single-handedly produce.[234] Conference-wide or NCAA-wide NIL products—such as full-roster video games or trading card sets—require aggregation of individual NIL rights. While direct licensing is theoretically possible, the transaction costs associated with direct licensing render such agreements inefficient and impractical.[235] A conference-level licensing arm would function as a clearinghouse, similar to a PRO, reducing transaction costs associated with group licensing and thus increases opportunities for group licensing.[236] A conference-level licensing agency falls squarely within *Broadcast Music*'s rule-of-reason analysis, with a strong procompetitive-efficiencies argument that would likely withstand rule-of-reason scrutiny.

Although a conference-level licensing entity would be a joint venture,[237] it is likely permissible under *American Needle* and its rule-of-reason

234. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20–24 (1979).

235. In *Broadcast Music*, no one musician or composer could license the rights to use all music in the industry. *See id.* at 21–23. In college sports, no individual athlete could license the NIL rights to all college athletes' NIL. Thus, a centralized agency that has the right to license all of its members' NIL would be a new product under *Broadcast Music*. *Cf.* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 323 (2d Cir. 2008) ("Only MLBP can offer licenses to use the intellectual property of more than one Club, and it can grant a license to use any, some, or all of the Clubs' intellectual property."); *Broad. Music*, 441 U.S. at 14–15.

236. *See Salvino*, 542 F.3d at 323, 327; *id.* at 337 (Sotomayor, J., concurring); *Broad. Music*, 441 U.S. at 20–23; *see also* Major League Baseball Props., Inc. v. Salvino, Inc., 420 F. Supp. 2d 212, 216–17, 220 (S.D.N.Y. 2005) (identifying one-stop shopping as a procompetitive benefit of centralized licensing), *aff'd*, 542 F.3d 290 (2d Cir. 2008).

237. A joint venture is simply the joining of independent economic actors that share in the risks and rewards of the proposed entity. *See* Texaco, Inc. v. Dagher, 547 U.S. 1, 4, 6 (2006). In a market for college athletes' NIL, any joining together by the athletes, universities, or conferences would be considered a joint venture under current court precedent. *See, e.g.*, Am. Needle, Inc. v. NFL, 560 U.S. 183, 187 (2010) (all NFL teams have authorized NFL Properties to be exclusive licensor); NCAA v. Alston, 141 S. Ct. 2141, 2155 (2021) ("But even assuming (without deciding) that the NCAA is a joint venture, that does not guarantee the foreshortened review it seeks. Most restraints challenged under the Sherman Act—including most joint

analysis.[238] Critically, the proposed structure avoids cartel-like behavior.[239] The conference-level agencies would be charging the licensees a portion of their revenue rather than a flat fee, avoiding the risk of price-fixing allegations.[240] Likewise, there is no downstream integration that might lead to foreclosure of rivals or output restrictions.

With the above guardrails in place, *Salvino* provides a helpful roadmap for analyzing what the procompetitive effects of centralized licensing are. First, an agency that distributes revenue equally among all college athletes would likely withstand scrutiny under the Second Circuit's rule-of-reason analysis.[241] Rather than treating revenue sharing as unlawful price fixing, the Second Circuit found that such distribution promoted competitive balance and could maximize output of licenses.[242] At the collegiate level, pro rata distribution of revenues would continue to expand NIL-related compensation.

Second, reduced transaction costs and the efficiencies associated with single licensing agencies could increase output.[243] Output may also increase if the conference-specific NIL licensing agency offered the ability for third-party companies to obtain partial licenses—i.e., football players at the University of Texas at Austin, softball players at the University of Oklahoma, women's volleyball players at Stanford, etc. Under such a structure, the issuance of licenses would not only be responsive to consumer demand for products,[244] it would also encourage competition among companies in the

venture restrictions—are subject to the rule of reason."); Chi. Pro. Sports Ltd. P'ship v. NBA, 961 F.2d 667, 673 (7th Cir. 1992) (classifying the NBA as a joint venture); Bos. Pro. Hockey Ass'n, Inc. v. Dall. Cap & Emblem Mfg., Inc., 510 F.2d 1004, 1009 (5th Cir. 1975) (all NHL teams have authorized NHL Services to be exclusive licensor of team trademarks); *see also* Edelman, *supra* note 111, at 190–91.

238. *See Texaco*, 547 U.S. at 6–7; *see also Am. Needle*, 560 U.S. at 188, 195, 197 ("Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that 'depriv[e] the marketplace of independent centers of decisionmaking.'" (alteration in original) (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984))).

239. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 95–96 (1984) (recounting the district court's description of the NCAA as a 'classic cartel' with complete control over the market for college football).

240. *See id.* Licensing fees directly related to market conditions and the success of the merchandise bearing the players' NIL, paired with equal revenue distribution to players, further abates price-fixing concerns. *See* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 303 (2d Cir. 2008). The author understands that *Salvino*'s holding is not binding on other courts—except those in the Second Circuit. Nonetheless, the concurrence by then-Judge Sonia Sotomayor, as explained in Part II.B.1, provides another avenue for defendants to argue that the agreement on revenue distribution survives a rule-of-reason analysis. *See supra* Parts II.B.1, II.C.1 and accompanying notes.

241. *See Salvino*, 542 F.3d at 320, 326, 328, 332. The author recognizes that a licensing arm for college athletes would differ slightly from players associations because college athletes are not unionized. However, there is no requirement that members be unionized in order to successfully operate a clearinghouse or single licensing agency.

242. *Id.* at 326, 328–34.

243. *See id.* at 327, 334.

244. *See id.* at 326–27.

market as it increases the number of licenses that can be issued at the licensing arm's discretion.[245]

Salvino also provides a helpful framework for the relevant market for a rule-of-reason analysis.[246] However, as discussed in Part II.B.2, questions remain about whether conferences have market power and about whether athletes compete with one another across sports, across universities, or even with their professional counterparts for their NIL opportunities. *Salvino* underscores that these issues turn on an in-depth economic analysis.[247] Even so, recent Supreme Court treatment of college sports suggests skepticism that such conferences wield the sort of market power that would, by itself, render coordinated NIL licensing unlawful,[248] making a properly structured conference-level model less likely to run afoul of § 1.

C. Why Collective Licensing Better Serves Collegiate Athletics than Individualized Alternatives

Many are familiar with the saying "there is no I in team." This stands for the proposition that there are moments in which the collective can and should take precedence over the individual. The NIL landscape is one such instance. It is time to move away from the so-called "wild west" of NIL toward a system that provides athletes with transparency and stability, while benefiting the entirety of collegiate athletics.

The NIL marketplace, and the NCAA as a whole, celebrates its most visible figures—Caitlin Clark, Livvy Dunne, the Cavinder twins, Arch Manning, and others. These highly marketable athletes bring excitement and viewership to college sports.[249] But there would be no college sports without the thousands of other players that make up every team. High-value college athletes, like Caitlin Clark, are rare in that they represent the small percentage

245. *See id.* at 327 ("[S]ince the Clubs made MLBP their exclusive licensing agent for all retail products bearing MLB Intellectual Property, the number of licenses and licensees has multiplied"); *see also* Brown et al., *supra* note 189, at 28 (discussing that an NIL licensing agency could offer licenses "at the desired level of aggregation—for individual college athletes, teams, conferences, or divisions").

246. *See Salvino*, 542 F.3d at 329–31.

247. *See id.*; *see also* Edelman, *supra* note 32, at 646.

248. *See* NCAA v. Alston, 141 S. Ct. 2141, 2163–65 (2021); *see also* Holden et al., *supra* note 57, at 466.

249. *See* Corbin McGuire, *The Caitlin Clark Effect*, NCAA (Feb. 15, 2024), https://www.ncaa.org/news/2024/2/15/media-center-the-caitlin-clark-effect.aspx [https://perma.cc/2PJV-UV9M]; Caroline Price, *2025 NCAA Women's Gymnastics Postseason Breaks Viewership Records*, FORBES (July 24, 2025, at 14:13 ET), https://www.forbes.com/sites/carolineprice/2025/04/22/2025-ncaa-womens-gymnastics-postseason-breaks-viewership-records/ (on file with the *Fordham Law Review*); *see also* Sarah Person, *Women's College World Series Outdraws Men's in 2025 TV Ratings*, SPORTS ILLUSTRATED (June 25, 2025), https://www.si.com/onsi/softball/news/women-s-college-world-series-outdraws-men-s-in-2025-tv-ratings-01jyktknax6y [https://perma.cc/2D6C-X3Q2] (identifying the rise in women's college sports viewership).

of college athletes who eventually play professionally.[250] In a time when college sports viewership is skyrocketing, where college athletes can finally profit from their NIL, it is integral to put the collective above the individual high-value-earning players.

This Note's proposal does not require high-value earners to participate; rather, all athletes should have the ability to opt out of any group licensing programs.[251] However, having the ability to opt out does not mean that an athlete will exercise this right. On the professional level, there have been few instances when a player has chosen to opt out on the belief that they could earn more money than under the distribution structure used by the players associations.[252] Although allowing opt outs by individuals might reduce the overall value of the group license, thereby maintaining the disparity between the high-value athletes and all other college athletes, no one solution is poised to solve every issue that currently exists in the NIL landscape. The purpose of this Note is to advocate for an approach that brings stability to the current system and that would put all college athletes in the best position to maximize their NIL value.

Conference-wide licensing agencies also internalize the externalities currently present in the NIL landscape, particularly with respect to collectives.[253] Centralizing the NIL rights of athletes at the conference level creates a system in which collectives have a limited role in licensing deals.[254] Because the conference-level licensing arm would have to grant licenses to

250. NCAA, NCAA RECRUITING FACT SHEET 2 (2024), https://ncaaorg.s3.amazonaws.com/compliance/recruiting/NCAA_RecruitingFactSheet.pdf [https://perma.cc/ATL6-XB7T] ("Of the student-athletes participating in college sports with professional leagues, less than 2% become professional athletes."). Arch Manning, although likely to be drafted, has not yet gone professional. Additionally, Livvy Dunne and the Cavinder twins have become full-time influencers because of their successful use of social media in building their brand. *See* Adam Rittenberg, *NIL Trailblazers Haley and Hanna Cavinder Ready for What's Next*, ESPN (Feb. 27, 2025, at 11:30 ET), https://www.espn.com/womens-college-basketball/story/_/id/44026952/haley-hanna-cavinder-twins-nil-name-image-likeness-miami-hurricanes-womens-college-basketball [https://perma.cc/K8GM-89DQ]; Madz Dizon, *Livvy Dunne Makes Career Decision Months After Gymnastics Retirement*, Y! ENT. (Oct. 29, 2025, at 12:47 ET), https://www.yahoo.com/entertainment/celebrity/articles/livvy-dunne-makes-career-decision-044715273.html [https://perma.cc/MLF4-2AWC].

251. *See* Andrea Adelson, *Arch Manning Reverses Course, Will Be in EA Sports Video Game*, ESPN (July 9, 2024, at 15:15 ET), https://www.espn.com/college-football/story/_/id/40527193/arch-manning-reverses-course-ea-sports-video-game [https://perma.cc/YTY6-YESE].

252. *See* Edelman, Grow & Holden, *supra* note 104, at 84–85. Opt outs from group licensing programs in professional sports are exceedingly rare, with Barry Bonds being a notable individual who exercised this right. *See* Darren Rovell, *Bonds Will Be Individually Licensed*, ESPN (Nov. 14, 2003, at 20:05 ET), https://www.espn.com/mlb/news/story?id=1661883 [https://perma.cc/CJ2P-4GXG]. For the vast majority of athletes, participation in a group licensing program allows them to earn more than they would under an individualized system. *See* Jessop, *supra* note 11.

253. *See* Brown et al., *supra* note 189, at 27–35 (advocating for a nonprofit licensing agency in college sports); Thompson, *supra* note 11, at 1378–80 (same).

254. *See* Arianna Garcia, Note, *NIL Collectives and the Disadvantage Dilemma: Disparities and Challenges in Collegiate Athletics*, 19 FIU L. REV. 979, 988–89 (2025) (describing an NIL collective that offers NIL deals to college athletes across the country rather than having school-specific collectives).

collectives for the use of the athletes' NIL for group licensing, collectives would only focus on individual deals. For example, collectives could help facilitate individual NIL deals within the parameters set by the conference-specific agencies. The conference-specific licensing arms would also provide oversight, grant group licenses to third-party companies, and manage conference-level and school-level sponsorships.

Finally, conference-level group licensing agencies allow underrepresented athletes to benefit from the aggregation of their NIL with that of more visible teammates and athletes, driving up the revenue for all.[255] Although this Note does not discuss Title IX, group licensing and NIL deals negotiated through conference-wide agencies can promote the same principle—equal access to opportunity—particularly in the wake of the settlement in *House v. NCAA*.[256] As discussed in Part I, many athletes, particularly female athletes and those in nonrevenue-generating sports, historically had limited media visibility.[257] As visibility and fan interest increase, particularly for female athletes,[258] a centralized conference-specific NIL licensing arm can provide much-needed oversight and administrative support, help navigate licensing, protect athlete rights, and ensure consistent quality control. Additionally, it can facilitate higher-value group licensing deals, as the NIL value of female athletes has continued to grow alongside that of their male counterparts.[259]

* * *

This proposal ties together the principles judicially blessed by courts in *American Needle*, *Salvino*, and *Broadcast Music*, to advocate for a system that puts the athlete ahead of both their university's and the NCAA's financial interests.[260] Conference-level NIL agencies would draw on each of

255. *See* Thompson, *supra* note 11, at 1381–83; Jessop, *supra* note 11 ("In fact, for many NCAA athletes, group licensing presents the greatest opportunity to generate the highest NIL income."). As discussed in Part III.B.1., high-value college athletes may opt out, but because the revenue from a group license likely supplements the money they could earn from individual deals, it is unlikely they will.

256. *See* Ben Nuckols, *Female Athletes Appeal Landmark NCAA Settlement, Saying It Violates Federal Antidiscrimination Law*, ASSOCIATED PRESS (June 12, 2025, at 09:19 ET), https://apnews.com/article/ncaa-house-settlement-appeal-female-athletes-e2864d7bcdf74d0c538c1f2e6c98fe6c [https://perma.cc/32VQ-KWVW]. *See generally In re* College Athlete NIL Litig., 803 F. Supp. 3d 959 (N.D. Cal. 2025). As part of the "NIL Claims Settlement," the NCAA agreed to pay three classes of athletes (Football and Men's Basketball Class, Women's Basketball Class, and Additional Sports Class) $2.576 billion over the course of ten years distributed in a specified manner as outlined in the settlement. *Id.* at 974–75. The settlement also contains an "Injunctive Relief Settlement" that allows the NCAA to modify existing rules, or enact new rules, regarding student-athlete compensation, among other things. *In re* College Athlete NIL Litig., 803 F. Supp. at 975–77.

257. *See* Traynor, *supra* note 67, at 223–24, 227–28.

258. *See* Dosh, *supra* note 11.

259. *See* Darvin, *supra* note 232; *see also* Caroline Price, *The Next Livvy Dunne: The Search for the Next NIL Star in Women's College Sports*, FORBES (Sep. 29, 2025, at 17:00 ET), https://www.forbes.com/sites/carolineprice/2025/09/29/the-next-livvy-dunne-the-search-for-the-next-nil-star-in-womens-college-sports/ (on file with the *Fordham Law Review*) (describing one female athlete's popularity).

260. Although this Note's proposed structure intends to benefit the athletes, a conference-level licensing arm also benefits the schools and the conferences themselves. If

these principles—e.g., internal revenue sharing and procompetitive efficiencies—to offer a legally tenable path forward, replacing the current instability with a system of clarity and competitive balance.

CONCLUSION

Collegiate athletics requires collaboration. But it also requires college athletes. It is the job of the universities, conferences, and the NCAA to construct an NIL system that puts athletes first. Conference-specific NIL licensing agencies would provide the needed stability that is currently absent, promote efficiencies by reducing transaction costs for third-party companies, and increase cobranding opportunities to raise the value of the group licensing deals.[261] More importantly, properly structured conference-specific NIL agencies would likely survive rule-of-reason scrutiny, critically reducing litigation risk for college athletes. In 2021, the NCAA gave the power to conferences and universities to regulate the NIL landscape as they saw fit; it is time the conferences take charge and provide the needed stability for athletes to maximize their NIL value.

conferences are responsible for organizing NIL deals and offering various benefits to their students associated with NIL deals, it provides another level at which these parties economically compete with one another for the best athletes. Additionally, as the public becomes invested in the rights of the athletes, the goodwill associated with conferences and universities working with and for the athletes may translate to higher revenue for all parties.

261. Although these conference-specific agencies would be subject to the various state laws that regulate NIL, these agencies, not the athletes, would have to navigate the disparate and patchwork regulatory systems. *See* Holden, Edelman & McCann, *supra* note 2, at 33–35.