# NCAA AND NIL: THE TENSION BETWEEN STUDENT CONDUCT CODES AND CONSTITUTIONAL RIGHTS

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## INTRODUCTION

Imagine you are legal counsel for The Ohio State University (OSU). The head of compliance calls you; a student athlete has signed an endorsement contract with Hi-Point Firearms, a firearms manufacturer based in Mansfield, Ohio. The school is inquiring whether they can restrict the endorsement contract, if they can penalize the student, and whether they can prohibit future endorsements of firearm companies. Consider three other hypothetical scenarios: an athlete at West Virginia University posts a Tik-Tok video promoting Nexplanon, a birth control implant; an athlete at Tulane University signs a contract with Barstool Sports, a media group with ties to sports betting; an athlete at The University of Washington signs a deal with InfoWars, a far-right conspiracy theory and fake news website which is a recent subject of litigation due to the media coverage claiming the Sandy Hook shooting was a hoax. Restricting, penalizing, and prohibiting these endorsement deals would violate the athletes' First Amendment rights.

The National Collegiate Athletic Association (NCAA) is a nonprofit organization whose membership includes colleges, universities, athletic organizations, and other affiliated organizations.[1] The NCAA regulates intercollegiate athletic competitions across three divisions among approximately "1,100 member schools in all 50 states, the District of Columbia, Puerto Rico, and even Canada."[2] Before the NCAA's concession on July 1, 2021, college athletes were not permitted to receive profits from name, image, and likeness (NIL) activities while still maintaining athletic eligibility.[3] A name, image, and likeness activity is "any activity that involves the commercial use of an individual's name, image, or likeness to advertise or endorse the sale or use of a product or service."[4] However,

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1. *Overview*, NCAA, https://www.ncaa.org/sports/2021/2/16/overview.aspx (last visited Oct. 4, 2025).

2. *Id.*

3. *See*, *e.g.*, Anthony M. Dalimonte, *NIL Timeline: The Events That Transformed College Sports*, FOSTER SWIFT (Apr. 21, 2023), https://www.fosterswift.com/communications-timeline-NIL-cases-transform-college-sports.html.

4. NCAA, DIVISION I 2024-2025 MANUAL 413 (2024).

this custom was put under a microscope in 2009 when former University of California, Los Angeles (UCLA) basketball player, Ed O'Bannon, brought a class action suit against the NCAA claiming a video game used the group's likeness without consent or compensation.[5] The NCAA raised the grant-in-aid limit to the full cost of attendance and permitted up to $5,000 in additional compensation annually after the federal district and appellate courts upheld O'Bannon and the other plaintiffs' arguments that the NCAA's amateurism rules were an illegal restraint of the trade.[6] Later in 2014, the Northwestern University football players petitioned the National Labor Relations Board (NLRB) to classify them as employees, allow them to unionize, and directly benefit from commercial opportunities.[7]

Two of the major causes of action in NCAA compliance is antitrust and private association law.[8] The Sherman Anti-Trust Act is a federal statute prohibiting monopolistic business practices affecting interstate commerce.[9] Plaintiffs bringing cases under the Sherman Act are claiming these restrictions enforced by the NCAA are an unreasonable restraint of the trade.[10] In several antitrust complaints,[11] athletes claimed that the NCAA regulations capping the compensation institutions may offer athletes was a violation of the Sherman Anti-Trust Act of 1890.[12] These complaints brought by several plaintiffs were consolidated during pretrial proceedings into a single class action suit known as *NCAA v. Alston*.[13] Here, the NCAA argued the amateurism restrictions prevented the appearance that athletes were paid to play.[14] Ultimately, the U.S. Supreme Court denied the NCAA's antitrust appeal, concluding the NCAA was in violation of the Sherman Anti-Trust Act.[15] This decision paved the way for further compensation to student athletes. California was the first state to pass NIL legislation in 2019 with the Fair Pay to Play Act, which forbade the NCAA or its member institutions from penalizing student-athletes who receive NIL income.[16] Several other states followed suit by passing their own laws scheduled for enactment in 2022 and 2023.[17]

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5. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015); Dalimonte, *supra* note 3.

6. Dalimonte, *supra* note 3.

7. *Id.*

8. *See* Bloom v. NCAA, 93 P.3d 621, 622 (Colo. App. 2004); Oliver v. NCAA, 920 N.E.2d 203, 210 (Ohio C.P. 2009).

9. *Sherman Anti-Trust Act (1890)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/sherman-anti-trust-act (last visited Oct. 4, 2025).

10. County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1155 (9th Cir. 2001) (establishing the standard for bringing a claim under the Sherman Antitrust Act).

11. *See In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1061-62 (N.D. Cal. 2019).

12. *See id.*; Sherman Antitrust Act, 15 U.S.C. § 1 (1890).

13. *In re NCAA Grant-in-Aid Litig.*, 375 F. Supp. 3d at 1065 n.5.

14. *See* NCAA v. Alston, 594 U.S. 69, 82-83 (2021).

15. *See id.* at 107.

16. Dalimonte, *supra* note 3.

17. *Id.*

Bottom line, the NCAA is suppressing the potential profits of student athletes while those same athletes collectively generate billions of dollars in revenues for their institutions each year. These massive sums of money flow to everyone but the athletes—it flows to six-figure salaries held by college presidents, conference commissioners, NCAA executives, etc. To remedy the antitrust issues, the NCAA opened the door to NIL compensation, but it still placed caps on athlete compensation through NIL endorsement restrictions. This system is disproportionate and inequitable.

These restrictions, along with morality clauses in both coaching contracts and student codes of conduct, create serious apprehension when they establish conditional employment for coaches and conditional eligibility for athletes. The nature of these restrictions raises significant concerns about their First Amendment constitutionality, particularly in light of heightened judicial scrutiny, as applied to governmental speech restrictions. Further, the framework analyzing the constitutionality of governmental intrusion on commercial speech casts even more skepticism due to the broadness of these policies.

Part I of this Comment discusses what might motivate states or institutions to restrict an athlete's endorsement opportunities. Part II outlines restrictions currently in effect both specific to institutions and at the state level. Part III first provides an overview of what morality clauses are, their origins, and how they are enforced. This Part proceeds to discuss student conduct codes as well as coaching employment contracts. Further, Part III analyzes whether athletes should be considered employees of their institution and how employment status may implicate enforcement of morality clauses. Part III concludes by examining the constitutionality of such restrictions through the lens of public versus private action. Part IV analyzes NIL restrictions under commercial speech framework and discusses the limitations and relation between commercial speech, postsecondary institutions, and vice industries.

## I. MOTIVATIONS TO RESTRICT

Following the concession by the NCAA allowing athletes to profit off their NIL, states began passing individual policies as athletes, sponsors, and schools began navigating uncertain state limitations and a commercial marketplace many referred to as the "Wild West."[18] The rapid implementation of state legislation forced the NCAA to propose rules allowing the compensated use of NIL for student athletes, and these rules included "guardrails" to ensure NIL was utilized "in a manner consistent with the collegiate model" and followed the NCAA's

18. *See, e.g.*, Chris Corr, *Wild, Wild West? NIL Means Little to Most College Athletes*, SPORTS BUS. J. (Jan. 18, 2024), https://www.sportsbusinessjournal.com/Articles/2024/01/18/oped-18-corr [https://web.archive.org/web/20240926224733/http://www.sportsbusinessjournal.com/Articles/2024/01/18/oped-18-corr]; Khristopher J. Brooks, *It's the "Wild, Wild West" for Companies Hoping to Monetize College Athletes*, CBS NEWS (July 30, 2021, at 12:21 ET), https://www.cbsnews.com/news/nil-college-athletes-collegiate-sports-ncaa/; 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.

principles of amateurism.[19] These guardrails included prohibitions against "pay-for-play," school or conference involvement, use of NIL for recruiting by schools or boosters, and endorsements of goods inconsistent with NCAA and the institution's values (i.e., alcohol, tobacco, sports gambling).[20] However, there are a number of different reasons an institution may wish to block an NIL deal. For example, (1) the deal may conflict with an existing contractual agreement between the institution and another company; (2) the deal (if implemented) would damage the school's reputation; (3) the deal has potential to influence recruitment decisions based on monetary gain rather than athletic ability; or (4) the deal is exploitive or not aligned with the institution's values, especially if the athlete is young and may not understand the implications of the deal. As NIL evolves, student conduct codes may attract greater attention, and universities may be tempted to manage brand deals and endorsement contracts through the institution's conduct codes.

## II. CURRENT ENDORSEMENT RESTRICTIONS

### *A. Examination of State Law Restrictions*

The first state law allowing student athletes to earn compensation off of their name, image, and likeness was California's Fair Pay to Play Act passed in September 2019.[21] The Fair Pay to Play Act allowed student athletes to acquire endorsement deals and sponsorships without losing any eligibility.[22] Following the passage of California's law, a wave of other similar state laws passed.[23] Ron DeSantis of Florida introduced the first restriction on endorsements by prohibiting "NIL compensation if the term of the contract conflicts with a term of the athlete's

19. FED. & STATE LEGISLATIVE WORKING GRP., REPORT TO THE NCAA BOARD OF GOVERNORS 4 (Oct. 29, 2019), https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/Oct2019BOG_Report.pdf; *see also* Barrett Sallee & Adam Silverstein, *NCAA Takes Big Step Toward Allowing Name, Image, and Likeness Compensation for Athletes*, CBS SPORTS (Apr. 29, 2020, at 09:52 ET), https://www.cbssports.com/college-football/news/ncaa-takes-big-step-toward-allowing-name-image-and-likeness-compensation-for-athletes/ (explaining that the NCAA Board of Governors approved the proposed rule changes to allow college athletes to monetize their name, image, and likeness for the first time, paving the way for compensation through endorsements, social media, personal appearances, and business ventures).

20. FED. & STATE LEGISLATIVE WORKING GRP., *supra* note 19, at 4; *see also* Michael Cunningham, *NCAA 'Guardrails' Mean Athletes Won't Have Full Name and Image Rights*, THE ATLANTA J. CONST. (Apr. 29, 2020), https://www.ajc.com/blog/mike-check/ncaa-guardrails-mean-athletes-really-won-have-full-publicity-rights/LYKs03bWDdKqPYnMJJiXAI/ (arguing that the NCAA's proposed NIL rule changes include restrictive 'guardrails'—such as bans on pay-for-play, limitations on school or booster involvement, and artificial market-value controls—that undermine college athletes; pursuit of full publicity rights despite nominal reforms).

21. Andrew Parry, *Do College Athletes Have a Free Speech Right to Control Use of Their Own Name, Image, and Likeness?,* GEO. UNIV.: THE FREE SPEECH PROJECT, http://freespeechproject.georgetown.edu/wild-wild-west-in-regulatory-power-vacuum-new-nil-rules-threaten-athletes-first-amendment-rights/ (last visited Oct. 4, 2025).

22. Fair Pay to Play Act, California Senate Bill 206, Ch. 383, Educ. § 67456(a)(1)-(2) (2019).

23. *See id.*; *e.g.*, Use of Student Athlete's Name Image or Likeness, S. 23-293, 75th Session (Colo. 2023).

team contract."[24] The United States Supreme Court's decision in *NCAA v. Alston*[25] led the NCAA to quickly adopt an "interim" NIL policy which permitted students to monetize their name, image, and likeness.[26] The policy stated, "[i]ndividuals can engage in NIL activities that are consistent with the law of the state where the school is located."[27] However, due to the lack of guidance, states and universities drafted their own policies as well.

Following this trend, states such as Mississippi, Illinois, and Tennessee passed laws prohibiting student athletes from promoting tobacco, alcohol, and gambling.[28] Washington state adopted an act prohibiting athletes from endorsing banned substances or sports wagering and permitted institutions to adopt policies to prevent athletes from engaging in NIL activities that have an adverse impact on the school's reputation.[29] Additionally, states vary in what types of endorsements are prohibited. In May of 2024, a South Carolina bill was put on hold due to a gun debate.[30] The legislation was near adoption and would have barred college athletes from signing deals involving "alcohol, illegal drugs, steroids, tobacco and nicotine products, gambling, adult entertainment and weapons."[31] However, the bill was brought to a halt by an avid gun rights supporter and backer of the permit-less carry law, Senator Shane Martin.[32] Some legislators pointed out many colleges have shooting teams whose athletes may seek sponsorship from gun companies; other legislators pointed out such athletes are idolized by children, and a star quarterback endorsing a gun can contribute to youths engaging in gun violence.[33] This debate is the core problem with the lack of federal legislation regarding NIL restrictions: where is the limit on state restriction for the speech of athletes? The NCAA's localization and delegation of authority over athlete NIL restrictions paved way for various constitutional concerns. The Supreme Court has found the NCAA to be non-state actors, but state legislatures and public institutions are indisputably

24. Parry, *supra* note 21.

25. NCAA v. Alston, 594 U.S. 69, 107 (2021) (affirming lower court injunction barring the NCAA from enforcing caps on education-based compensation, as such caps constitute price-fixing in violation of the Sherman Antitrust Act).

26. Dalimonte, *supra* note 3.

27. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, at 16:20 ET), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx.

28. *See NIL State Laws: Current Name, Image, and Likeness Legislation at the State Level*, NIL NETWORK, (Aug. 27, 2022), https://www.nilnetwork.com/nil-laws-by-state/ [hereinafter *NIL State Laws*].

29. DAVID FROCKT ET AL., S.B., S.67-5942, at 3 (Wash. 2022).

30. S.C. CODE ANN. § 59-158-20 (2024); Jessica Holdman, *Senators Approve Lifting NIL Restrictions on SC Colleges After Gun Debate Puts Bill on Timeout*, S.C. DAILY GAZETTE (May 7, 2024), https://scdailygazette.com/2024/05/07/bill-lifting-nil-restrictions-on-sc-college-athletics-blocked-in-debate-over-gun-sponsorships/.

31. Holdman, *supra* note 30.

32. *Id.*; S.C. GEN. ASSEMBLY, CONSTITUTIONAL CARRY GUIDANCE, H. 125-3594, 125th Sess. (2024).

33. Holdman, *supra* note 30.

state actors.[34] Yet the limits on governmental power on the restriction of speech (set in place by the Constitution) are still unclear.

### *B. Examination of Institution-Specific Restrictions*

Public colleges and universities have even been held as state actors when enforcing or responding to the NCAA rules.[35] Therefore, independent NIL regulations would be considered state action subject to governmental limits. Kentucky passed a bill into law permitting institutions to place limitations on NIL endorsements.[36] The Kentucky NIL law prohibits NIL deals involving products they deem "detrimental to the image, purpose, or stated mission of the postsecondary educational institution."[37] Many states passed laws similar to Kentucky, yielding broad discretion to university officials.[38] West Virginia University (WVU) implemented restrictions on specific vice industries, but additionally prohibits "[a]ctivities which are, in WVU's sole judgement, misleading, offensive, or in violation of a statute, law, ordinance, NCAA bylaw, or any University contract obligation."[39] Brigham Young University (BYU) has imposed a policy prohibiting students from signing endorsement contracts with any business that does not conform with their honor code.[40] BYU offered some examples including "companies involving alcohol, tobacco, gambling, adult entertainment, coffee, etc."[41] Some of these policies are extraordinarily specific—declining athletes the freedom to commercialize their brand as they choose. Alternatively, several of these state and institution policies are remarkably vague, granting a permeating power to university officials as to what constitutes a violation and how to penalize the athlete.

## III. MORALITY CLAUSES

### *A. Overview of Morality Clauses*

A morality clause is a provision, typically in employment contracts, which requires the employee to adhere to certain behavioral standards throughout the life

34. *See* NCAA v. Tarkanian, 488 U.S. 179, 192-99 (1988) (holding that the NCAA is not a state actor).

35. *See, e.g.*, Crue v. Aiken, 370 F.3d 668, 680 (7th Cir. 2004) (holding the Public University of Illinois liable for violating the First Amendment by restricting faculty communications with prospective athletic recruits to conform with NCAA recruiting guidelines).

36. KY. REV. STAT. ANN. § 164.6945 (West 2024).

37. SEC. OF STATE, 2021-418, RELATING TO RESPONSIBILITIES OF POSTSECONDARY EDUCATIONAL INSTITUTIONS AS TO NAME, IMAGE AND LIKENESS COMPENSATION OF STUDENT-ATHLETES (Ky. 2021).

38. *See NIL State Laws*, *supra* note 28.

39. Parry, *supra* note 21.

40. Brandon Judd, *How Will BYU's Honor Code Affect Athletes Seeking NIL Compensation?*, DESERET NEWS (July 1, 2021, at 10:59 ET), https://www.deseret.com/2021/7/1/22559298/byus-policy-guidelines-for-name-image-and-likeness-include-adherence-to-honor-code-standards-ncaa/.

41. *Id.*

of the employment contract.[42] Violating this provision gives one contracting party the unilateral right to terminate the agreement.[43] Morality clauses were created to protect the image of an employer by requiring an employee to follow certain ethical standards.[44] They were popularized by the film and media industry after a comedic actor, Roscoe Arbuckle, was accused of manslaughter.[45] Although they were not involved in the *Arbuckle* case, due to the allegations and outrage, Universal Studios began including morality clauses in their contracts to prevent actors from behaving in ways that would reflect badly on the studio, production, or industry.[46] Instances of morality provisions have increased and are now frequently found in contracts that affiliate an individual's reputation with the company's reputation.[47]

Morality clauses are elements of contracts, and because all contracts have an implied obligation of good faith and fair dealing, parties exercising discretion in morality clauses are required "not to act arbitrarily or irrationally in exercising that discretion."[48] Further, courts have "equated the covenant of good faith and fair dealing with an obligation to exercise…discretion 'reasonably and with proper motive,…not…arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.'"[49] However, the expansive principles of freedom of contract allow parties to contract as they so choose, and courts will "enforce…without passing on their substance,"[50] as courts recognize that "individuals have broad powers to order their own affairs."[51]

In *Mendenhall v. Hanesbrands*,[52] the court noted it would decline to enforce a morality clause if it was merely based on disagreement with the other party's philosophies.[53] Mendenhall was employed as a running back by the Pittsburg

42. *Employment Contract Negotiation: Morals Clauses*, HARV. L. SCH.: PROGRAM ON NEGOTIATION (May 21, 2025), https://www.pon.harvard.edu/daily/business-negotiations/preparing-for-the-worst-in-business-negotiations-nb/.

43. Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347, 351 (2009).

44. Caroline Hansen, *What Is a Morality Clause and How Is It Legal*?, U.S. NEWS (Sep. 28, 2023), https://law.usnews.com/law-firms/advice/articles/what-is-a-morality-clause.

45. *Id.*

46. *Id.*

47. Caroline Epstein, Note, *Morals Clauses: Past, Present, and Future*, 5 N.Y.U.J. INTELL. PROP. & ENT. L. 72, 78 (2015).

48. Dalton v. Educ. Testing Serv., 663 N.E.2d 289, 291 (N.Y. 1995).

49. Fishoff v. Coty Inc., 634 F.3d 647, 653 (2d Cir. 2011); *see also* Dalton, 663 N.E.2d at 389 (reaffirming that New York contract law imposes an implied duty of good faith and fair dealing, requiring parties to avoid arbitrary or irrational conduct that would deprive the other party of the contract's intended benefits, especially where discretion is involved); Tedeschi v. Wagner Coll., 49 N.Y.2d 652, 660 (1980) (holding that a private college violated the implied contractual relationship with a student by expelling her without adhering to its own published disciplinary procedures, and emphasizing that such procedures, once established, create enforceable obligations grounded in principles of fairness and good faith).

50. RESTATEMENT (SECOND) OF CONTS. ch. 8, intro. note (A.L.I. 1981).

51. *Id.*

52. Mendenhall v. Hanesbrands, Inc., 856 F. Supp. 2d 717, 717 (M.D.N.C. 2012).

53. *Id.* at 726.

Steelers.[54] During his employment with the Steelers, he signed a talent agreement with Hanesbrands to advertise and promote their products sold under the Champion trademark.[55] The agreement Mendenhall entered contained a morality clause entitling Hanesbrands to terminate the agreement if Mendenhall "becomes involved in any situation or occurrence…tending to shock, insult, or offend the majority of the consuming public…."[56] Mendenhall was later terminated following the use of his Twitter account to express views on Islam, women, parenting and relationships, and further made comments comparing the National Football League to the slave trade.[57] On May 2, 2011, Mendenhall issued controversial tweets criticizing the celebration following the announcement of the death of Osama Bin Laden, and Hanesbrands subsequently indicated their intent to terminate their contract with Mendenhall.[58]

When Mendenhall sued for breach of contract, the company countered arguing they retained the "conclusive authority" to exercise the provision.[59] Mendenhall pointed out some of the responses to his tweets had been positive.[60] He argued, and the court agreed, Hanesbrands invoked the termination merely because they disagreed with his statements.[61] The court found it may have been unreasonable for Hanesbrands to determine the tweets constituted prohibited behavior merely because they disapproved of the content.[62] It follows that morality clauses within athlete endorsement contracts, student codes of conduct, and within coaching employment contracts cannot be based on mere disagreement with the content. This precedent, if applied to athlete endorsement contracts, would permit coaches and athletes to contract in a more expansive manner—without influence due to disagreements by school administration.

### *B. Student Codes of Conduct*

Colleges and universities are generally given broad discretion in the administration of their internal affairs.[63] Student conduct codes are a set of rules and guidelines, published by the institution, outlining expected behavior; the code defines what actions are considered acceptable versus unacceptable and lays out procedures for sanctioning students for violations.[64] Student conduct codes are

54. *Steelers Sign First-Round Draft Pick Rashard Mendenhall*, PITTSBURG STEELERS (July 25, 2008), https://www.steelers.com/news/steelers-sign-first-round-draft-pick-rashard-mendenhall-959714.

55. *Mendenhall*, 856 F. Supp. 2d at 719.

56. *Id.* at 720.

57. *Id.*

58. *Id.* at 721.

59. *Id.* at 722.

60. *Id.* at 726.

61. *Id.*

62. *Id.*

63. *E.g.*, Martin-Trigona v. Univ. of New Hampshire, 685 F. Supp. 23, 25 (D.N.H. 1988).

64. *See generally Code of Student Conduct*, THE OHIO STATE UNIV. (Nov. 6, 2023), https://trustees.osu.edu/sites/default/files/documents/2024/10/CodeStudentConduct.pdf (setting behavioral standards for students and outlining disciplinary procedures based on fairness, due process, and univ-

generally enforced by the school administration through a designated Student Conduct Administrator or Board.[65] However, codes of conduct are not limited to academic infractions; they can regulate other aspects of student choices and can intersect with NIL in two ways: (1) universities can use the existing broad provision, such as "conduct unbecoming" to try to regulate athlete choices; or (2) universities can adopt new provisions specifically targeting NIL or restricting NIL speech.

When a student conduct code is challenged in court, they have been treated as implied contracts between students and their schools, and students agree to the terms of the contract—often uninformed, yet required—when they enroll for classes.[66] Courts have held these implied contracts do not bind universities to honor every provision found in the handbooks; rather, like all obligations imposed pursuant to implied contractual terms, they are centered around what is reasonable.[67] The First District Court of Appeals noted, a

> [u]niversity has the power to formulate and enforce rules of student conduct that are appropriate and necessary to the maintenance of order and propriety, considering the accepted norms of social behavior in the community, where such rules are reasonably necessary to further the University's educational goals.[68]

However, courts have also held schools, whether public or private, may not depart from the *explicit* due process protections established in their student conduct codes, as doing so would go against the student's implicit contractual interests.[69] Additionally, courts have not been kind to vague, open-ended policies having the potential to limit speech rights. The Sixth Circuit Court of Appeals overturned a harassment/hate speech policy in *Dambrot v. Central Michigan University*.[70] In the Court's opinion, the policy was overly broad, creating an environment under which "[d]efining what is offensive is, in fact, wholly delegated to university officials."[71]

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ersity values); *see also Student Code of Conduct*, VA. TECH. (Aug. 2024), https://codeofconduct.vt.edu/content/dam/codeofconduct_vt_edu/CodeofConduct-Aug2024.pdf. [https://web.archive.org/web/20250125021219/https://codeofconduct.vt.edu/content/dam/codeofconduct_vt_edu/CodeofConduct-Aug2024.pdf] (establishing behavioral expectations for students, including academic integrity, health and safety, and community standards, and outlining procedures for addressing violations to uphold a respectful and safe campus environment); *Student Conduc*t, U. OF KY. (June 16, 2023), https://regs.uky.edu/sites/default/files/2023-07/AR4-10StudentCode-FINAL-ApprovedbyBOT6-6-23edits7.26toREPOST.pdf (defining student behavioral expectations grounded in core values—integrity, respect, responsibility, accountability, and community—and outlines rights, standards, and fair disciplinary procedures, including expanded amnesty protections and due-process enhancements).

65. *Student Codes of Conduct*, FINDLAW (Oct. 14, 2023), https://www.findlaw.com/education/student-conduct-and-discipline/codes-of-conduct.html.

66. *See generally* Ruegsegger v. Bd. of Regents of W.N.M. Univ., 154 P.3d 681 (N.M. 2006) (recognizing that student-university relationships may give rise to implied contractual obligations, particularly where students accept policies, such as conduct codes, by enrolling).

67. *Id.* at 688.

68. Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 879 (1967).

69. Tedeschi v. Wagner Coll., 404 N.E.2d 1302, 1306 (N.Y. 1980).

70. Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1180 (6th Cir. 1995).

71. *Id.* at 1184.

This decision is significant when examining NIL policies. Where NIL policies leave full discretion to the school officials, it presents a similar problem as posed in *Dambrot*. State and institution NIL policies that award university officials the discretion to strike a potential endorsement deal merely because it does not align with the institutional values accomplishes the same constitutionally dubious end. It allows the officials to define what is against institutional values, creating a dangerously subjective standard for what is acceptable and what is not.

Alternatively, the only explicitly written contracts between athletes and institutions are scholarship agreements.[72] Scholarship agreements generally stipulate the institution is to provide a specified amount of financial aid to the athlete, and the institution may not reduce or cancel the promised aid due to poor performance or inability to contribute to the team's success.[73] They generally provide that the institution can withhold aid in the event the athlete voluntarily withdraws from the sport or does not comply with the school's conduct code.[74]

The New Mexico Court of Appeals interpreted an athletic scholarship agreement in *Ruegsegger v. Board of Regents of Western New Mexico University*.[75] In *Ruegsegger*, Jessica Ruegsegger (Plaintiff) was attending Western New Mexico University (WNMU) with an athletic scholarship.[76] During her enrollment, she was allegedly raped by two WNMU football players.[77] Due to her dissatisfaction with the ensuing investigation, she filed a complaint alleging breach of contract.[78] The court found the language in the scholarship agreement did not obligate the institution to investigate the sexual assault claims. Rather, the scholarship agreement simply required the plaintiff to maintain acceptable academic performance, play basketball, and comply with school regulations, and in exchange, the school was obligated to provide financial assistance.[79] Thus, courts will not impute terms from the conduct code into scholarship agreements, and athletes are afforded limited protection.

The relationship between an athlete and their institution is already a skewed power dynamic; to add weight to an already one-sided relationship by allowing them sole discretion to allow or strike endorsement opportunities is inequitable.

### *C. Coaching Employment Contracts*

Morality clauses have become standard in a vast majority of industries, especially collegiate coaching contracts.[80] Coaches are held to high standards as collegiate athletics increasingly serve as an emblem of universities. They frequently act as the institution's face and spokesperson in a variety of capacities.

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72. *See, e.g.*, Ruegsegger v. Bd. of Regents of W.N.M. Univ., 154 P.3d 681, 685 (N.M. 2006).
73. *See, e.g.*, *id.* at 686.
74. *See, e.g.*, *id.*
75. *Id.*
76. *Id.* at 683.
77. *Id.*
78. *Id.*
79. *Id.* at 686.
80. Hansen, *supra* note 44.

Thus, colleges and universities include morality clauses to support just cause for termination and to protect their reputation if the coach conducts themselves in an inappropriate or damaging way.

It seems as though courts' interpretations of coaching morality clauses are limited. In *Haywood v. University of Pittsburgh*, a head football coach was fired following a domestic altercation.[81] After the learning of Haywood's arrest, which had plenty of press coverage as it was broadcasted on ESPN, the university terminated his employment.[82] Haywood brought action alleging the university breached his employment contract by refusing to pay him liquidated damages when it terminated him, as the contract provided all obligations by the university ceased upon termination with just cause.[83] The court, however, found in favor of the university, holding Haywood's claim of breach of the implied duty of good faith and fair dealing cannot override the written contract.[84] The written contract provided the university with discretion to determine whether it had just cause to terminate Haywood's employment under paragraph 14.1(F), if his conduct was

> [s]eriously prejudicial to the best interest of the University or its intercollegiate athletics programs; that violates the University's or the Department's then-current mission; that brings the University into disrepute; or that reflects dishonesty, disloyalty, willful misconduct, gross negligence, moral turpitude or refusal or unwillingness to perform his duties.[85]

As previously noted, however, when a contract imputes discretion to a party, the implied duty of good faith and fair dealing requires the party to reasonably exercise such discretion.[86] The court continues by stating a jury could only find a violation of the employment contract if the university had terminated his employment in bad faith.[87] In addition, the court determined Haywood would not be entitled to recover damages because he was truly fired for just cause and in good faith.[88]

Litigation spurs in circumstances such as *Haywood* where morality clauses are included in contracts without having guidelines in place. Morality clauses that do not outline specific prohibited conduct, and thus do not put the employee on notice of behavior which could result in their termination, are often subject to constitutional challenges.[89]

While morality clauses in contracts must satisfy due process safeguards, the Supreme Court held in *Garcetti v. Ceballos*,[90] public employees who make

81. Haywood v. Univ. of Pittsburgh, 976 F. Supp. 2d 606, 621 (W.D. Pa. 2013).
82. *Id.* at 618.
83. *Id.* at 625.
84. *Id.* at 628.
85. *Id.* at 614.
86. *Id.* at 628.
87. *Id.* at 635.
88. *Id.*
89. *See Risqué Business: Controlling Employee Conduct Through Morality Clauses*, OBERMAYER (Feb. 19, 2014), https://www.hrlegalist.com/2014/02/risque-business-controlling-employee-conduct-through-morality-clauses/.
90. Garcetti v. Ceballos, 547 U.S. 410, 425-26 (2006).

statements while performing their official duties are not viewed as exercising their rights as private citizens under the First Amendment; therefore, the First Amendment does not prohibit managerial discipline of employees for such speech.[91] The Court noted, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."[92] At the same time, public employees speaking outside the course of their official duties remain protected by the First Amendment as they are still recognized as a citizen.[93] This produces a narrow window for coaches to speak unobstructed by state constraint. Coaches may speak freely so long as it is not within the course of their employment, except where they are put on notice of such speech entitling the institution to terminate their employment. Coaches—and potentially athletes—are stuck in a Catch-22 situation. They may speak freely outside of school sponsored events, but only about approved matters—a flawed concept of "free speech."

### *D. Should Athletes Be Considered Employees?*

Following the landmark case of *NCAA v. Alston*, one question floated considering whether the efforts of athletes who provide tangible benefits to identifiable institutions deserve compensation—this was addressed in *Johnson v. NCAA*.[94] In *Johnson*, several Division I athletes filed a complaint asserting violations of the Fair Labor Standards Act of 1938 (FLSA)[95] arguing they were entitled to federal minimum wage compensation.[96] To determine whether college athletes are employees, the district court applied the seven-factor test established in *Glatt v. Fox Searchlight Pictures, Inc.*[97] Here, the court considered whether unpaid interns must be deemed employees under the FLSA.[98]

The primary beneficiary test outlined in *Glatt* considers the following seven factors: (1) the extent to which the intern and employer understand there is no expectation of compensation; (2) the extent to which the internship provides training that would be similar to that which would be given in an educational environment; (3) the extent to which the internship is tied to the intern's formal education program by integrated coursework of the receipt of academic credit; (4) the extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar; (5) the extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning; (6) the extent to which the intern's work compliments, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and (7) the extent to which the intern and employer understand the internship is conducted without entitlement to a paid

91. *Id.*
92. *Id.* at 418.
93. *Id.* at 419.
94. Johnson v. NCAA, 108 F.4th 163, 167 (3d Cir. 2024).
95. Fair Labor Standards Act, 29 U.S.C. § 203 (1938).
96. *Johnson*, 108 F.4th at 167.
97. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536-37 (2d Cir. 2015).
98. *Id.* at 533.

job at the conclusion of the internship.[99] The district court utilized this analysis acknowledging the Ninth Circuit's commentary, "the primary beneficiary test captures the Supreme Court's economic realities test in the student/employee context and that it is therefore the most appropriate test for deciding whether students should be regarded as employees under FLSA."[100]

However, the Third Circuit concluded the *Glatt* test was inappropriate. Instead, it determined the economic realities test was the proper analysis, as the nature of the work performed by interns differs significantly from that of athletes.[101] The economic realities test applies a common law agency analysis looking at the totality of the circumstances, and the Third Circuit thus found that "college athletes may be employees under FLSA when they (a) perform services for another party, (b) necessarily and primarily for the other party's benefit, (c) under that party's control or right of control, and (d) in return for 'express' or 'implied' compensation or 'in-kind' benefits."[102] The court discusses how amateurism "highlights the need for an economic realities framework that distinguishes college athletes who 'play' their sports for predominantly recreational or noncommercial reasons from those whose play crosses the legal line into work protected by the FLSA."[103] However, this decision by the Third Circuit is likely not the final word on this issue.

Further, while courts may instinctively consider college athletes as students, some courts have adopted a different stance. The Sixth Circuit in *Lowery v. Euverard*[104] found student athletes to have "greater similarities to government employees than the general student body."[105] *Lowery* involved a claim brought by high school football players who were dismissed from their team after signing a petition asking their principal to replace the disliked head coach.[106] The Sixth Circuit found this fact pattern mirrored to a dispute between public employees and their government employers.[107] Recent affirmative declarations lend credence to the position that college athletes are employees under the National Labor Relations Act (NLRA)[108] and FLSA.[109] The latter was supported heavily by Justice

99. *Id.* at 536-37.

100. Johnson v. NCAA, 556 F. Supp. 3d 491, 509 (E.D. Pa. 2021) (quoting Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1147 (9th Cir. 2017)).

101. *Johnson*, 108 F.4th at 180.

102. *Id.*

103. *Id.* at 182.

104. Lowery v. Euverard, 497 F.3d 584, 584 (6th Cir. 2007).

105. *Id.* at 597 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995)).

106. *Id.* at 585-86.

107. *Id.* at 597-99.

108. In a September 2021 memorandum, the general counsel of the National Labor Relations Board (NLRB) expressed their opinion that athletes *are* employees under the NLRA. The memo "assume[d] for purposes of this memorandum, that Northwestern's scholarship football players are statutory employees," although the memo did not include any factual findings regarding this issue. N.L.R.B. GC 21-08, STATUTORY RIGHTS OF PLAYERS AT ACADEMIC INSTITUTIONS (STUDENT-ATHLETES) UNDER THE NATIONAL LABOR RELATIONS ACT (Sep. 29, 2021).

109. *See* Johnson v. NCAA, 108 F.4th 163, 182 (3d Cir. 2024) (holding student athletes' amateur status does not preclude them from bringing a FLSA claim).

Kavanaugh in his *Alston* concurrence.[110] Justice Kavanaugh opines, and this comment supports his contention, that collective bargaining would solve various legal issues created by compensating athletes and could provide athletes "a fairer share of revenues that they generate for their colleges."[111]

If the court finds college athletes are considered employees of their institution, it is likely they will be subject to the morality clauses of their student handbook and likely the applicable NIL policies as well. They would not be entitled to First Amendment protections as they would be considered at-will employees. Should the court find student-athletes to be employees of their institutions, the restrictions and morality clauses of student codes of conduct and NIL policies would mirror coaching employment contracts. Thus, so long as these contracts outline specific prohibited conduct, they will be enforced producing a narrow window of unrestricted speech similar to coaches.

### *E. Private vs. Public Schools*

Despite their differing legal obligations, both public and private educational institutions have a moral, ethical, and educational responsibility to treat students with decency, respect, and fairness.[112] Public institutions are bound by the Constitution, requiring them to provide a certain degree of due process[113] and constitutional rights because they are acting as an arm of the state.[114] When public schools choose to enforce NIL standards, they must consider athletes' due process rights and make sure athletes are given the chance to be heard and, at the very least, notice of any alleged misconduct.

On the other hand, courts have continuously distinguished private institutions from public institutions. The Supreme Court further refined due process jurisprudence by holding students attending private universities do not possess the same due

110. NCAA v. Alston, 594 U.S. 69, 111 (2021) (Kavanaugh, J., concurring).

111. *Id.*

112. *See* Jason J. Bach, *Students Have Rights Too: The Drafting of Student Conduct Codes*, 2003 B.Y.U. EDUC. & L.J. 1, 5 (2003); *Guiding Principles for Creating Safe, Inclusive, Supportive, and Fair School Climates*, U.S. DEP'T OF EDUC. 14 (Mar. 2023), https://www.ed.gov/sites/ed/files/policy/gen/guid/school-discipline/guiding-principles.pdf. *See generally Code of Ethics for Educators*, NAT'L EDUC. ASS'N (Sep. 14, 2020), https://www.nea.org/resource-library/code-ethics-educators (articulating professional ethical standards for educators, emphasizing responsibilities to students and the profession, including fairness, honesty, student welfare, and integrity in professional conduct).

113. Students attending public schools have a procedural right to due process in disciplinary matters. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment, as now applied to the states, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."). Alabama State College attempted to expel six students without showing them detailed charges or any of the evidence against them. The notice of expulsion that was mailed to the students did not specify any grounds for expulsion, and they were not given a hearing prior to their expulsion either. Additionally, the State Board of Education members who voted to expel the children gave "somewhat varying and differing grounds for their decision." Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 154 (5th Cir. 1961) (holding that the Due Process Clause requires notice and some opportunity for a hearing before a public student is expelled for misconduct). *See also* Goss v. Lopez, 419 U.S. 565, 581 (1975) (holding that even students facing temporary suspension must be afforded notice of the charges against them and an opportunity to be heard).

114. *See Goss*, 419 U.S. at 574.

process rights guaranteed to students attending public schools.[115] In *Rendell-Baker v. Kohn*,[116] an otherwise private institution does not engage in "state action,"[117] regardless of public funds accounting for up to 99% of the school's operating budget.[118] Had the court ruled otherwise, private schools receiving public funding would be required to defend the rights of their students. In absence of constitutional protections, courts have typically mandated disciplinary actions taken by private schools to follow a "fundamental" or "basic" fairness criterion and not be arbitrary or capricious.[119]

While private universities acting of their accord can normally act without fear of First Amendment scrutiny, this presumption becomes complicated where states require private institutions to enact certain restrictions. Despite having ostensibly more regulatory freedom than public universities, the Supreme Court has outlined a bevy of situations in which private action is sufficiently entwined with state conduct to substantiate a conclusion the private actor acted under the color of state law.[120] Some circumstances include when the private action is a result of the State's exercise of "coercive power,"[121] which courts determine by examining whether the "private entity had a choice to act or refrain from acting."[122]

As previously discussed, state legislation over NIL varies. Some states permit institutions to implement particular restrictions, while other states require certain restrictions. For example, Texas prohibits athlete endorsement of adult entertainment, alcohol, drugs, gambling, or weapons; on the other hand, Kentucky *permits* institutions to create reasonable restrictions on adult entertainment, alcohol, tobacco products, or firearms.[123] When states permit—rather than

115. Rendell-Baker v. Kohn, 457 U.S. 830, 840-41 (1982).

116. *Id.* at 830.

117. *Id.* at 840.

118. *Id.* at 846 (1982) (Marshall, J., dissenting).

119. *See* Cloud v. Trs. of Boston Univ., 720 F.2d 721, 725 (1st Cir. 1983) ("We also examine the hearing to ensure that it was conducted with basic fairness."); *see also* Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 244 (D. Vt. 1994) ("The College has agreed to provide students with proceedings that conform to a standard of 'fundamental fairness' and to protect students from arbitrary and or capricious disciplinary action to the extent possible within the system it has chosen to use."); Schaer v. Brandeis Univ., 735 N.E.2d 373, 380 (Mass. 2000) ("In addition to reviewing the allegations of breach of contract, 'we…examine the hearing to ensure that it was conducted with basic fairness.'"); Coveney v. President & Trs. of Coll. of the Holy Cross, 445 N.E.2d 136, 138 (Mass. 1983) ("A private university, college, or school may not act arbitrarily or capriciously dismiss a student."); Ahlum v. Adm'rs of the Tul. Educ. Fund, 617 So. 2d 96, 99 (La. Ct. App. 1993) ("The disciplinary decisions of a private school may be reviewed for arbitrary and capricious action.").

120. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295-96 (2001).

121. *Id.* at 296 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

122. Julie K. Brown, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 566 (2008).

123. *Compare* S.B. 1385, 2021-2022 Leg., 87th Sess. (Tex. 2021) ("A student athlete participating in an intercollegiate athletic program at an institution to which this section applies…may not enter into a contract for the use of the student athlete's name, image, or likeness if…the compensation for the use of the student athlete's name, image, or likeness is provided…in exchange for an endorsement of alcohol, tobacco products…"), *with* ANDY BESHEAR, KENTUCKY GOVERNOR, RELATING TO RESPONSIBILITIES OF POSTSECONDARY EDUCATIONAL INSTITUTIONS AS TO NAME, IMAGE AND LIKENESS COMPENSATION OF STUDENT-ATHLETES (2021). ("The postsecondary educational inst-

compel—certain private action, courts do not extend the state actor doctrine over the private conduct.[124] Thus, if Bellarmine University (Kentucky) prohibited an athlete from signing an agreement with Miller Brewing Company, the maker of Miller Light, courts would likely not find Bellarmine to be a state actor. However, if Baylor University (Texas) imposed the same restriction, courts would likely find Baylor to be acting under the color of state law and consequently subject to First Amendment scrutiny. This creates a double-edged sword for private institutions. Generally, private institutions are not at the mercy of the state and can conduct their affairs as they choose, allowing them to create NIL opportunities some public institutions cannot. The institutions can use such NIL opportunities to make them more desirable to prospective student athletes. On the other hand, the restrictions they implement may create recruiting battles for the institution. Some states allow more freedom for endorsement deals, which is more enticing to the athlete; whereas private institutions, not at the mercy of the state, may implement an array of restrictions which may dissuade the athlete.

Overall, NIL opportunities cast major concerns around recruitment and impose competitive imbalance among private and public institutions nationwide. The resources among institutions vary, and differing alumni connections may offer more valued NIL deals. This leaves smaller programs at a disadvantage when trying to attract top talent. Thus, due to the state of NIL, prospective student athletes might choose schools on the basis of anticipated financial gain rather than athletic fit and academic opportunities.

## IV. CONSTITUTIONAL LIMITATIONS & COMMERCIAL SPEECH

A content-based restriction on speech is a law or regulation against speech based solely "on the substance of what it communicates."[125] Content-based restrictions are presumptively unconstitutional and subject to strict scrutiny—the highest form of judicial review.[126] However, in the context of commercial speech, courts have found content-based restrictions to be less protected.[127]

Commercial speech is any speech endorsing some type of commerce.[128] The Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission*[129] established that commercial speech is afforded less protection

itution *may* create reasonable limitations on…potential agreements or contracts for compensation of name, image, and likeness that the postsecondary institution determines is incompatible or detrimental to the image, purpose or stated mission of the postsecondary educational institution, such as, but not limited to, the promotion or advertisement of alcohol, tobacco products, firearms, sexually-oriented activities.").

124. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 165 (1978).

125. David L. Hudson Jr., *The First Amendment Encyclopedia: Content Based*, FREE SPEECH CTR. (July 2, 2024), https://firstamendment.mtsu.edu/article/content-based/.

126. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 680 (1994) (O'Connor, J., concurring in part and dissenting in part); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 124 (1991) (Kennedy, J., concurring).

127. *Legal Information Institute: Commercial Speech*, CORN, L. SCH. (Aug. 2022), https://www.law.cornell.edu/wex/commercial_speech.

128. *Id.*

129. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 557 (1980).

under the First Amendment than other constitutionally guaranteed expression.[130] Although an athlete's NIL rights are generally classified as commercial speech, it is important to note that NIL restrictions are not solely a commercial speech issue. Nevertheless, the current NIL landscape is legally problematic using even the standard of scrutiny that is most advantageous to the state.[131]

### *A. Commercial Limitations*

The Court has noted that publicity rights must be balanced with First Amendment rights.[132] In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Court crafted a standard for evaluating restrictions on commercial speech[133] and held that a complete ban on promotional advertising by a utility company was unconstitutional regardless of the speech being purely commercial.[134] The *Central Hudson* test encompasses four elements: (1) the speech cannot concern unlawful activity or be misleading; (2) the state must assert the interest at the heart of the speech restriction; (3) the restrictions implemented must directly advance the stated interest; and (4) restrictions cannot be more extensive than necessary to achieve that interest.[135] If all four of these elements are met, a court would likely hold the restriction as unconstitutional.

Courts can apply the *Central Hudson* test to The Ohio State University (OSU) NIL policy. The OSU policy prohibits athletes from entering NIL contracts with the following industries: distilled spirits, tobacco products (including vapes or any other nicotine products), casinos or any other gambling entity, controlled substances, marijuana, and any business associated with adult entertainment.[136] Further, the OSU policy restricts any agreements that conflict with any Ohio State agreement; for example, an athlete cannot endorse a company that competes with Nike, Coca-Cola, or Ticketmaster.[137] Under the first requirement of the test, the regulations cannot be unlawful or misleading.[138]

Applying the hypothetical posed above, an athlete signs a deal with a firearms manufacturer, purchasing a firearm is legal—so long as the endorsement does not contain false information about the product, the deal would meet this requirement. Next, courts should ask whether the governmental interest in restricting a firearm

130. *Id.* at 562-63.

131. *See* Sam C. Ehrlich & Neal C. Ternes, *Putting the First Amendment in Play: Name, Image, and Likeness Policies and Athlete Freedom of Speech*, 45 COLUM. J. L. & ARTS 47, 60 (2021) (suggesting that even viewed under the category of speech afforded the least protection—commercial speech—the current structure of NIL restrictions raises significant legal concerns for state actors).

132. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 577-78 (1977).

133. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 555-56.

134. *Id.* at 571-72.

135. *Id.* at 563-64.

136. *Student-Athlete Name, Image, Likeness Guidelines*, OHIO STATE ATHLETICS 3 (Oct. 7, 2024), https://ohiostatebuckeyes.com/documents/2024/10/8/Student-Athlete_NIL_Guidelines_10-7-24.pdf.

137. *Id.*

138. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563-64.

endorsement is substantial.[139] The governmental interest in restricting the endorsement of firearms is substantial as it is imperative to keep firearms out of the possession of those not legally entitled to own them. The Ohio State University's interest will likely fulfill this requirement. However, the school would also have interests in prohibiting these kinds of NIL deals, such as protecting their reputation and image. As the Court noted in 1989, the interest in "promoting an educational rather than commercial atmosphere" and "preventing commercial exploitation of students" is substantial.[140] However, this contention fails as athletes are permitted to commercialize their image for uncontroversial products and services. Additionally, there are no restrictions in place for non-athlete students.

The third question posed by the *Central Hudson* test is whether OSU's restrictions directly advance the interest posed under prong two of the test. While the interest is substantial, this argument is not persuasive as there are other means to administer gun control than prohibiting athlete endorsements—background checks, age requirements, permit requirements, prohibitions in particular locations such as schools, gun removal programs to keep them out of the hands of people who are prohibited from possession of them, etc. The notion that banning athlete endorsements is the most effective way to restrict firearms is a faulty one. Further, as the Court noted in *Edenfield v. Fane*, the burden on OSU to justify the restriction "is not satisfied by mere speculation or conjecture," and OSU must show the "harms it recites are real and…its restriction will in fact alleviate them to a material degree."[141] It would be difficult for OSU to demonstrate how future endorsements by athletes for firearms would result in weapons being in the possession of felons or people underage. It may be conceivable for OSU to produce evidence of an endorsement of this type to tarnish the school's reputation; however, both interests fail to survive the *Central Hudson* requirements, as they are predicated on the supposed harm created by speech that has not been spoken yet.

Finally, the Central Hudson test questions whether the restrictions are more extensive than necessary to achieve the desired purpose.[142] Here, OSU would need to prove the significant regulations imposed on athlete speech do not exceed the magnitude of the alleged harms. These policies place a preemptive blanket restriction on speech with no showing of other ineffective means to protect the institution's interests. Therefore, policies restricting the endorsements of firearms would fail to meet the requirements posed by the *Central Hudson* analysis.

While the *Central Hudson* analysis does not preclude the possibility of content-based restrictions, a "more limited regulation of appellant's commercial expression[]" may adequately protect the State's elaborated interests.[143] However, the Court found in *Sorrell v. IMS Health*[144] that a Vermont statute prohibiting the sale of information identifying physicians by the medications they prescribed to pharmaceutical manufacturers for marketing purposes was subject to heightened

139. *Id.* at 564.
140. Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 475 (1989).
141. Edenfield v. Fane, 507 U.S. 761, 770-71 (1993).
142. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.
143. *Id.* at 570.
144. Sorrell v. IMS Health Inc., 564 U.S. 552, 552 (2011).

scrutiny because it imposed content and speaker-based restrictions.[145] Analogous to the *Sorrell* decision, NIL policies deserve a heightened level of scrutiny, as they are both content-based and speaker-based restrictions.

### *B. Institutional Limitations*

The Supreme Court has noted on multiple occasions students, teachers, and the like do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[146] The Supreme Court has established a standard for reviewing speech restrictions in secondary institutions,[147] and subsequently tightened those standards for censoring the speech of students.[148] However, these standards have predominantly been applied in the context of primary and secondary schools, which draws the question of their applicability to postsecondary institutions and collegiate athletes. The Supreme Court has noted multiple times that secondary students are "distinguishable from their counterparts in college education,"[149] as college students are "young adults" who are "less impressionable than younger students."[150] Thus, it is unlikely to believe the analysis set forth for primary and secondary institutions applies to the context of college athlete speech, and further—athlete endorsements.

Additionally, colleges and universities do not stand in *loco parentis* for students who are generally considered adults when they enroll.[151] *Loco parentis* is "a doctrine of inferred parental consent to a public school's exercise of a degree of authority that is commensurate with the task that the parents ask the school to perform."[152] The college experience is culturally associated with moving away from one's parents and learning to live independently. It follows that college student speech cannot be restricted to the same degree as younger, more impressionable students, whose relationships with their institutions mirror those

145. *Id.* at 567.

146. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273-74 (1988) (where the Supreme Court held the school had an interest in protecting the identity of students in the student newspaper articles covering pregnancy and divorce and deleting two pages from the articles was not a violation of First Amendment rights.); Morse v. Fredrick, 551 U.S. 393, 397, 409-10 (2007) (where the Supreme Court held suspending a student for unfurling a banner reading "BONG HITS 4 JESUS" at a school-sponsored event was not a violation of the student's First Amendment rights. The Court found it was not only a substantial disruption, but the school also had an interest in stopping student drug use.).

147. *See Tinker*, 393 U.S. at 509.

148. *See Hazelwood*, 484 U.S. at 273 (finding that high school officials may utilize prior restraint to exercise editorial control over a school newspaper); *see also Morse*, 551 U.S. at 409-10 (2007) (finding that high school officials could punish students for unfurling a banner reading "BONG HITS 4 JESUS" at an off-campus event that was supervised by the school).

149. *See* Bd. of Regents v. Southworth, 529 U.S. 217, 238 n.4 (2000); Edwards v. Aguillard, 482 U.S. 578, 584 n.5 (1987) (stating the potential for undue influence is far less significant for college students); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 253 (1963) (finding such a "distinction warrants a difference in constitutional results").

150. Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981).

151. *See* Philip Lee, *The Curious Life of In Loco Parentis at American Universities*, 8 HIGHER EDUC. IN REVIEW 65 (2011).

152. Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 200 (2021) (Alito, J., concurring).

between parent and child. Further, college speech codes limiting the content of student speech has generally been reviewed under a strict scrutiny analysis,[153] as "state colleges and universities are not enclaves immune from the sweep of the First Amendment."[154]

Although the Court has acknowledged the need for authority of the States and school officials to regulate behavior within schools consistent with constitutional safeguards,[155] this does not imply First Amendment protections should apply with less force on college campuses than in the community at large. First Amendment protections should apply with more force as "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[156] The Court has also noted, "America's public schools are the nurseries of democracy," and there is a fundamental interest in educating students and the public about the value of differences in opinion.[157] While this interest is greater for political speech than commercial, there remains a concerted interest in free market expression among postsecondary institution students; however, universities appear to have put their commercial interests ahead of their fundamental instructional function in American democracy by limiting athlete NIL deals.

According to two leading constitutional scholars, Erwin Chemerinsky and Howard Gillman, college campuses have two distinct speech zones: one for formal academic and educational settings such as classes, where free speech is permitted but constrained by rules to guarantee appropriate conduct, and a larger speech zone including all other campus areas where speech restrictions are the same as in any other public forum.[158] Athlete endorsement contracts would fall under the latter category as the speech in question occurs away from the classroom and when athletes are not directly engaged in team activities. Colleges are not positioned to arbitrate public forums outside of their campus or university operations, even though they may do so for the few public forums on their own campuses. While the university is capable of engaging in discussions beyond its direct domain, its communication and actions are framed as a form of governmental expression.[159] Universities are still permitted to promote ideas and programs to their cohorts within public forums; however, "the Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech."[160] Via NIL restrictions, the government forecloses athletes from conveying their own positions, and compels them to take a parallel stance on such issues. By imposing NIL restrictions,

153. *See*, *e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 845-46 (1995) (holding a campus policy denying funding to student groups who were not ideologically neutral on issues of religion was a violation of students' First Amendment Rights).

154. Healy v. James, 408 U.S. 169, 180 (1972) (finding a public university's denial of official status to the Students for a Democratic Society, a left-leaning political organization, was a form of prior restraint violating the student's First Amendment rights).

155. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

156. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

157. *Mahanoy Area Sch. Dist.*, 594 U.S. at 190 (2021).

158. ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 77 (2017).

159. Ehrlich & Ternes, *supra* note 131, at 76.

160. *See* Walker v. Tex. Div. Sons of Confederate Veterans, 576 U.S. 200, 208 (2015).

institutions explicitly view athletes as full-time ambassadors of the school all while failing to accept them as employees. Such a stance is untenable and unjust.

### *C. Restrictions on 'Vice' Industries*

Restrictions on deals with 'vice' industries are also unlikely to withstand First Amendment scrutiny. Athletes endorsing firearms, casino gambling, or alcohol would be restricted under institutional policy despite the endorsement otherwise being permitted under state law. However, on numerous occasions the court has noted the State cannot restrict the dissemination of truthful information regarding legal activity. In *Greater New Orleans Broadcasting Association v. United States*,[161] the Court ruled that a federal law prohibiting advertisements of lotteries and casino gambling could not be used to block advertisements for legal casino gambling in Louisiana.[162] Similarly, in *44 Liquormart v. Rhode Island*,[163] the Supreme Court struck down a statute prohibiting the advertisement of retail liquor prices outside of the store they were being sold.[164] The Court found no reason to review a ban on "truthful, nonmisleading [*sic*] commercial speech" with any "added deference."[165] Justice Stevens noted, bans on commercial speech "rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth" and concluded the "First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[166] The Supreme Court in *Lorillard Tobacco Co. v. Reilly*[167] held that while the State's interest in preventing underage tobacco use is substantial, the sale and use of tobacco by adults is a legal activity, tobacco manufacturers/retailers have an interest in conveying truthful information about tobacco to adults, and adults have a corresponding interest in receiving truthful information about tobacco products.[168] College athletes and their endorsements of vice products are analogous to the decision in *Lorillard* as the sale and use of these products are legal activities.

By prohibiting athletes from endorsing tobacco, alcohol, firearms, and other legal products, institutions hope to avoid appearing as if they support vice products. However, these restrictions are not a reasonable fit to accomplish these interests. A university has the ability to prohibit athletes from using institution property or logos in their ads, as most universities currently do. Additionally, a vast majority of post-secondary institutions sell alcohol on campus during their sporting events. Prohibiting athletes from profiting from the same products the institution does is paradoxical and flawed.

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161. Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 173 (1999).
162. *Id.* at 195-96.
163. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 484 (1996).
164. *Id.* at 516.
165. *Id.* at 502.
166. *Id.* at 503.
167. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 525 (2001).
168. *Id.* at 571.

Moreover, the Court noted in *Greater New Orleans*, *Lorillard Tobacco*, and *Sorrel* the state's public policy objectives in preventing the vice industries are insufficient justification for content-based speech restrictions.[169] This argument was addressed in the majority opinion in *Central Hudson* where Justice Powell posed this stance by noting, "[i]f a governmental unit believes that the use or overuse of air conditioning is a serious problem, it must attack that problem directly, by prohibiting air conditioning or regulating thermostat levels."[170] This is comparable to institutions' restrictions on vice industries. Institutions may place a blanket restriction on athletes promoting alcohol, purport their purpose to be protecting their image, yet sell the same products in their stadium. If their objective was truly safeguarding their image, they should ban such products altogether—not merely foreclose athletes from the potential profit.

Universities have a wide range of alternatives for expressing their opposition to vice industries, including speakers to highlight safeguards against such products, campus activities, and policies prohibiting the use of products on campus. Thus, restrictions on athletes from endorsing these products off campus stretch beyond the State's interest in limiting its institutional connection to vice industries.

## V. CONCLUSION

The various state laws and institutional limitations single out athletes and target the content of their speech, flagging First Amendment challenges. Colleges and universities are delegated the authority to block NIL deals before they are finalized and have policies that permit them to do so based on mere content of the speech. These restrictions are only constitutional when they serve a substantial and narrowly tailored state interest—a school engaging in economic and reputational protectionism is not an important state interest. Forcing college athletes to forego NIL opportunities merely because the institution disapproves of the image it poses is a form of compelled speech which deprives the athlete of their First Amendment rights. As this comment has outlined, delegating governance over NIL to the states has flagged significant First Amendment issues. Because these constitutional concerns only apply to public schools and private schools subject to compulsory state legislation, private schools not tied to state legislation have a major competitive recruiting advantage. This competitive advantage could only be remedied through passage of a federal NIL statutory scheme—which would ultimately need to comply with the First Amendment.

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169. *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 194 (1999); *see also Lorillard Tobacco Co.*, 533 U.S. at 565-66 (striking down Massachusetts regulations that restricted tobacco advertising near schools and playgrounds, holding that the state's public health goals—though substantial—did not justify broad, content-based restrictions on commercial speech under the First Amendment); Sorrell v. IMS Health Inc., 564 U.S. 552, 579-80 (2011) (striking down Vermont law restricting the sale and use of prescriber-identifying data for pharmaceutical marketing, holding that the law imposed unconstitutional, content and speaker based restrictions on commercial speech, and that the state's public policy interest in regulating drug marketing did not justify those restrictions under heightened First Amendment scrutiny).

170. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 579 (1980).

A simpler solution lies in Justice Kavanaugh's concurring opinion in *Alston*, where he noted "difficult questions could be resolved in ways other than litigation," such as legislation or collective bargaining.[171] While immunizing the NCAA from antitrust law would uncover a complex problem, this comment joins the response urging the NCAA to permit athlete collective bargaining. Collective bargaining in the NCAA would allow athletes to have a unified voice to negotiate better conditions, including but not limited to compensation, health and safety standards, academic support, and overall treatment. Collective bargaining would offer an approach to address concerns regarding the power disparity between players and NCAA institutions, given that athletes bring in large sums of money for their schools while having limited capacity to advocate for themselves. By providing a systematic way of safeguarding their rights, collective bargaining can provide a framework to address antitrust concerns. Athletes would have more negotiating power with the NCAA and their member institutions, which would lead to more equitable agreements. Further, a well-structured collective bargaining system can prevent legal disputes and create a more stable environment for college athletes and the transfer portal.

No matter how the world of NIL grows from here, this comment makes clear a national NIL policy likely violates antitrust law, and localized regulations likely violate the First Amendment. Failure to reform is a promise for future litigation—one which the State will not win. Athletes should not be signing away their free speech rights on the recruitment trip, nor at the college door.

171. NCAA v. Alston, 594 U.S. 69, 111 (2021) (Kavanaugh, J., concurring).