# REVISITING CATALYZING FANS: HOW DAN MARKEL PREDICTED THE FUTURE OF COLLEGE ATHLETICS

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## INTRODUCTION

Dan Markel did not like sportsball.[1] He used football pass interference to illustrate how penalties deter rules violations but was not comfortable with the analogy. Dave Fagundes, one of Dan's (many) friends in the legal academy, recalled attempting to convince Dan of the virtues of sports fandom; Dan described watching and caring about sports as "the death of time."[2]

It is ironic, therefore, that Dan's final published work focused on sports and appeared posthumously in a sports journal.[3] It is more ironic that events since the article appeared have made his insight relevant and essential to modern college sports.

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1. *Sportsball*, URBAN DICTIONARY, https://www.urbandictionary.com/define.php?term=sportsball [https://perma.cc/48PH-7YV3].

2. David Fagundes, *Contextualizing Fan Action Committees: A Comment on* Catalyzing Fans, 6 HARV. J. SPORTS & ENT. L. 169, 177 (2015).

3. Dan Markel, Michael McCann & Howard M. Wasserman, *Catalyzing Fans*, 6 HARV. J. SPORTS & ENT. L. 1 (2015).

The origins of his sports insight reflect Dan's scholarly mind and intellectual environment. He presented the germ of an idea for comment on his Facebook page[4]—what if sports fans could pool and spend money to support their favorite players and teams, recruiting star players to join or remain with the team or helping the team offset the costs of paying them. He recruited the authors for our knowledge of sports and of how to translate his idea into the world of sports, law, and sports law. A short popular-media essay[5] and longer scholarly article[6] introduced "fan action committees" ("FACs"), collectives of fans pooling money to distribute to or for the benefit of key players and thus their favorite teams. We considered law-and-policy angles (tax law and free speech), practical and organizational angles (whether it would generate sufficient funds and whether it would achieve its stated goals), and moral and philosophical angles (whether this is best for sports and the best way for members of the public to spend money).[7]

Much has changed since 2012-15 when Dan introduced the idea and we wrote, refined, and published it. Crowdfunding was in its infancy, having existed for about five years;[8] by 2022, it had grown to a multi-billion business across multiple platforms.[9] Social media was in a similarly early state.[10] The original article wondered why no one had done this prior to 2015.[11] Developments across a decade reveal the answer—the times and technology were not ready.

Features of our original work make it a product of its time. We framed an early version around fans convincing the NBA's New York Knicks to retain guard Jeremy Lin,[12] which looks bizarre a decade later. Lin, a journeyman guard, enjoyed a twelve-game run (dubbed "Linsanity") during the 2012 season in which he averaged more than twenty-five points per game and played like one of the best players in

4. Dan led the crowd in moving scholarly conversations online. He started PrawfsBlawg in 2005, at the bleeding edge of the wave of law blogs. He carried his legal ideas onto Facebook in that site's earliest days.

5. Dan Markel & Howard Wasserman, *What If Fans Could Have Paid Jeremy Lin to Stay in New York?*, THE ATLANTIC (July 23, 2012), https://www.theatlantic.com/entertainment/archive/2012/07/what-if-fans-could-have-paid-jeremy-lin-to-stay-in-new-york/260190/ [https://perma.cc/3Z3K-YFYA].

6. Markel et al., *supra* note 3.

7. *Id.* at 27-31; Markel & Wasserman, *supra* note 5.

8. Markel et al., *supra* note 3, at 37.

9. *See* Lloyd Hitoshi Mayer, *Regulating Charitable Crowdfunding*, 97 IND. L.J. 1375, 1382-83 (2022).

10. *See* Colleen T. Scarola, *What Happens on Social Media . . . Could Derail Your Legal Career: Teaching E-Professionalism in Experiential Learning*, 44 VT. L. REV. 165, 169-72 (2019); Jamie P. Hopkins, Katie Hopkins & Bijan Whelton, *Being Social: Why the NCAA Has Forced Universities to Monitor Student-Athletes' Social Media*, PITT. J. TECH. L. & POL'Y, Spring 2013, at 1, 5-10; *see generally* NATHANIEL PERSILY ET AL. SOCIAL MEDIA AND DEMOCRACY: THE STATE OF THE FIELD, PROSPECTS FOR REFORM (2020).

11. Markel et al., *supra* note 3, at 37; *see also* Fagundes, *supra* note 2, at 173.

12. Markel & Wasserman, *supra* note 5.

the league; an injury ended the run, the Knicks declined to match a competing big-money contract offer during the off-season, and Lin never returned to those heights.[13] At least we centered the larger article on fans seeking to lure LeBron James, the peripatetic but greatest (or second greatest) NBA player of all time.[14] Of course, we also imagined readers attempting to attract pollster Nate Silver,[15] one year before Donald Trump's unexpected first presidential victory[16] and a decade before Silver's activities[17] stripped him of his glow in the eyes of liberal readers.

More importantly, the structure of sports changed. When we wrote in 2015, fans could give money to professional athletes in professional sports but not to college athletes.

That professional focus limited the scheme in two respects. It is morally questionable whether fans of ordinary means should give money to millionaire athletes playing for wealthy teams controlled by billionaire owners.[18] And FACs may have little effect in professional sports, as top salaries (for top-tier players whom fans seek to recruit and retain because they help the team win) dwarf the money even the most successful FAC might raise and provide.[19] Fan contributions would not incentive meaningful professional choices, functioning as a symbolic expression of fan support akin to historic fan expenditures such as purchasing team jerseys or purchasing tickets to watch and cheer the players.[20]

College athletics adhered to the ideal of "amateurism," a century-old set of rules defining college athletes as non-professional "student-athletes" (in that order), prohibited from receiving compensation beyond their scholarships.[21] The NCAA solidified this position in the 1950s, defeating arguments that injured players performed labor from which schools generate revenue and thus qualified as employees

13. *See* LINSANITY (Arowana Films 2013); Daniel Chin, *The Legacy of Linsanity, 10 Years Later*, THE RINGER (Feb. 4, 2022, 6:30 AM), https://www.theringer.com/nba/2022/2/4/22916972/jeremy-lin-linsanity-knicks-asian-american-representation-10th-anniversary [https://perma.cc/7UWK-JGSF].

14. Markel et al., *supra* note 3, at 1.

15. *Id.* at 1, 35.

16. *See* Jay Caspian Kang, *What Was Nate Silver's Data Revolution?*, NEW YORKER (June 13, 2023), https://www.newyorker.com/news/our-columnists/what-was-nate-silvers-data-revolution [https://perma.cc/LS9P-E84K].

17. NATE SILVER, ON THE EDGE: THE ART OF RISKING EVERYTHING (2024).

18. Markel et al., *supra* note 3, at 18-20.

19. *Id.* at 22; Markel & Wasserman, *supra* note 5.

20. *See* Markel et al., *supra* note 3, at 6; Fagundes, *supra* note 2, at 170.

21. *See, e.g.*, ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 17-22 (1999); Michael A. McCann, *Sharing Broadcast and Streaming Revenues with College Athletes*, 15 HARV. J. SPORTS & ENT. L. 187, 188 (2024); Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ [https://perma.cc/5HVW-BXWJ].

entitled to workers' compensation.[22] FACs would seem to best apply to this system. College athletes earn no money from their schools, certainly not the tens of millions that top professionals receive annually. Ninety-eight percent of student-athletes never play professionally and thus never earn money for playing their sports.[23] But the rules of 2015 defeated that best application.

Amateurism began to collapse in the mid-2010s.[24] Courts recognized athletes' rights to earn compensation from their name, image, and likeness (NIL),[25] a subspecies of the right of publicity.[26] The Ninth Circuit held that the NCAA's amateurism rules—which stripped athletes of eligibility if they received money on their NIL—violated federal antitrust law.[27] Several states enacted laws barring colleges, conferences, and the NCAA from rescinding athletes' eligibility as punishment for exercising their rights of publicity.[28] Days before those statutes took effect in July 2021 and lacking a coherent legal strategy to challenge them, the NCAA acquiesced and adopted internal regulations allowing athletes to profit on their NILs.[29]

"NIL" deals take many forms. They include endorsement, sponsorship, advertising, and influencing deals (on and off social media).[30] They include licensed use of athletes' personalities and likenesses in video games.[31] A July 2024 class-action settlement (awaiting judicial approval) authorizes athletes to receive NIL compensation from schools and third parties.[32]

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22. *See* Marc Edelman et al., *The Collegiate Employee-Athlete*, 2024 U. ILL. L. REV. 1, 10-12.

23. *See generally* NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA RECRUITING FACTS 2 (2014), https://www.nfhs.org/media/886012/recruiting-fact-sheet-web.pdf [https://perma.cc/LR4S-QXBA].

24. Michael A. McCann, *New Amateurism*, 11 TEX. A&M L. REV. 869, 881-86 (2024).

25. *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1053-54 (9th Cir. 2015).

26. Adam Epstein et al., *An Evolving Landscape: Name, Image, and Likeness Rights in High School Athletics*, 77 VAND. L. REV. 845, 849-50 (2024).

27. *O'Bannon*, 802 F.3d at 1075-76.

28. *See* Michael McCann, Eben Novy-Williams & Emily Caron, *Name, Image and Likeness: A Guide to College Athlete NIL Deals, Compensation*, SPORTICO (Mar. 7, 2023, 12:00 PM), https://www.sportico.com/feature/college-athletes-paid-name-image-likeness-deals-nils-1234616329/ [https://perma.cc/KP44-432V].

29. *See id.*; *see also* Michael McCann, *A Legal Playbook for the NCAA to Challenge State NIL*, SPORTICO (July 24, 2023, 5:55 AM), https://www.sportico.com/law/analysis/2023/legal-how-ncaa-challenge-state-nil-1234731783/ [https://perma.cc/9BVU-B93C].

30. *See generally* Michael H. LeRoy, *Do College Athletes Get NIL? Unreasonable Restraints on Player Access to Sports Branding Markets*, 2023 U. ILL. L. REV. 53, 75.

31. *E.g.*, Ed O'Bannon, *EA Paying College Players Should Have Happened Years Ago*, SPORTICO (May 22, 2023, 5:55 AM), https://www.sportico.com/leagues/college-sports/2023/ea-paying-college-players-should-have-happened-years-ago-1234723581/ [https://perma.cc/NZY3-633P].

32. Michael McCann, *NCAA House Settlement Handed to Judge as Reviews, Challenges Loom*, SPORTICO (July 26, 2024, 5:29 PM), https://www.sportico.com/law/analysis/2024/ncaa-house-settlement-legal-hurdles-1234790331/ [https://perma.cc/XTH3-MYUP].

An emerging source of NIL funding is the "fan collective"—donor-driven pools of funds paid to players who attend, transfer to, or remain with a particular school.[33] These collectives represent cooperative enterprises through which fans seek to help schools land and keep top recruits.[34] In other words, FACs—"an easy way for fans of different means to pool money that is put toward NIL opportunities for a school's student athletes."[35] Although big-money major donors and boosters run many funds, other collectives combine large and small donations from a cross-section of fans.[36] The University of Michigan's "One More Year" Fund raised more than $150,000 from 1,000 fans, distributed to thirteen players who returned for an additional year of college, including several stars who led the Wolverines to the 2023 national football championship.[37] Within days after that championship, the group organized a new fund, called "Those Who Stay," raising more than $10,000 in a few days to retain key players for another title run.[38] And because each university fields many teams with many athletes, college sports offer fans expansive opportunities to develop and operate FACs to support their favorite playes in their favorite sports.

This volume honors Dan Markel's work—primarily in criminal law—on the tenth anniversary of his death. It offers us an opportunity to look beyond Dan's core interest and to revisit his most creative and unexpected idea. As college sports morph into professional sports—something we could not have predicted—they provide the true proving ground and the meaningful future for Dan's idea. Applied to college athletics, FACs offer student-athletes a primary rather than secondary income source. And payments of five or six figures represent meaningful income, allowing funding fans to offer their favorite college

33. Alex Sinatra & Trayveon Williams, *College Athletics and NIL: Perspectives from a Practitioner and an Athlete*, 14 HARV. J. SPORTS & ENT. L. 133, 145-47 (2023); Michelle Bodkin, *Navigating NIL, How Fan Collectives like LockerRoom Help*, KSL SPORTS (Apr. 12, 2022, 12:25 PM), https://kslsports.com/484007/navigating-nil-how-fan-collectives-like-lockerroom-help/ [https://perma.cc/AX2P-FM4Z]; Jacob Feldman, *Top Hoops Recruit Lets Fans Offer NIL Bucks for His College Choice*, SPORTICO (Jan. 15, 2025, 9:00 AM), https://www.sportico.com/personalities/athletes/2025/nate-ament-recruitment-fanstake-byu-nil-offer-1234823953/ [https://perma.cc/4BB6-YXTG]; *see also* Von Lozon, *"One More Year" Fund Created to Help Corum, Others Return to Michigan*, MAIZE N BREW (Jan. 8, 2023, 1:00 PM), https://www.maizenbrew.com/football/2023/1/8/23544833/one-more-year-fund-blake-corum-zak-zinter-trevor-keegan-michigan-wolverines-college-football-valiant [https://perma.cc/CL9R-U59U]; Les Morris, *One More Year Campaign Aids Michigan's Quest for National Championship*, NILNEWSSTAND (Jan. 4, 2023), https://www.nilnewsstand.com/updates/one-more-year-campaign-michigan-national-championship [https://perma.cc/TC4B-6MEY].

34. *See generally* Tan Boston, *The NIL Glass Ceiling*, 57 U. RICH. L. REV. 1107 (2023).

35. Bodkin, *supra* note 33.

36. *See, e.g.*, Lozon, *supra* note 33; Feldman, *supra* note 33.

37. Morris, *supra* note 33.

38. Matthew Postins, *Michigan Collective Launches "Those Who Stay" NIL Campaign*, FANNATION (Jan. 6, 2024, 10:00 AM), https://www.si.com/fannation/name-image-likeness/news/michigan-collective-launches-those-who-stay-nil-campaign-matt9 [https://perma.cc/BU78-UP6K].

players and teams real financial support and more than the symbolic show they can offer professional athletes.

## I. FACS REVISITED

### *A. On the Origin of Concept*

FACs merged the long-standing world of sports-fandom with the then-new world of crowdfunding. Sports fans have long spent money in mostly individual symbolic support of their favorite players and teams—tickets, merchandise, media packages, and taxes to fund new stadiums.[39] FACs envisioned fans pooling their money through emerging crowdfunding mechanisms and giving it to (or for the benefit of) star players as an incentive to join or remain with their favored team.[40] The pool could consist of large contributions from a small number of fans, smaller contributions from a larger number of fans, or symbolic payments from a cross-section; it likely would combine all three.[41]

These might operate in three ways. Under a "direct compensation" model, fans pay the player, giving him collected money for signing with the team Under a "charitable contribution" model, fans donate collected money to a star player's charitable foundation or some other cause. A third, less likely, model envisions fans giving collected money to the team, offsetting the team's share of the player's salary.[42]

Payments to or for the benefit of athletes offer fans a greater degree of influence. Sports fandom tends to the passive and symbolic—fans pay their money to support their players and teams, hoping for (but not always demanding) on-field success. By purchasing more tickets and merchandise when the team succeeds, fans hope to incentivize the organization to assemble a winning team; when the players or team do something fans do not approve of, they can use their spending choices to deter or sanction such conduct.[43] And many efforts require some degree of coordination and publicity—a boycott[44] succeeds only if it attracts sufficient supporters and the target knows about it. Ten fans declining to watch games on TV does not change behavior; ten thousand fans emptying a stadium might.[45]

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39. Markel et al., *supra* note 3, at 21 & n.60.

40. *Id.* at 6-8.

41. *Id.* at 9.

42. *Id.* at 10-11, 31 n.91.

43. *See* Fagundes, *supra* note 2, at 170-72.

44. *See id.* at 171-72.

45. Eric He, *Oakland Athletics fans boycott home opener outside stadium in protest of Las Vegas move*, ASSOC. PRESS (Mar. 29, 2024), https://apnews.com/article/opening-day-athletics-boycott-protest-547133ae8faa799766d9a31eca97bfd6 [https://perma.cc/54AQ-V5SK]; Megan Cardona, *Hundreds of Dallas Mavericks fans protest Luka Doncic trade to Los Angeles Lakers*, KERA NEWS (Feb. 8, 2025, 4:25 PM), https://www.keranews.org/news/2025-02-08/hundreds-of-dallas-mavericks-fans-protest-luka-doncic-trade-to-lakers [https://perma.cc/U4L2-4V8D].

FACs offer something different in kind—an active vehicle to express support directly to players.[46] Unlike passive fandom or remote boycott, fans open a direct business deal with the star player. They establish a trilateral relationship among fans, teams, and players. The player/team relationship remains primary, a larger monetary exchange controlling the initial terms of engagement—if player and team lack some mutual interest, fan influence never enters the picture. But FACs allow fans to do more than watch that exchange. They offer the player a direct benefit, actively influencing the team's construction—and performance—through an unmediated relationship to the player.[47]

We explored legal, practical, moral, and philosophical objections to this idea. We considered effects on competitive balance within sports leagues and the concern that the system benefits wealthy teams in large cities with larger and wealthier fan bases; those teams enjoy existing benefits without adding FACs to the mix.[48] We considered distributive-justice concerns—whether ordinary fans spending hard-earned money to reward millionaire players for playing a sport for a particular team was the socially optimal or most just use of money.[49] We considered concerns for futility—whether competing fan groups will cancel each other out or whether the failure to lure a player (or to convince the team to pursue a player) will frustrate and disappoint fans.[50] In a response essay published alongside our piece, David Fagundes considered wealth effects—FACs become the plaything of one or a few wealthy fans rather than reflecting the collective will of a team's broader fan base, thereby "exacerbat[ing] the rich/poor gap in sports by providing yet another means by which wealthier individuals enjoy advantages, even over more passionate but less wealthy middle- and lower-class fans."[51] Ultimately, the entire enterprise could collapse among internal disputes within the FAC over how to spend the money, external disputes between the FAC and the team that retains final say in player transactions, and inter-FAC competition.[52]

We rejected these objections, citing the basic principle that people in a free society with a market economy will spend their money how they wish to spend it. No "pure," non-monetized fandom exists or occupies a higher moral plane than the monetized fandom reflected in FACs. No reason therefore exists to single out FACs as one uniquely problematic form of fan support.[53]

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46. Markel et al., *supra* note 3, at 8.
47. *See id.* at 7-8.
48. *Id.* at 22-24.
49. *Id.* at 18-20.
50. Markel et al., *supra* note 3 at 20-22.
51. Fagundes, *supra* note 2, at 174.
52. *Id.* at 174-75.
53. Markel et al., *supra* note 3, at 19-22, 24-26, 30-31.

That Dan did not like or see the value in sports proves the point. He would have believed FACs a waste of money and a misallocation of societal efforts and resources—the death of time. But he would have recognized that millions of people love sports and want to translate that love (and money) into a project such as a FAC. Neither legal, practical, nor ethical objections should stand in their way.

### *B. On the Limits of Concept*

The year 2014 feels a lifetime ago in another world—before two Trump Administrations and COVID and January 6 and the death of judicial deference to regulatory schemes.[54] The different world in which we wrote circumscribed the scope and framing of Dan's FAC insight. We did not know what we had because we could not predict how the world would change. We thus limited the idea in the face of limitations we saw and developments we could not see.

#### *1. Coordination and Communication*

One 2014 question was why FACs had not developed by that point.[55] That no one had thought of it might suggest the absence of a fan market or interest.[56] Or it might have been unnecessary—fans possessed other, superior mechanisms for spending money to shape their teams.[57]

We concluded that the concept had not ripened. Crowdfunding had existed for about five years and the full range of parameters and applications had not developed, despite a few low-grade efforts.[58] Fans faced problems of coordination, lack of information, social norms against such arrangements, and institutional barriers within sports.[59] The fan/team/player trilateral relationship added layers of complexity.[60] One high-profile success did suggest the potential—91,000 fans raised $5 million (an average of $62 per person) to finance a movie update of the *Veronica Mars* TV series.[61] That success hinted at why professional sports may have been slow to follow. It was easy for fans to give money to an artist to make a film; it is more difficult for fans to navigate as outsiders between teams and players.

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54. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272-73 (2024).

55. Markel et al., *supra* note 3, at 37; Fagundes, *supra* note 2, at 172-73.

56. *See* Markel et al., *supra* note 3, at 37.

57. *See* Fagundes, *supra* note 2, at 173.

58. Markel et al., *supra* note 3, at 37.

59. *Id.* at 38-39.

60. *Id.* at 7-9.

61. *Id.* at 6; Jason Cohen, *Reviving an Old Series the New Way: Fan-Financing*, N.Y. TIMES (Apr. 27, 2013), https://www.nytimes.com/2013/04/28/us/veronica-mars-will-return-thanks-to-fan-financing.html [https://perma.cc/BS94-92G3].

Time has alleviated limitations on coordination and information. From its 2014 infancy, crowdfunding has expanded into a billion-dollar market across multiple platforms. Estimates of its precise scope—in terms of platforms, users, projects, and funds—vary wildly. Writing in 2022, Lloyd Mayer finds sources suggesting anywhere from 600 to 3,500 platforms; anywhere from $12 billion to $25.8 billion in funds; and predictions of growth to almost $100 billion by 2025. Other sources estimate more than 740,000 projects since 2014 financed by more 66 million backers Regardless of exact figures, hundreds if not thousands of crowdfunding platforms host hundreds of thousands of projects, supported by millions of contributors, providing billions of dollars collectively.[62]

The same holds for information costs. Social media as we understand it had existed for less than a decade when we wrote the original piece—Facebook formed in 2004 and Twitter in 2006. By 2022, 4.70 billion people used social media worldwide.[63] The opportunities and willingness to communicate and coordinate with others is boundless.

### *2. Professional Sports and College Sports*

The focus on professional sports in our proposal[64] and Fagundes' response[65] further limited the concept. At the time, this represented the sole context in which fans could offer money or things of value to players because of their athletic skill.[66]

That professional focus caused us to understate the real futility issue—professional athletes' salaries dwarf the money a group of fans can raise or contribute. FAC money therefore cannot move the needle for a free-agent professional choosing a team. That problem has increased as salaries have increased across the past decade—the highest NBA salary jumped from $ 25 million in 2024 to more than $ 55 million in 2024; the average NBA salary almost double from $4.5 million in 2015 to more than $8 million in 2024.[67] The thousands or hundreds of thousands of dollars a FAC might raise does not make a dent in that. The $5 million raised to produce one movie may not be replicable across multiple teams seeking multiple star players earning tens-of-

62. Mayer, *supra* note 9, at 1381-82; Andrew A. Schwartz, *Crowdfunding Issuers in the United States*, 61 WASH. U. J.L. & POL'Y 155, 157 (2020).

63. Jason R. Hildebrand, *If a Social Media Platform Was an Intersection, Should Contract Law or Free Speech Have the Right-of-Way with Respect to User Content?*, 18 J. BUS. & TECH. L. 171, 173 (2023).

64. Markel et al., *supra* note 3, at 5.

65. Fagundes, *supra* note 2, at 176.

66. *See infra* Section II.A; *supra* notes 21-29 and accompanying text.

67. Dimitrije Curcic, *NBA Salaries Analysis (1991-2022)*, RUN REPEAT (Mar. 25, 2024), https://runrepeat.com/salary-analysis-in-the-nba-1991-2019 [https://perma.cc/BUW9-7YCR]; Ryan Phillips, *What's the Average NBA Salary for 2024-25 Season?*, SPORTS ILLUSTRATED (Sept. 18, 2024), https://www.si.com/nba/whats-average-nba-salary-for-2024-25-season [https://perma.cc/6NZY-2U9H].

millions of dollars each year. While not meaningless, FAC payments become symbolic and expressive rather than financially significant—a way to express the fan support that might make the city and team an attractive destination.[68] But they do not affect player's financial choices.

The disparity between salary and FAC funds also prompted us to favor the charitable model for professional sports, in which fans donate money to a player's charitable foundation or some other cause.[69] That model further highlights the symbolic and expressive nature of fan contributions—they support a player by supporting the player's favored philanthropic efforts. Hundreds of thousands of dollars might make a difference to that preferred cause. And it overcomes the distributive-justice problem, as the money goes not to an already-wealthy athlete but to some (presumably) worthy projects.[70]

We had no opportunity to apply the FAC idea outside professional sports to the big-money world of Division-I college athletics. Two features defined the college game as of 2014. It operated under a long-standing regime of amateurism—players were student-athletes (in that order), entitled to a free education but ineligible for monetary compensation from their schools or any outside source arising from or related to their athletic skills.[71] And NCAA regulations limited player movement among schools; transferring players were ineligible to play for a new school for one year and the current coach could veto a player's transfer choices.[72] That combination eliminated any role for FACs in college sports. Fans had no opportunity to compensate players for their athletic ability and status as star players, no need to convince current players to remain at the school, and limited opportunities to recruit transfers from other schools. At best, fans could pool money to vocalize their support for potential recruits through t-shirts[73] and billboards.[74]

College-sports rules have changed since 2014, following a series of lawsuits and court decisions and major changes to NCAA policies enacted under threat of further litigation. Those changes enable player movement and create opportunities for players to receive

68. Markel et al., *supra* note 3, at 9, 21.

69. *Id.* at 10-11.

70. *Id.* at 31.

71. *See* ZIMBALIST, *supra* note 21, at 17-22; Branch, *supra* note 21; McCann, *supra* note 21 at 188-89.

72. Roger D. Blair & Wenche Wang, *The NCAA's Transfer Rules: An Antitrust Analysis*, 11 HARV. J. SPORTS & ENT. L. 1, 5 (2020).

73. *See, e.g.*, Brandon Gurney, *From Chicago to Provo? BYU Fans Plan T-shirt Campaign for Jabari Parker*, DESERET NEWS (Nov. 2, 2012, 2:44 PM), https://www.deseret.com/2012/11/2/20509154/from-chicago-to-provo-byu-fans-plan-t-shirt-campaign-for-jabari-parker/ [https://perma.cc/AH48-7ZPW].

74. *See, e.g.*, Markel et al., *supra* note 3, at 33 & n.96.

compensation. And those changes open the field for fans to collect and contribute money to players—they open the field to FACs.

## II. NIL COLLECTIVES AS FACS

### *A. The Shift from Amateurism in College Athletics*

The NCAA long operated under a model of amateurism—athletes receive a free education but cannot otherwise receive compensation, from their schools or other sources, arising from or related to their athletic skills.[75] NCAA rules prohibited booster clubs (which existed at every big-time program) from paying players, although illicit payments proliferated for years.[76] Colleges rejected suggestions that student-athletes were school employees (despite producing revenue for the institutions) and repelled workers' compensation[77] and labor organizing efforts.[78] Star players did not move between schools. The best men's basketball players played one college season before entering the NBA draft.[79] For those who spent multiple years in college, the rules limited movement; transferring players could not play for the new school for one year, and a coach could veto a player's transfer choice.[80]

The NCAA fought to preserve this system, even winning when losing. *NCAA v. Board of Regents of the University of Oklahoma*[81] declared that NCAA rules limiting a school's national television appearances violated federal antitrust law.[82] But Justice Stevens wrote that the NCAA "plays a critical role in the maintenance of a revered tradition of amateurism in college sports" and thus "[t]here can be no question but that it needs ample latitude to play that role."[83] The NCAA wielded that language to convince courts to defer to its efforts to preserve amateurism in the face of antitrust liability.[84]

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75. *See* ZIMBALIST, *supra* note 21, at 17-22; Edelman et al., *supra* note 22, at 10-12; McCann, *supra* note 21, at 188-89; Branch, *supra* note 21.

76. *See* ZIMBALIST, *supra* note 21, at 22-25, 45-46; Branch, *supra* note 21.

77. *See, e.g.*, Edelman et al., *supra* note 22, at 21-23.

78. *See generally* Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from* Northwestern University *and Potential Next Steps in the College Athletes' Rights Movement*, 38 CARDOZO L. REV. 1627, 1635-36 (2017).

79. NBA rules prohibit teams from drafting or signing players directly out of high school, requiring players to spent at least one season in college or a different professional league. NBPA CBA Art. X, *available at* https://imgix.cosmicjs.com/25da5eb0-15eb-11ee-b5b3-fbd321202bdf-Final-2023-NBA-Collective-Bargaining-Agreement-6-28-23.pdf [https://perma.cc/9SJV-85JU].

80. *See* Blair & Wang, *supra* note 72, at 5.

81. 468 U.S. 85 (1984).

82. *Id.* at 88, 120.

83. *Id.* at 120.

84. *See generally* Sam C. Ehrlich, *A Three-Tiered Circuit Split: Why the Supreme Court Was Right to Hear* NCAA v. Alston, 32 J. LEGAL. ASPECTS SPORT 1, 19, 48 (2022).

Amateurism's demise begins with the case of Ed O'Bannon, a former UCLA basketball star. O'Bannon sued the NCAA and video game publisher Electronic Arts for using college players' likenesses in video games without their consent and for prohibiting them from earning compensation for that use.[85] NIL forms a subset of the right of publicity, which forbids commercial use of another person's identity and unique characteristics without their consent.[86] Professional athletes wield that right when signing endorsement deals and granting chosen brands the exclusive right to use their identity for product or service promotion.[87] Actors, musicians, and influencers rely on this right to prevent unauthorized use of their fame without consent and without payment.[88]

College athletes always possessed this right of publicity.[89] But NCAA rules stripped them of eligibility and their athletic scholarships for exercising that right.[90] That is, the NCAA—in the name of amateurism—prohibited athletes from availing themselves of their publicity rights in exchange for the opportunity to play college sports. *O'Bannon* held that amateurism rules created an antitrust conspiracy between the NCAA and its member schools, allowing them to use (and profit from) athletes' NIL in video games and other commercial products.[91] Several states responded to *O'Bannon* with laws overriding NCAA regulations and guaranteeing athletes at schools in those states the right to use NIL and retain athletic eligibility.[92] Facing judicial and statutory defeat, the NCAA adopted new internal policies allowing athletes to profit from their identities including through NIL.[93]

*O'Bannon* was not the players' lone judicial victory. *NCAA v. Alston*[94] accorded the NCAA ordinary (i.e., not deferential) antitrust scrutiny for rules limiting athlete compensation,[95] rejecting the NCAA's longstanding reliance on *Board of Regents* dicta.[96] *Alston* concerned a peripheral college-sports issue—NCAA rules barring colleges from compensating athletes for academic-related expenses, such as

85. *Id.*

86. *See* Epstein et al., *supra* note 26, at 849-50.

87. *See* Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 260-61 (2005).

88. *See* Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 202-04 (2002).

89. *See generally* J. Thomas McCarthy, *Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1710 (1987).

90. *See* ZIMBALIST, *supra* note 21, at 17-22.

91. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1075-76 (9th Cir. 2015); *see also* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F.Supp. 3d 955, 1007 (N.D. Cal. 2014).

92. *See* McCann *supra* note 21, at 190.

93. *Id.*

94. 594 U.S. 69 (2021).

95. *Id.* at 87-95.

96. *Id.* at 91-93; *see also supra* notes 81-83 and accompanying text.

computer fees, study abroad, and internships.[97] But the decision—and the rhetoric in multiple opinions—signaled a fundamental shift in how the Court views the NCAA and amateurism.

Justice Kavanaugh's concurring opinion excoriated the NCAA, depicting the organization and its member schools as a cartel[98] engaged in "price-fixing labor," which is "ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work."[99] Rules barring athletes from opportunities for compensation "would be flatly illegal in almost any other industry in America."[100] Although more cautious in tone, Justice Gorsuch's majority opinion highlights the disparity between compensation opportunities available to players compared with those available to the NCAA and its member schools.[101] Some NCAA officials and coaches earn millions of dollars a year, while athletes earn nothing.[102] The annual March Madness basketball tournament is worth more than a billion dollars—money shared among a host of entities other than the players.[103]

Subsequent lawsuits used *Alston* to challenge a host of NCAA regulations and followed a similar pattern—courts rule (or appear ready to rule) against the NCAA and the NCAA abandons the challenged policy. A district court issued a temporary restraining order prohibiting the NCAA from enforcing a rule limiting how often an athlete can transfer schools without a waiver or sitting out a year;[104] the NCAA settled the case, allowing athletes to transfer more easily.[105] Another district court enjoined enforcement of a rule restricting how NIL collectives recruit prospective high-school and transfer athletes;[106] the NCAA abandoned enforcement for the remainder of the upcoming academic year.[107] Finally, proposed settlements of three antitrust cases

97. *See Alston*, 594 U.S. at 103-06.

98. *See id.* at 109-11 (Kavanaugh, J., concurring).

99. *Id.* at 110 (Kavanaugh, J., concurring) (citing Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006)).

100. *Id.* at 109 (Kavanaugh, J., concurring).

101. *See id.* at 79-80 (majority opinion).

102. *Id.* at 80.

103. *Id.* at 79-80.

104. Ohio v. Nat'l Collegiate Athletic Ass'n, 706 F. Supp. 3d 583, 602 (N.D. W. Va. 2023) (order granting temporary restraining order).

105. *NCAA, States Reach Agreement in Multiple-Transfer Athlete Lawsuit*, ESPN (May 30, 2024, 4:38 PM), https://www.espn.com/college-sports/story/_/id/40246638/ncaa-states-reach-agreement-multiple-transfer-athlete-lawsuit [https://perma.cc/RP9R-XXP3].

106. Tennessee v. Nat'l Collegiate Athletic Ass'n, No. 3:24-CV-00033, 2024 WL 755528, at *6 (E.D. Tenn. Feb. 23, 2024) (order granting preliminary injunction).

107. Michael McCann & Daniel Libit, *NCAA Abandons NIL Enforcement After Antitrust Court Loss*, SPORTICO (Mar. 1, 2024, 6:59 PM), https://www.sportico.com/leagues/college-sports/2024/ncaa-nil-enforcement-antitrust-tennessee-1234768948/ [https://perma.cc/NEZ2-99MF].

may end amateurism at major programs,[108] allowing colleges to opt into an arrangement to pay players *qua* players under a $21-million revenue-sharing model.[109] The district court preliminarily approved settlement in October 2024 and should make a final decision in 2025.[110]

The settlement envisions greater NCAA control over the NIL market, including requiring that NIL deals exceeding $600 reflect fair market value.[111] This could boost the NCAA's ability to distinguish permissible fair-market-value NIL contracts from prohibited pay-for-play arrangements,[112] although some doubt the association can consistently and fairly distinguish the two.[113] Regardless, NIL deals should continue transforming college sports.[114]

### *B. FACs and College Athletics*

NIL schemes include "fan collectives"—fan-donated pools of funds paid to players who joine and remain with the team.[115] In other words, FACs—"an easy way for fans of different means to pool money" for student athletes[116] in lieu of or in addition to money from the school and other sources.

Recent litigation outcomes and rule changes expand the field for fan collectives. Recognizing that fans wish to spend money to support college sports, *Alston* allows them to direct their money to the players rather than to colleges and conferences.[117] Post-*Alston* settlements increased opportunities for players to change schools; they thereby increased opportunities (and need) for fans to raise, collect, and spend money to retain current players and to recruit new players.[118] And because universities would pay college athletes a fraction of what their

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108. *See generally* House v. Nat'l Collegiate Athletic Ass'n, 545 F. Supp. 3d 804, 819-20 (N.D. Cal. 2021); Complaint at 4, 29, Hubbard v. Nat'l Collegiate Athletic Ass'n, No. 4:23-cv-01593 (N.D. Cal. Apr. 4, 2023); Complaint at 57, Carter v. Nat'l Collegiate Athletic Ass'n, No. 3:23-cv-06325 (N.D. Cal. Dec. 7, 2023

109. McCann, *supra* note 32.

110. Eric L. Han et al., *NCAA Proposed Settlement Receives Preliminary Approval*, ROPES & GRAY (Nov. 13, 2024), https://www.ropesgray.com/en/insights/alerts/2024/11/ncaa-proposed-settlement-receives-preliminary-approval [https://perma.cc/CX3X-5PM9].

111. Michael McCann, *House Objections Might Not Sway Judge as Court Hearing Looms*, SPORTICO (Feb. 2, 2025, 8:00 am), https://www.sportico.com/law/analysis/2025/house-objections-ncaa-1234826348/ [https://perma.cc/37EP-ML7J].

112. *Id*.

113. *See generally* Meg Penrose, *The NCAA' s Challenge in Determining NIL Mark et Value*, 76 OKLA. L. REV. 203 (2024).

114. Daniel Libit et al., *Inside a Big Ten Athlete Revenue Sharing Agreement*, SPORTICO (Jan. 19, 2025, 3:50 pm), https://www.sportico.com/leagues/college-sports/2025/big-ten-athlete-revenue-sharing-agreement-1234824623/ [https://perma.cc/P5WD-GNCX].

115. *See* sources cited *supra* note 33.

116. Bodkin, *supra* note 33.

117. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 91, 107 (2021); *see also id.* at 108-10 (Kavanaugh, J., concurring).

118. *See supra* notes 104-09 and accompanying text.

professional counterparts receive, pooled fan money forms a substantial source of athlete income. FACs provide fans greater voice and greater influence on player choice. All of which cements a closer relationship between fans and players, unmediated by the university.

FACs fit college sports better than they do professional sports in three respects.

### *1. Intensity of Fandom*

FACs reflect and match the intensity of college-sports fandom. College teams attract wide and diverse fan bases—area residents (state citizens support the flagship public university); those who grew up in the area and established fandom as children; current and former students for whom sports fandom constitutes an essential piece of the college experience; and members of the wider culture who connect with a team (Georgetown men's basketball and University of Miami football became 1980s national cultural icons[119]). Alumni retain a personal and sentimental attachment to alma mater, intertwined with deep feelings for their time in college and the benefits of their education. Attendance and television data suggest college sports' increasing popularity, buoyed by a dramatic growth in interest in women's basketball and women's volleyball.[120] This wide and deeply invested fan base includes many who would express their support through FACs.

### *2. More Funding Opportunities*

College sports offer more fan-funding opportunities. A big-time college athletics program includes as many as twenty teams (men's and women's), allowing fans to support multiple teams with many athletes. FACs need not limit their efforts to "revenue sports" (football, men's basketball, women's basketball), although they attract outsize money and attention. A smaller number of fans dedicated to a college's gymnastics team, swim team, or volleyball team might collect and spend a comparatively smaller amount of money to attract an Olympic-caliber athlete[121] to attend the school and help a team that does not otherwise

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119. *See generally* THOMAS F. SCHALLER, COMMON ENEMIES: GEORGETOWN BASKETBALL, MIAMI FOOTBALL, AND THE RACIAL TRANSFORMATION OF COLLEGE SPORTS (2021); Zack Tupper, *Georgetown Basketball in Reagan's America*, *in* DC SPORTS: THE NATION'S CAPITAL AT PLAY 267-68, 273 (2015).

120. *See* Alyssa Meyers, *Interest in College Sports Is on the Rise, Report Says*, MARKETING BREW (Mar. 5, 2024), https://www.marketingbrew.com/stories/2024/03/05/interest-in-college-sports-is-on-the-rise [https://perma.cc/BSU6-WPGQ]; Jamie Davis, *From Youth to the Pros, Volleyball is Surging in the U.S.*, Sportico (Oct. 26, 2023), https://www.sportico.com/leagues/other-sports/2023/us-volleyball-participation-surging-1234742921/ [https://perma.cc/LFE4-HS5R].

121. *E.g.*, Christine Zhu, *NIL Allows Elite Gymnasts to Balance Olympic Dreams and College*, CAP. NEWS SERV. (May 7, 2024), https://cnsmaryland.org/2024/05/07/nil-allows-elite-gymnasts-to-balance-olympic-dreams-and-college/ [https://perma.cc/RST6-FXXK]; Brian Hendrickson, *Michigan Gymnastics Duo Takes Olympic Stage by Storm*, NCAA (Aug. 1,

attract money or publicity. A smaller number of fans dedicated to the women's lacrosse team[122] might collect and spend a comparatively smaller amount of money that helps a non-revenue program retain players and remain among the best in the nation. Less money may be at stake for these teams. But fans need not substitute for the million-dollar salary the quarterback could earn in the NFL; they express and provide support for an athlete who otherwise would not earn money as an athlete.[123]

### *3. Helping Universities Navigate Financial Crises*

Fan-funded payment schemes may alleviate a financial crisis at the intersection of two higher-education trends—the rising costs of high-caliber athletics programs and the shrinking of university revenues.

In an August 2024 court filing, the NCAA claimed 97% of D-I programs report that athletic-department expenses exceed revenues without university subsidies.[124] This is consistent with studies finding that most programs lose money, though that calculation does not include favorable effects in attracting alumni donations, generating media hype, and enticing high school applicants who wish to attend a college with big-time sports.[125] Should schools begin directly compensating athletes—as seems likely[126]—the "price" of operating winning programs will rise. At the same time, universities face a "demographic cliff"—lower birth rates following the Great Recession of 2008 will produce a nationwide drop in college-attending students beginning in 2025 and lasting for more than a decade.[127] Colleges must provide greater tuition discounts and other financial concessions to compete for a smaller pool of students.[128] Universities face new financial

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2024, 9:00 AM), https://www.ncaa.org/news/2024/8/1/olympics-michigan-gymnastics-duo-takes-olympic-stage-by-storm.aspx [https://perma.cc/FBD5-KT2P].

122. *E.g.*, Jake Epstein, *Lacrosse: Northwestern's Kelly Amonte Hiller Reaches Final Hurdle on Path to Historic Milestone*, DAILY NW. (May 26, 2024), https://dailynorthwestern.com/2024/05/26/sports/lacrosse-northwesterns-kelly-amonte-hiller-reaches-final-hurdle-on-path-to-historic-milestone/ [https://perma.cc/DHX9-WFKZ].

123. *Supra* note 25 and accompanying text.

124. *See* Michael McCann, *NCAA Fires Back at Objectors, Defends House Settlement*, SPORTICO (Aug. 18, 2024, 5:09 PM), https://www.sportico.com/law/analysis/2024/ncaa-fires-back-at-house-objectors-1234793901/ [https://perma.cc/G8MT-PBNG].

125. Geoffrey Christopher Rapp, *Can College Sports Unions Save College Sports and Save Unions?*, 5 MISS. SPORTS L. REV. 16, 18 (2015).

126. *See supra* notes 106-111 and accompanying text.

127. *See* Editorial, *The "Demographic Cliff" Is Coming*, BOS. GLOBE (Apr. 7, 2024), https://www.bostonglobe.com/2024/04/07/opinion/demographic-cliff-colleges-universities/ [https://perma.cc/2U79-BXUR].

128. Rapp, *supra* note 125, at 18; *see also* Megan M. Carpenter, *Risk-Taking and Reform: Innovation for a Better Education*, 22 U.N.H. L. REV. 141, 143 (2024) (discussing schools' debt problems at a time when enrollment is shrinking).

challenges to remain universities, with experts predicting that more colleges will close during this period.[129]

That combination—decreased enrollment, decreased overall revenue, and increased athletic costs—places some colleges in a precarious position. They might respond by downsizing or reorganizing their athletics programs.[130] Any efforts to balance the budget by cutting varsity teams must comply with Title IX,[131] ensuring that cuts do not create sex-based disparities between opportunities for male and female athletes.[132] Schools also might convert some varsity teams to club teams, although club sports' lesser status (and financial support) would present as a demotion.[133]

Collectives and other fan-financed NIL mechanisms might mitigate these looming financial challenges. Boosters, fans, and other engaged third parties can pool resources and pay athletes to remain with or join the team; schools can retain teams on varsity status, remain competitive, and remain financially stable. FACs also present a more palatable and less problematic solution to rising athletics costs compared with gender-discriminatory program cuts, to say nothing of rumors of private equity and sovereign wealth funds buying into college sports.[134]

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129. *See, e.g.*, Nic Querolo, *Private Colleges Hurt by Rising Expenses Despite Tuition Gains*, BLOOMBERG (July 3, 2024, 1:30 PM), https://www.bloomberg.com/news/articles/2024-07-03/private-colleges-hurt-by-rising-expenses-despite-tuition-gains [https://perma.cc/UT42-PDSV]. Colleges may rely on online and hybrid programs to boost enrollment. Emma Hall, *Online and Hybrid Learning Are Increasingly Popular. Now Colleges Have to Keep Up.*, CHRON. HIGHER EDUC. (Aug. 15, 2023), https://www.chronicle.com/article/online-and-hybrid-learning-is-increasingly-popular-now-colleges-have-to-keep-up [https://perma.cc/97UQ-P9VV]. But those programs generate less revenue than residential programs. Bart Pfankuch, *Pandemic Puts Strain on State's Colleges*, RAPID CITY J. (Dec. 19, 2020), https://rapidcityjournal.com/news/state-and-regional/pandemic-puts-strain-on-states-colleges/article_e777020c-940e-5194-b344-8e50d41337e8.html [https://perma.cc/FCB2-7FH2].

130. Brad Wolverton, *New Benefits for Athletes Trigger Talk of Cutbacks in College Sports*, CHRON. HIGHER EDUC. (Jan. 15, 2015), https://www.chronicle.com/article/new-benefits-for-athletes-trigger-talk-of-cutbacks-in-college-sports/ [https://perma.cc/7H77-P432].

131. *See* 20 U.S.C. § 1681(a); *see also* ZIMBALIST, *supra* note 19, at 61-62.

132. ZIMBALIST, *supra* note 21, at 71; Ray Yasser & Samuel J. Schiller, *Gender Equity in Athletics: The New Battleground of Interscholastic Sports*, 15 CARDOZO ARTS & ENT. L.J. 371, 372-74 (1997).

133. Club teams play against other colleges and wear the school logo and colors. Tom Farrey, *Colleges Are Cutting Varsity Sports. That Could Be a Good Thing.*, N.Y. TIMES (Oct. 13, 2020), https://www.nytimes.com/2020/10/13/sports/college-sports-cuts.html [https://perma.cc/6XXT-3322]. But athletes do not receive athletic scholarships, team funding comes from outside the athletics department, and support (facilities, travel, and lodging) is more modest than for varsity athletes. McCann, *supra* note 24, at 897.

134. *See* Eben Novy-Williams, *As NCAA Settlement Looms, So Does College Sports' Private Capital Er*a, SPORTICO (May 22, 2024, 5:55 AM), https://www.sportico.com/business/finance/2024/college-sports-private-equity-investments-1234779804/ [https://perma.cc/26J9-7ZVM] (discussing the role of private equity in college sports); Jason Clinkscales, *Ex-Deion Sanders Assistant Claims He Lobbied Saudi PIF for Buffs' NIL*, SPORTICO (Aug. 22, 2024, 1:08 PM), https://www.sportico.com/leagues/college-sports/2024/deion-sanders-colorado-buffaloes-former-staffer-pif-nil-1234794406/ [https://perma.cc/GH4P-WZP7] (reporting on a claim that a football coach at the University of Colorado sought financial assistance from

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FACs operate in untested waters, so their full application and potential remains to be seen. This NIL regime has existed for less than three years—the NCAA opened the floodgates in July 2021. Michigan's "One More Year" Fund—raising $150,000 from 1,000 fans to support key players on the 2023 national champion football team—demonstrates the potential.[135] Fans and players will acclimate to this new system of showing support and receiving compensation, together developing new and creative ideas and approaches.

### *C. Problems with NILs and FACs in College Athletics*

Our original proposal operated within the professional sports paradigm—a knowing transaction between a sophisticated player (with a financial team or charitable foundation) and a FAC. The market for professional athletes is relatively stable, with clear collectively bargained rules for player contracts, free agency, when and how players and teams negotiate, and when players may seek to change teams. Fan-funding efforts operate within that scheme; they are stable because the system is stable.

But athlete pay, unlimited transfers, and NIL are new to college sports; they operate in a regulatory no-man's land—a "Wild West" where everything and anything goes.[136] With any player eligible to transfer to any school at any time, the floodgates open to a wave of transfers precipitating a wave of FAC competition for player allegiance. FACs become futile if competing groups of fans cancel one another out.[137] A system of constant player churn among schools highlights that futility.

In proposing FACs, we raised and considered numerous potential problems in their internal administration—wealthier donors exercising outsize influence on FAC decisions or internal disagreement among donors as to the best use of the funds.[138] We never considered blatant illegality or fraud between FAC and athlete. But reports of lying and false promises abound—collectives want the best recruits and recruits want the best deals, making conflict and gamesmanship

Saudi Arabia's Public Investment Fund, also known as PIF, to help pay athletes for their NIL).

135. *See supra* notes 33, 37-38 and accompanying text.

136. *See* Michael Rosenberg, *The NCAA Has Let Name, Image and Likeness Become the Wild West*, SPORTS ILLUSTRATED (Dec. 4, 2023), https://www.si.com/college/2023/12/04/ncaa-let-name-image-likeness-deals-become-wild-west [https://perma.cc/M9D3-KWY8].

137. *See* Markel et al., *supra* note 3, at 20; Fagundes, *supra* note 2, at 175.

138. Markel et al., *supra* note 3, at 19-22; *see also* Fagundes, *supra* note 2, at 174.

inevitable.[139] Schools also lack the wherewithal to protect athletes from exploitative collectives, fans, boosters, and agents.[140]

These problems have triggered litigation. Quarterback Jaden Rashada alleged various actors at the University of Florida fraudulently induced him to forfeit a $9.5 million NIL deal with one school by tricking him into believing he would receive $13.85 million to play for the Gators;[141] the collective severed ties without paying.[142] Rashada's complaint contains texts from a UF recruiter saying the school needed to "lock down Jaden!" and get him "to flip this week."[143] UF's recruiter calls "overly optimistic" promises, including through NIL offers, a lawful part and parcel of the college sports recruiting industry.[144] At a minimum, Rashada's lawsuit exposes the tawdry side of NIL and collectives[145] within a system that has had a tawdry side since its inception.[146]

Similar controversies, although not producing litigation, reveal the volatile and disruptive nature of NIL as a recruiting tool. After leading UNLV to a 3-0 record in fall 2024, starting quarterback Matthew Sluka quit the team.[147] Sluka was upset he had not received $100,000 from a university-linked collective. He alleged that a UNLV coach promised that amount in recruiting him to transfer from College of the Holy Cross; UNLV denied the accusation and insisted it would not support a play-for-play scheme.[148] As of this writing, Sluka has not transferred to a new school.[149]

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139. *See* Pete Nakos, *How NIL Packages Have Evolved into Game of Lies in Recruiting*, ON3 (Nov. 2, 2022), https://www.on3.com/nil/news/college-football-recruiting-nil-packages-salaries-lies-agents-collectives/ [https://perma.cc/9P5E-6U56].

140. *See* Josh Planos, *The NCAA Doesn't Know How to Stop Boosters from Playing the NIL Game*, FIVETHIRTYEIGHT (May 16, 2022, 6:00 AM), https://fivethirtyeight.com/features/the-ncaa-doesnt-know-how-to-stop-boosters-from-playing-the-nil-game/ [https://perma.cc/CK4B-SUHJ].

141. Complaint at 14-16, Rashada v. Hathcock, No. 3:24-cv-00219 (N.D. Fla. May 21, 2024).

142. *Id.* at 16-18.

143. *Id.* at 10.

144. *See* Michael McCann, *Florida Man Seeks Dismissal of Jaden Rashada's NIL Lawsuit*, SPORTICO (July 23, 2024, 6:38 PM), https://www.sportico.com/law/analysis/2024/jaden-rashada-motion-to-dismiss-1234790566/ [https://perma.cc/4R9L-PWJC].

145. *E.g.*, Connor Letourneau, *Boosters' Empty $13.9 Million Promise to QB Jaden Rashada Revealed NIL Problems*, S.F. CHRON. (Sept. 29, 2023, 12:50 PM), https://www.sfchronicle.com/sports/college/article/experience-asu-s-jaden-rashada-revealed-risk-18389680.php [https://perma.cc/8VTB-9KKG].

146. *See, e.g.*, ZIMBALIST, *supra* note 21, at 22-26.

147. Michael McCann, *UNLV's QB Dispute Over NIL Is A New Twist On An Old Principle*, SPORTICO (Sept. 25, 2024, 3:53 PM), https://www.sportico.com/law/analysis/2024/matthew-sluka-unlv-nil-contract-1234798711/ [https://perma.cc/7RKN-RSUU].

148. Id.

149. See Bruce Feldman & Stewart Mandel, *$100,000 or $3,000? Inside UNLV and Matt Sluka's NIL dispute and what it could mean for college football*, THE ATHLETIC (Oct. 1, 2024), https://www.nytimes.com/athletic/5803997/2024/10/01/college-football-nil-matt-sluka-unlv-ncaa/ [https://perma.cc/H4Z4-XYHV].

Valuation and contractual problems also plague NIL deals. Data on how much NIL deals pay and to which athletes remain limited. No one knows whether athletes, some of whom are not eighteen, receive advice on contractl terms and accompanying responsibilities. The best information reflects guesses and public relations. The website Opendorse projects that quarterbacks at top-25 programs earn, on average, more than $1.3 million[150] and women's basketball players trail only football players in NIL earnings.[151] Although these numbers suggest a robust market for elite athletes, they must be taken with a grain of salt. According to NIL expert Bill Carter, "[T]he only way to verify NIL income is to ask the student athlete or the brand partner involved in the deal. But few student athletes or brands have disclosed that information."[152] Further clouding the data, NIL agents tend to "exaggerate[]" to journalists the amount of money they negotiated for their clients.[153]

A 2024 bankruptcy proceeding involving University of Colorado safety Shilo Sanders reveals the discrepancy between actual and projected (or promised) NIL value. Shilo (the son of Colorado coach and NFL Hall-of-Famer Deion Sanders) received an NIL valuation of more than $1 million,[154] but tax returns filed in the bankruptcy court showed approximately $200,000 in NIL income.[155]

The proposed settlements *House*, *Hubbard*, and *Carter*[156] (the post-*Alston* antitrust cases) require players to disclose NIL deals exceeding $600[157] and authorize schools to ensure deals do not exceed fair market value.[158] Of course, it is not clear how to determine fair market value of an NIL deal when the value of most NIL deals remain unknown. Moreover, fair market value sounds in a "pay-for-play" arrangement

150. Sam Weber, *NIL At 3: The Annual Opendorse Report*, OPENDORSE (July 2, 2024), https://biz.opendorse.com/blog/nil-3-opendorse-report/ [https://perma.cc/2XES-7LMM].

151. *Id*.

152. Bill Carter, *Let's Stop Treating NIL Valuations like Actual Earnings*, SPORTS BUS. J. (Mar. 26, 2024), https://www.sportsbusinessjournal.com/Articles/2024/03/26/carter-nil-corner [https://perma.cc/U6GT-XU6Q].

153. *Id*.

154. *Shilo Sanders NIL Valuation*, ON3 (last visited July 28, 2024), https://www.on3.com/db/shilo-sanders-107260/nil/ [https://perma.cc/9HYN-SLR9].

155. Michael McCann, *Shilo Sanders' Bankruptcy, Legal Woes Complicate NIL Story*, SPORTICO (May 29, 2024, 4:05 PM), https://www.sportico.com/law/analysis/2024/shilo-sanders-bankruptcy-nil-1234782215/ [https://perma.cc/TBE3-B6L2].

156. *Supra* note 108.

157. *See* McCann, *supra* note 32; *supra* notes 108-114 and accompanying text.

158. *See* Ralph D. Russo, *Lack of Detailed NIL Rules Challenges NCAA Enforcement*, ASSOCIATED PRESS (Jan. 29, 2022, 1:46 PM), https://apnews.com/article/college-football-sports-business-15e776b5d115dac0a37a1563d5bfce00 [https://perma.cc/QV3F-5Z4B]; *see also* Penrose, *supra* note 113 (discussing the numerous hurdles facing the NCAA in determining a sensible system for fair market value analysis).

compensating a player to attend and play for a school, not in the commercial value of the player's identity.[159]

Whatever their problems, the recent and ongoing evolution of college sports—and the role FACs play in that evolution—offer encouraging signs. Although Dan would not care that college sports has become more just except as a philosophical exercise,[160] the rise of NIL collectives shows FACs playing a progressive role. College athletes profit from their actual value; fans express their support through financial incentives reflecting that actual value.

Finally, expect NIL to depart from our original conception of FACs in one fundamental respect—coordination between schools and FACs. The proposed settlements contemplate player compensation packages combining proceeds from NIL, media rights, ticket sales, sponsorships, and other revenue streams.[161] While paying players directly, colleges would rely on NIL money (including fan collectives) to complete and enhance university compensation. Professional leagues have never tied player salary to endorsement income;[162] concerned with competitive balance, they would not tolerate a team and a FAC combining to enhance a player's salary.[163] Greater university involvement and monitoring of NIL offers two benefits—acknowledging that even professionalized college sports differs from true pro sports and protecting vulnerable players from abusive collectives.

## CONCLUSION

Dan Markel might not have liked sportsball and he might not have contributed to a FAC for athletics at Florida State University (the sports-powerhouse school at which he spent his too-short academic career)—although he might have supported one to recruit a law professor.[164] But he devised a concept that could, a decade later, produce tectonic changes in an industry he did not care about but that he knew needed reform. He invented NIL collectives before student-athlete NIL or fan collectives were a thing. We wish he were alive to see them.

159. *See* Penrose, *supra* note 113, at 209-11, 217; *supra* notes 113-114 and accompanying text.

160. *See* Markel et al., *supra* note 3, at 18-19.

161. *See* McCann, *supra* note 32; *supra* notes 30-32 and accompanying text.

162. Markel et al., *supra* note 3, at 24.

163. *Id.* at 31 n.91.

164. *Id.* at 36 n.106.