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# Racialized Harm and the Structural Limits of International Law Beyond Borders

By: Indeara Chenevert[1]

## I. INTRODUCTION

The international legal frameworks fail to hold transnational corporations accountable for racially motivated harm, as they prioritize state sovereignty, territorial jurisdiction, and investor stability over enforceable human rights obligations.[2] This results in corporate power functioning globally while legal responsibility remains confined to state boundaries. As human rights and the global economy grow increasingly interconnected, transnational commercial conduct is gaining significance in international law. Businesses play a crucial role in expanding global markets, but their worldwide supply chains perpetuate racial hierarchies by transferring environmental degradation, labor exploitation, and economic fragility to existing oppressed populations.[3]

Historically, businesses have predominantly escaped direct accountability under international human rights law. Shielded by the territorial limitations of state jurisdiction and the sovereignty-centric framework of international legal responsibility. This has resulted in a regulatory void wherein transnational economic power operates globally, yet legal accountability remains fragmented, state-centric, and confined to specific domains. Thus, racial discrimination is less a coincidental outcome of globalization and more a

[1] J.D. Candidate, Southern University Law Center (2027).
[2] *BG Grp. PLC v. Republic of Arg.*, 572 U.S. 25, 30 (2014).
[3] Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 Int'l & Comp. L.Q. 573, 573 (2011).

fundamental aspect of modern economic structures embedded into the legal and institutional framework governing international trade.

This structural disparity between corporate power and legal accountability is most evident in the realm of racialized harm. Environmental racism in resource extraction zones, racialized labor exploitation in global supply chains, and ongoing underinvestment in developing states illustrate how sovereignty-based doctrines shield corporate entities from accountability while enabling discriminatory harm to endure across borders. These patterns show that current legal systems are not strong enough because they show that international economic governance puts the safety of investors and the stability of markets ahead of the safety of vulnerable groups. So, the main problem is not that there are not any rules; it is that corporate activity happens all over the world, but legal responsibility is limited to certain areas such as domestic state boundaries.[4] This paper analyzes the mechanisms employed to pursue and limit accountability, including the Alien Tort Statute (ATS) as a means for extraterritorial civil liability, the structural and enforcement deficiencies of international human rights treaties, the development of corporate human rights due diligence frameworks, and the function of international arbitration systems that prioritize investor certainty over community welfare. These frameworks show that the system of accountability is broken and does not work to deal with racialized injury in cross-border economic situations.[5]

This project claims that existing international legal frameworks are ineffective due to their reliance on assumptions that prioritize state consent[6],

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[4] Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443, 444–45 (2001).
[5] Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 Am. J. Int'l L. 45, 45 (2013).
[6] *BG Grp. PLC v. Republic of Arg.*, 572 U.S. 25, 30 (2014).

territorial jurisdiction, and investor stability over the safeguarding of substantive human rights[7]. Voluntary corporate social responsibility systems, soft law tools, and investor-state arbitration systems make this imbalance worse by treating human rights as secondary to economic governance rather than as enforceable legal limits on market behavior. So, even though corporate entities work smoothly across borders, racialized communities are still systematically denied access to real remedies.[8] But new reforms that show a big change in how the world is run are making this failure less acceptable. More people are starting to realize that just having sovereignty is not enough to control a global economy.[9] Laws that require businesses to do their due diligence on human rights[10], treaty-based efforts to control multinational corporations,[11] climate and environmental justice lawsuits, and the slow shift of international norms toward recognizing forms of corporate legal responsibility[12] all show this. This paper seeks to situate these modifications in a broader legal framework that establishes corporate accountability as a legal obligation—grounded in racial justice and substantive equality—rather than a voluntary ethical consideration.[13]

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[7] Simma, *supra* note 3, at 573.
[8] *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 243 (2018).
[9] Susan Ariel Aaronson & Ian Higham, *"Re-righting Business": John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms*, 35 Hum. Rts. Q. 333, 333 (2013).
[10] *Id.*
[11] Roberts, *supra* note 5, at 45.
[12] Ratner, *supra* note 4, at 443.
[13] Aaronson & Higham, *supra* note 9, at 333.

## II. THE STRUCTURE OF INTERNATIONAL LAW AND CORPORATE RESPONSIBILITY

The relationship between international law and business has always been shrouded in mystery. It's commonly believed that international law can theoretically apply to these entities, yet for many years it's been understood that the primary purpose of international law is to govern state actions.[14] This rationale emerged because businesses are viewed as wards of their respective states, resulting in potential challenges to a state's sovereignty when other state actors attempted to scold businesses for perceived bad behavior. This is further strengthened by the belief that regulations on businesses are the sole domain of domestic policy,[15] thus creating a patchwork system of regulations that are tailored to address domestic concerns while largely ignoring international ones. Trapp refers to this state-centric perspective as the "classical paradigm" of international law, which posited that states were both the primary subjects and objects of legal rights and obligations.[16] Trapp, on the other hand, says that international law has changed.[17] The law has changed well-known ideas like "necessity" and "proportionality" so that they can handle situations that the old model could not.[18] This is because of the emergence of strong non-state actors who wield tremendous power and influence over the global economic order.

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[14] Ratner, *supra* note 4, at 443.
[15] *Id.*
[16] Roberts, *supra* note 5, at 45.
[17] Ratner, *supra* note 4, at 443; Kimberley N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors*, 56 Int'l & Comp. L.Q. 141, 141 (2007).
[18] Simma, *supra* note 3, at 573.

The emergence of transnational corporations and global supply chains has eroded the distinction between states and non-state entities. Current literature indicates that corporations play a substantial role in international law, reflecting legal subjectivity due to their influence on international interests and obligations. This acknowledgment, however, creates a legal problem: even though states are the main parties responsible, corporations often wield more power than many state jurisdictions, making them nearly impossible to regulate seriously.[19] The current challenge is to align the evolving corporate subjectivity with strong accountability mechanisms for racial discrimination and other human rights violations that surpass state legal jurisdictions. Howard-Hassmann's study backs up this change by showing how human rights obligations have grown over time to include all "organs of society," not just the state.[20] The author talks about how "an emerging normative regime obliges transnational corporations and international organizations such as international financial institutions to also respect human rights." [21] This argument is an example of a doctrinal evolution: human rights, which were originally meant to protect individuals from the state, can evolve to protect people from harmful business practices and other non-state entities as well.

Howard-Hassmann also points out that political rhetoric and voluntary frameworks should not be the only places where normative extension happens.[22] If the term "human security" lets governments or businesses see protecting human rights as a choice instead of a legal duty, it could change "state obligations to respect individuals' inalienable human rights" into policy decisions about which

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[19] Ratner, *supra* note 4, at 444.
[20] Rhoda E. Howard-Hassmann, *Human Security: Undermining Human Rights?*, 34 Hum. Rts. Q. 88, 88 (2012).
[21] Aaronson & Higham, *supra* note 9, at 333.
[22] Howard-Hassmann, *supra* note 20, at 88.

parts of human security to protect in which situations.[23] The consequences for corporate accountability are substantial, as international business organizations cannot rely on market-driven ethics or informal legal frameworks such as the United Nations Guiding Principles.[24] Trapp's pragmatism means that a practical understanding of international law must put doctrinal uniformity aside in favor of addressing current sources of power and suffering.[25] In the same way that Trapp said that international law needs to change its rules of necessity to deal with violent non-state actors, modern human rights law needs to change to deal with economic non-state actors whose actions can also hurt global justice and equality.[26] Howard-Hassmann says that international law is strong because it says that "all organs of society are expected to protect human rights." The practical challenge is turning that expectation into a duty that can be enforced.[27]

# III. HUMAN RIGHTS AND RACIAL DISCRIMINATION IN INTERNATIONAL LAW

Both treaty law and customary international law assert that racial discrimination is not allowed. The UN Charter says that all member nations must promote universal human rights without regard to race.[28] The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

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[23] *Id.* at 97.
[24] Aaronson & Higham, *supra* note 9, at 334.
[25] Trapp, *supra* note 17, at 141.
[26] *Id.*
[27] Howard-Hassmann, *supra* note 20, at 111.
[28] Ratner, *supra* note 4, at 445.

is the main convention that states use to promise not to discriminate against people based on their race.[29]

ICERD has a broad definition of racial discrimination. It bans both intentional and systemic discrimination and requires states to take steps to stop private actors, like businesses, from acting in a discriminatory way.[30] Article 2(d) makes it clear that states must stop and get rid of racial discrimination by any individual, group, or organization. This means that the states are responsible for more than just their own actions.[31] Article 26 and Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) make these protections even stronger by requiring nations to stop inciting racial discrimination.[32] Scholars assert that equality should be regarded as a positive obligation, relevant to both public and private entities, while maintaining freedom of expression.[33]

### *A. Treaty Interpretation Beyond Text*

The CERD Committee has always understood ICERD to mean that states must regulate private actors when they cause harm through discrimination.[34] This way of thinking about interpretation sees racial discrimination as a structural problem that comes from how institutions and markets work. According to the committee's guidance, states have a duty to stop, monitor, and fix discriminatory harm produced by private organizations. This essentially creates a framework for indirect corporate accountability. This interpretation turns abstract treaty ideals

[29] Howard-Hassmann, *supra* note 20, at 89.
[30] Ratner, *supra* note 4, at 445.
[31] *Id.*
[32] *Id. at 446.*
[33] Roberts, *supra* note 5, at 47.
[34] Simma, *supra* note 3, at 574.

into real governance duties by presenting equality as an operational duty. However, enforcement still depends a lot on state institutions.[35]

### B. State Responsibility for Corporate conduct

ICERD's inclusion of private actors sets the stage for state regulation of how businesses function. In theory, this means that states must ensure Companies comply with regulations governing working conditions, environmental protections, and fair treatment of individuals. However, in practice, enforcement is not always applied consistently. Transnational supply chains take advantage of gaps in regulation and differences in jurisdiction, which lets companies work in areas with little scrutiny.[36] Consequently, racial discriminatory practices within the workplace are often treated as a regulatory failure rather than a direct responsibility of the company. Since companies do not have direct international duties, they are structurally protected from responsibility, even when they cause clear harm through discriminatory practices.

### C. Symbolic Ratification and Enforcement Gaps

Empirical research elucidates these enforcement deficiencies. The large number of countries signing human rights accords is often a result of inadequate monitoring and low levels of compliance. Research indicates that the intensity of enforcement has an inverse relationship with state participation: more stringent monitoring decreases ratification rates, whereas lax oversight results in symbolic compliance.[37] Bureaucratic and institutional capacity, rather than mere treaty ratification, predicts effective protection of rights.[38] States often accept equality

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[35] Howard-Hassmann, *supra* note 20, at 100.
[36] Ratner, *supra* note 4, at 460.
[37] Howard-Hassmann, *supra* note 20, at 104.
[38] Aaronson & Higham, *supra* note 9, at 336.

rules in a symbolic way, but they do not have the administrative machinery to enforce them.[39] This means that they do not follow through on their duties to private actors, including businesses. Scholars also say that duties that apply to any person, group, or organization do not work unless the state can enforce them.[40]

These results collectively demonstrate that legal consistency devoid of institutional capability yields symbolic rather than substantive conformity.[41] To transition from abstract rules to practical enforcement, sovereignty must transform into collective responsibility across borders.[42] New solutions include laws that require companies to follow human rights laws outside of their own countries,[43] corporate commitments based on treaties, and arbitration systems that include human rights scrutiny[44]. These mechanisms are ways to turn the idea of equality into rules that can be enforced. International anti-discrimination law is widely accepted and powerful in speech; however, until this system is in place, it is ineffective in practice.

## IV. CORPORATE LIABILITY AND THE ALIEN TORT STATUTE (ATS)

The Alien Tort Statute (ATS), 28 U.S.C. § 1350, gives federal courts the power to hear "any civil action by an alien for a tort only, committed in violation of the law of nations, or a treaty of the United States."[45] Before *Kiobel*, the ATS was viewed as a way for individuals in the United States to sue companies for

[39] Howard-Hassmann, *supra* note 20, at 108.
[40] *Id.*
[41] *Id.*
[42] *Id. at 111.*
[43] Simma, *supra* note 3, at 595.
[44] Aaronson & Higham, *supra* note 9, at 358.
[45] *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 253 (2018) (quoting 28 U.S.C. § 1350).

human rights abuses that occurred abroad. Scholars and litigants were hopeful that it would work.[46] Stewart and Wuerth say that the law is "the main engine for transnational human rights litigation in the United States," and they point out that early cases gave a lot of energy to holding businesses accountable.[47]

The Supreme Court's ruling in *Kiobel v. Royal Dutch Petroleum Co.* (2013) quickly put an end to this hope.[48] The Court used the presumption against extraterritoriality to say that ATS claims must "touch and concern the territory of the United States with enough force to displace the presumption."[49] *Kiobel* restricted foreign corporation liability for actions conducted abroad by changing the jurisdiction from a universal to a sovereignty-bound framework.[50] This changed the ATS from a tool for global accountability to a mechanism with limited jurisdiction. Stewart and Wuerth contend that the ruling transformed what was once regarded as "a badge of honor in international law" into a source of "uncertainty over the scope of its extraterritorial reach."[51]

In *Jesner v. Arab Bank, PLC* (2018), the Supreme Court made corporate responsibility even less clear by saying that foreign companies can not be sued under the ATS.[52] Justice Kennedy said that making businesses liable could "cause foreign relations tensions" that Congress should deal with instead.[53] However, individual employees could still be liable. This ruling moved the duty from organizations to people, making it clear that corporate liability must be pursued

[46] David P. Stewart & Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Tort Statute, 107 Am. J. Int'l L. 601, 601 (2013).
[47] *Id. at 601-02.*
[48] *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013).
[49] *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 261 (2018) (quoting *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108, 114 [2013]).
[50] *Id.*
[51] Stewart & Wuerth, *supra* note 46, at 602.
[52] *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 255 (2018).
[53] *Id. at 262* (Kennedy, J.).

through officer or executive claims.[54] Becker stated that Jesner "made things unclear for future and ongoing ATS lawsuits" because it did not clarify whether domestic corporations or their offices could be sued.[55] It also brought up complicated questions about aiding and abetting liability, choice of law, and personal jurisdiction.[56]

In *Nestlé USA, Inc. v. Doe* (2021), the Court further narrowed the reach of ATS claims, holding that plaintiffs must demonstrate "more domestic conduct than general corporate activity" to get beyond the presumption against extraterritoriality.[57] Justice Thomas attacked the emphasis on broad domestic activity, saying, "[T]he presumption . . . would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved."[58] *Kiobel*, *Jesner*, and *Nestlé* show how U.S. courts are moving away from strong global human rights adjudication.[59] Although individual corporate leaders can still theoretically be held accountable, plaintiffs face uncertainty in lower courts regarding numerous procedural and substantive issues, including which law applies and where to file their case.

Officer responsibility is not a perfect replacement for corporation liability.[60] In principle, suing directors or executives directly may lead to solutions, but in practice, it makes things more complicated legally. Courts must deal with issues including personal jurisdiction, evidence problems, and the complexities of aiding-and-abetting standards.[61] All of these make the case more

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[54] Tyler Becker, *The Liability of Corporate Directors*, Officers, and Employees Under the Alien Tort Statute After *Jesner v. Arab Bank, PLC*, 120 Colum. L. Rev. 91, 93 (2020).
[55] *Id.* at 93.
[56] *Id.* at 94.
[57] *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 633 (2021).
[58] *Id.* at 644 (Thomas, J.) (quoting id. At 633).
[59] Stewart & Wuerth, *supra* note 46, at 602–03.
[60] Ratner, *supra* note 4, at 453.
[61] Becker, *supra* note 54, at 93–94.

complicated and less likely to succeed. Becker says that corporate leaders are still responsible in principle, but these allegations are hard to forecast and do not always hold companies accountable in the same way that direct corporate lawsuits do.[62] So, even though the ATS still has a symbolic role in global justice, it mostly shows how limited judicial internationalism is in a domestic constitutional system.

The path from pre-*Kiobel* hope to post-*Nestlé* reality illustrates how the ATS, once seen as a tool to hold international corporations accountable, has been incredibly constrained over time.[63] The court's rationale is mainly concerned with sovereignty and the separation of powers, which makes the law unclear and broken.[64] Lower courts are still having trouble figuring out how to use ATS principles in real life, and officer liability, although possible, is not a perfect solution that entirely fills the gap left by prohibited corporate actions.

## V. THE EMERGING FRAMEWORK OF CORPORATE DUE DILIGENCE

This section examines the shift from voluntary corporate social responsibility to mandatory human rights due diligence obligations at the international level. It asserts that the UN Guiding Principles on Business and Human Rights (GPs), developed by John Ruggie and endorsed by the Human Rights Council, accelerated the shift from soft law to hard law.[65] Ruggie's governance model reshaped the relationships among nations, corporations, and

[62] *Id.* at 94.
[63] *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 261 (2018).
[64] *Id.*
[65] Aaronson & Higham, *supra* note 9, at 333.

affected individuals by incorporating human rights considerations into the framework of global trade.[66]

Aaronson and Higham assert that Ruggie's "Protect, Respect, Remedy" paradigm offered "an innovative and comprehensive reevaluation of assessing corporations' human rights performance."[67] The model emphasizes three fundamental principles: the state's duty to safeguard human rights, the business need to honor those rights, and enhanced access to remedies for victims of corporate misconduct. This approach redefines firms as entities with social and legal obligations, rather than only economic players. The fundamental principle of the GPs is human rights due diligence, defined as "the measures a company must implement to recognize, avert, and mitigate negative human rights consequences." [68] Companies are anticipated to establish human rights policies, perform effective evaluations, incorporate human rights into various functions, and oversee and disclose their advancements. Aaronson and Higham observe that the GPs "connect governments' international human rights responsibilities to voluntary corporate actions," thus converting soft standards into nascent regulatory requirements.[69] As states and international organizations implement the GPs; due diligence procedures transition from optional ethics to an evolving worldwide standard of business conduct.

### *A. From Soft Law to Hard Law*

The 2011 amendment of the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises marked the inaugural integration of Ruggie's principles into an intergovernmental

[66] *Id.* at 334.
[67] *Id.* at 335.
[68] *Id.* at 336.
[69] *Id.* at 337.

framework.[70] Aaronson and Higham assert that the modification, significantly shaped by Ruggie's contributions, incorporated specific human rights terminology and mandated companies to establish due diligence procedures to detect and minimize risks.[71] The OECD Guidelines broadened accountability to corporate subsidiaries and supply chains, improving grievance mechanisms via National Contact Points, and illustrated that even voluntary standards can establish quasi-enforceable expectations. The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas implements these concepts in a sector-specific manner, highlighting transparency, monitoring, and public reporting. [72]These restrictions prompt companies to monitor the sources of minerals and refrain from funding armed factions, creating a global standard that due diligence in reviewing risks that impact human rights is essential to legitimate commercial practices.

### *B. Comparative Legislative Models*

Governments are progressively incorporating international standards into national legislation. Aaronson et al. note that "an increasing number of international entities now acknowledge that states must take greater measures to prevent firms from violating human rights both domestically and internationally."[73] Examples include the United States' Dodd-Frank Act (2010), mandating the disclosure of conflict minerals sourced from the Democratic Republic of Congo; resource transparency initiatives setting a standard throughout the European Union; Brazil's constitutional amendment allowing land confiscation in instances of slave labor; and EU directives providing guidance on responsible practices within the International Trade Centre (ITC) and extractive

[70] *Id.* at 338.
[71] *Id.*
[72] *Id.* at 340.
[73] *Id.* at 341.

sectors.[74] Each project illustrates the transition from voluntary business actions to legally binding responsibilities.

The European Union's Corporate Sustainability Due Diligence Directive (CSDDD), commencing in 2024, imposes a legal obligation on firms to identify, prevent, and rectify human rights and environmental infringements across their value chains.[75] Previous national rules, including France's Loi de Vigilance (2017) and Germany's Supply Chain Act (2023), anticipated this shift by establishing accountability for deficiencies in due diligence. These legislative models collectively demonstrate the transformation of voluntary norms into enforceable legal duties, exhibiting differences in scope, enforcement mechanisms, and targeted sectors across several jurisdictions.

### *C. Limits of Due Diligence*

#### **1. Enforcement**

Notwithstanding the legal codification of due diligence, enforcement is inconsistent. Compliance systems sometimes depend on business entities' self-reporting and monitoring, potentially diminishing the efficacy of oversight.[76] Regulatory bodies in numerous jurisdictions are inadequately resourced to guarantee comprehensive enforcement, while cross-border businesses exacerbate jurisdictional complexities.[77] Consequently, discrepancies remain between legislative requirements and real company conduct.

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[74] *Id.* at 342.
[75] *Id.*
[76] *Id.*
[77] Ratner, *supra* note 4, at 461.

### 2. Remedies

Although due diligence rules establish a foundation for corporate accountability, the enforcement of appropriate remedies continues to pose difficulties. Legal systems differ in their ability to offer redress, and litigants have the burden of presenting sufficient evidence to establish corporate accountability, particularly across many jurisdictions and intricate supply chains.[78] Even when remedies are available, they may be protracted, narrowly defined, or inadequately compensated for victims.[79]

### 3. Access to Justice

Access to justice remains a substantial impediment. Individuals and communities impacted by corporate malfeasance often lack the resources, legal acumen, or institutional backing to pursue claims, especially against multinational corporations.[80] The intricacies of procedures, financial burdens, and cross-border enforcement difficulties intensify these hurdles, indicating that formal legal requirements do not consistently result in substantial accountability or protection in practice.[81]

The developing framework of corporate due diligence signifies a distinct shift from voluntary corporate responsibility to legal requirements, illustrating an increasing global consensus on the importance of human rights in business practices. Nonetheless, enforcement deficiencies, restricted remedies, and access restrictions underscore that substantial obstacles persist in converting legislative standards into tangible protection and accountability.

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[78] *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014).
[79] Simma, *supra* note 3, at 595.
[80] *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014).
[81] Howard-Hassmann, *supra* note 20, at 111.

## VI. **INTERNATIONAL ARBITRATION AND HUMAN RIGHTS: BETWEEN PRIVATE AUTONOMY AND PUBLIC ACCOUNTABILITY**

International arbitration frameworks, such as the International Centre for Settlement of Investment Disputes (ICSID) Convention (1965), the New York Convention (1958), and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, are designed to guarantee neutrality and enforceability in transnational commercial disputes. Over time, investor–state arbitration has transformed into a venue where public law matters, such as discrimination, labor rights, and environmental regulation, intersect with private contractual autonomy. Foster asserts that investor-state arbitration "has converted a method of commercial dispute resolution into a mechanism of public law adjudication."[82]

Anthea Roerts observes that more than 3,000 investment treaties permit private investors to contest sovereign actions before arbitral tribunals, thereby internationalizing administrative review.[83] This transition, while enhancing investor remedies, has complicated the protection of human rights by privatizing disputes that affect public benefit. The "reorientation of adjudicatory authority" threatens to compromise the traditional understanding of public international law as a legal framework governing relations between publicly representative bodies.[84] When private arbitration tribunals assess regulatory measures, concerns

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[82] *BG Group plc v. Republic of Arg*., 572 U.S. 25, 26 (2014).
[83] Roberts, *supra* note 5, at 45.
[84] *Id.*

such as racial discrimination or labor safeguards are reinterpreted as economic injuries rather than claims based on rights.

Roberts' study, Power and Persuasion in Investment Treaty Interpretation, enhances this argument by illustrating how arbitral courts claim interpretive supremacy under bilateral investment treaties (BITs).[85] States assume a "dual role" as both treaty drafters and respondents; nonetheless, courts progressively influence treaty interpretation through self-referential reasoning.[86] Roberts' empirical research indicates that 94 percent of investment awards reference past arbitral decisions, although a minority consider subsequent state practice as stipulated in Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties.[87] The resulting jurisprudence resembles a closed epistemic community rather than a democratically accountable interpretative process. The legitimacy issue of arbitration is fundamentally constitutional when applied to define the scope of governmental regulatory power. When arbitrators assess the legality of measures concerning discrimination or labor standards, public accountability might decrease.

The legitimacy challenge is exacerbated by procedural obstacles encountered by victims of corporate human rights violations. Conventional investment arbitration is structured to benefit investors rather than impacted communities. Individuals or local entities adversely affected by corporate actions typically lack standing within the ICSID framework, as consent is derived from treaties and restricted to states and eligible investors. The expenses associated with arbitration, frequently amounting to millions of dollars, further limit accessibility. Confidentiality regulations may inhibit impacted groups from

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[85] Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 Am. J. Int'l L. 179, 181 (2010).
[86] *Id.*
[87] *Id.* at 188.

becoming aware that procedures involve their rights. Moreover, stringent jurisdictional criteria, including nationality stipulations and definitions of "investment," preclude numerous claims.[88] Although counterclaims by governments are theoretically permissible, tribunals have exercised caution in their acceptance, effectively restricting the potential for directly addressing corporate human rights commitments in investor-state disputes.[89] These structural impediments demonstrate how the framework of arbitration favors capital mobility at the expense of victims' access to remedies.

One of the few doctrinal ways for arbitral tribunals to deal with corporate wrongdoing directly is through human rights counterclaims.[90] In investor-state arbitration, counterclaims allow the state that is responding to the claim to make claims against the investor in the same case. But to establish a counterclaim's validity, three structural conditions must be met: the treaty's jurisdiction, a legal basis that binds the investor, and a strong link between the counterclaim and the investor's original claim. Historically, tribunals have been hesitant to accept counterclaims based on human rights, often arguing that bilateral investment treaties (BITs) place duties on states, not investors.[91] Even when tribunals agree that companies can be held responsible under domestic law or international norms, they often need clear treaty language before accepting counterclaims. Even though counterclaims could theoretically be used to deal with human rights violations by businesses, such as exploiting workers or harming the environment, they are not built into the system in a way that makes them common. The imbalance remains: investors go to arbitration with treaty rights that can be enforced, while affected communities must rely on states to come up with creative

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[88] Roberts, *supra* note 5, at 58.
[89] Simma, *supra* note 3, at 595.
[90] *Id.*
[91] *Id.*

ways to make counterclaims in systems that are not meant to decide corporate human rights duties.[92]

The Supreme Court of the United States' ruling in *BG Group plc v. Republic of Argentina* (2014) exemplifies judicial deference to arbitral independence.[93] The tribunal pardoned the investor's inability to exhaust local remedies owing to Argentina's emergency legislation, and the Supreme Court affirmed the verdict, underscoring that procedural adherence was the responsibility of arbitrators, not courts. Justice Breyer emphasized efficiency and party autonomy, thereby strengthening a pro-arbitration federal policy.[94] Justice Sotomayor warned that undue deference could protect arbitral verdicts even when governmental actions aim to achieve essential public goals.[95] The case underscores the conflict between procedural autonomy and substantive review, especially in contexts where regulatory measures pertain to economic crises, social welfare, or equality issues.

The conflict between transparency and confidentiality constitutes another fundamental divide. Historically, traditional ICSID proceedings have prioritized confidentiality; nevertheless, revisions have progressively increased the disclosure of awards and the accessibility of hearings.[96] However, openness frequently relies on the permission of the parties involved. In contrast, the Hague Rules on Business and Human Rights Arbitration, established under the aegis of the Permanent Court of Arbitration, explicitly emphasize transparency. They allow public hearings, document release, and amicus curiae involvement, while

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[92] Roberts, *supra* note 5, at 65.
[93] *BG Grp. plc v. Republic of Arg.,* 572 U.S. 25, 34 (2014).
[94] *Id.*
[95] *Id.* at 50 (Sotomayor, J., concurring in part).
[96] Roberts, *supra* note 5, at 68.

incorporating the UN Guiding Principles on Business and Human Rights. Confidentiality is maintained where essential to safeguard victims or sensitive data; however, transparency is the prevailing principle. This recalibration acknowledges that disputes concerning human rights cannot be seen solely as private commercial issues.

A comparison between ICSID and the Hague Rules highlights this normative disparity. ICSID arbitration is founded on treaties, driven by investors, and largely focused on safeguarding investment norms, including fair and equitable treatment. The enforcement mechanism established by the ICSID Convention guarantees almost instantaneous acknowledgment of awards, so enhancing their finality. The Hague Rules are contractual and voluntary; they do not establish jurisdiction but offer a procedural framework suitable for human rights issues. While ICSID underscores depoliticized neutrality and enforceability, the Hague Rules prioritize inclusivity, victim engagement, and public oversight. The legitimacy of ICSID is founded on stability and enforceability, whereas the Hague framework pursues legitimacy via transparency and normative integration with international human rights legislation.

In addition to procedure and transparency, the legitimacy issue in arbitration also involves representation and systemic equilibrium. Arbitrators are often chosen from a limited group of distinguished professionals, many of whom alternate between roles as counsel and arbiter.[97] Critics contend that the practice of "double hatting" may establish structural incentives that implicitly promote broad interpretations of investor rights.[98] Furthermore, impacted communities seldom engage directly in the appointment process, thus exacerbating views of a

[97] *Id.* at 70.
[98] *Id.*

democratic deficit. Despite revisions within ICSID promoting enhanced diversity in arbitrator selections and more explicit disclosure requirements, doubts remain about the efficacy of incremental procedural changes in addressing fundamental legitimacy issues.

A different aspect of legitimacy pertains to remedial imbalance. Investor-state arbitration predominantly grants monetary compensation, frequently of considerable magnitude. In contrast, human rights adjudication often prioritizes reparation, assurances against recurrence, or systemic reform. When public interest regulation is examined through a compensating perspective, states may experience regulatory chill, reluctant to implement stringent environmental or social protections due to concerns about expensive lawsuits.[99] Despite the contentious nature of empirical data about regulatory chill, the perception alone influences public confidence. The Hague Rules seek to address this disparity by allowing greater remedial flexibility and by framing conflicts within a human right's normative context rather than solely an economic one.[100]

The enforcement system under the ICSID Convention is not just about following the rules; it also protects investors' interests structurally. Article 53 of the ICSID Convention makes awards binding and not subject to appeal, which means that domestic courts cannot review them in any way that is substantive.[101] While Article 52 limits annulment to minor procedural mistakes, like a clear abuse of power or a serious breach of basic procedural rules.[102] This stops the tribunal from rethinking its interpretation of treaty protections or regulatory legitimacy. The Convention protects investor awards from external review by only allowing internal ad hoc committees to review them rather than national courts. Article 54

[99] Simma, *supra* note 3, at 595.
[100] *Id.*
[101] *BG Grp PLC v. Republic of Arg.*, 572 U.S. 25, 36 (2014).
[102] Roberts, *supra* note 5, at 78.

also states that Contracting States must treat monetary awards as if they were final domestic judgments, which makes cross-border execution much easier.[103] Article 55 preserves sovereign immunity in place during the execution stage, but it protects only state assets, not the award's validity.[104] These rules work together to make a self-contained enforcement system that puts finality, predictability, and capital mobility first. There is no similar treaty-based enforcement system for corporate human rights obligations or for victims of racialized labor exploitation who want to get justice. Consequently, the ICSID enforcement mechanism does more than just carry out awards. It makes asymmetry a part of the system by placing investor protections into a binding transnational enforcement system while leaving human rights enforcement up to different domestic remedies.

The future validity of arbitration ultimately hinges on the reconciliation of enforceability and accountability. The transition from ICSID's depoliticized paradigm to the transparency-focused Hague framework indicates a progressive constitutionalizing of international arbitration. The system must address criticisms that it favors private capital over public welfare, whether by increasing states' interactive authority under the Vienna Convention, enhancing victim participation, or implementing institutional reforms. In a time characterized by global supply chains, climate risk, and social inequality, arbitration can no longer assert neutrality by dissociating from public principles. The ongoing authority will depend on its ability to incorporate human rights considerations as fundamental principles of adjudication rather than external restrictions.

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[103] Simma, *supra* note 3, at 595.

[104] *BG Grp. PLC v. Republic of Arg.*, 572 U.S. 25, 42 (2014).

### A. *Comparative Models of Corporate Accountability: United States and European Jurisdictions*

The legal systems that hold companies accountable in the US and Europe directly affect how victims of racialized supply-chain harm can get help. U.S. courts limit general jurisdiction to a corporation's place of incorporation or principal place of business, as stated in *Hertz and Daimler*. This means that accountability is limited to formal corporate centers and not operational sites of harm. European domicile-based models also put the statutory seat or central administration first. These strategies encourage predictability and respect for sovereignty, but they also make it harder for communities in the Global South that have been hurt by extractive zones, agricultural plantations, and manufacturing hubs. Victims of racially stratified labor exploitation or environmental degradation must navigate procedural obstacles such as personal jurisdiction, forum non-conveniens, standing, and evidentiary burdens, which are prior to judicial consideration of the merits.[105] Jurisdictional restraint acts as a gatekeeping doctrine that turns racialized corporate harm into a procedural challenge instead of a legal violation.[106]

In the United States, corporate jurisdiction is regulated by constitutional due process principles and statutory diversity regulations, with courts emphasizing the corporation's state of formation and primary business location. The Supreme Court explained in Hertz Corp. v. Friend that a corporation's principal place of business denotes its "nerve center," defined as "the location where the corporation's senior executives direct, control, and coordinate its activities”.[107] This site generally aligns with the business headquarters and

[105] *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014)
[106] Roberts, *supra* note 5, at 45.
[107] *Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010).

establishes a definitive and manageable criterion for ascertaining jurisdiction. The nerve center test guarantees consistency and predictability, enabling courts to ascertain the jurisdiction where business decisions are rendered.[108]

Likewise, personal jurisdiction over corporations is constitutionally constrained. In Daimler AG v. Bauman, the Supreme Court determined that a corporation is amenable to broad jurisdiction solely in instances where its connections to the forum state are "so continuous and systematic as to render [it] essentially at home in the forum State." [109] The Court dismissed broad claims of jurisdiction based merely on subsidiary activities, underscoring that due process necessitates confining jurisdiction to regions where the corporation's operations are sufficiently central to warrant universal jurisdiction.[110] The Court explained that permitting jurisdiction purely based on a subsidiary's contacts would result in an unacceptably expansive jurisdictional reach, in violation of constitutional due process.[111]

This jurisdictional framework embodies a sovereignty-based concept that restricts corporate accountability to the sites of corporate control and management. In contrast, European countries typically depend on domicile-based jurisdiction, which is defined as the corporation's statutory seat, central administration, or primary location of operation.[112] This methodology, like the U.S. framework, prioritizes predictability and guarantees that businesses are litigated in nations where they possess a formal legal presence and operational authority.

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[108] *Id.*
[109] *Daimler AG v. Bauman*, 571 U.S. 117, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).
[110] *Id.* at 139.
[111] *Id.*
[112] *Id.*

The cocoa supply chain in Côte d'Ivoire and Ghana demonstrates how jurisdictional limitations and disjointed enforcement lead to racially biased failures in access to remedies.[113] West Africa grows most of the world's cocoa, but most cocoa farmers make less than one dollar a day. The industry has also been linked to dangerous child labor and deforestation caused by high demand around the world.

There is a clear geographic and racial hierarchy in the supply chain's economic structure: Black West African farming communities do most of the production, while multinational corporations based in Europe and the United States have most of the power to capture value, brand, and negotiate contracts.[114] Even though most people know about child labor and producer poverty, accountability systems are still indirect and rely on voluntary certification systems, state regulation, or political negotiation instead of legally binding duties across borders.

The doctrine of jurisdiction makes this imbalance even worse. According to U.S. due process law, corporations usually only have general jurisdiction in the state where they were formed or where their main office is located. European domicile rules also put the statutory seat or central administration first.[115] These frameworks make it easier for companies to plan, but they separate the decision-making process from the places where racialized labor exploitation happens. West African producers lack standing in investor-state arbitration and do not benefit from a treaty-based enforcement system, which safeguards foreign investors under agreements like the ICSID Convention.[116] So, even though cocoa supply chains work well across borders, solutions for racialized labor exploitation are

[113] *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 633 (2021).
[114] Ratner, *supra* note 4, at 483.
[115] *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014).
[116] Roberts, *supra* note 5, at 58.

still limited to certain areas, depend on politics, and are hard to get to. The damage is worldwide, but the responsibility is local. This structural mismatch shows how jurisdictional limits change racialized economic harm from a legal obligation to a matter of regulatory discretion.

### *B. Remedies*

In the United States, the judicial system has extensive power to impose both equitable and statutory remedies for corporate wrongdoing. Federal securities legislation establishes measures to avert unfair enrichment and guarantee accountability. In SEC v. Jensen, the court upheld the Securities and Exchange Commission's jurisdiction to pursue disgorgement of unlawfully acquired corporate profits as a penalty for securities infractions.[117] This power aims to prevent persons from keeping financial gains acquired by misbehavior and acts as a fair remedy to restore the original state.

Statutory remedies are also available at the state level. Shareholder oppression statutes empower courts to enforce remedies such as dissolution, buyouts, and company reorganization. Oregon law permits courts to mandate remedies, including dissolution, custodian appointments, or compelled buyouts in cases of oppressive conduct by controlling shareholders.[118] The Oregon Supreme Court clarified that legislative remedies are available to rectify "illegal, oppressive, or fraudulent conduct" and to safeguard minority shareholders against the exploitation of corporate authority.[119] The Oregon Supreme Court explained that legislative remedies exist to correct illegal, oppressive, or fraudulent conduct and to protect minority shareholders from the abuse of corporate power.

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[117] *SEC v. Jensen*, 835 F.3d 1100, 1108 (9th Cir. 2016).
[118] *Graydog Internet, Inc. v. Giller*, 362 Or. 177, 188, 406 P.3d 45, 52 (2017).
[119] *Id.*

Correspondingly, legal remedies are available to guarantee appropriate corporate governance practices. Courts may mandate shareholder meetings or oversee corporate activity where corporate governance protocols are inadequate.[120] In 2025 Pennsylvania put into law 15 Pennsylvania Consolidated Statutes § 1792(a) (2025). This PA statute empowers courts to mandate meetings or designate executives to guarantee compliance with corporate governance responsibilities. Federal securities legislation imposes criminal and civil sanctions for corporate malfeasance. According to 15 U.S.C. § 78ff, people who intentionally breach securities laws may face fines and incarceration.[121] These penalties fulfill both deterrence and punitive roles, strengthening adherence to federal regulatory mandates.

In contrast, European remedies are predominantly regulated by statutory frameworks that prioritize shareholder protection and business stability. English law acknowledges derivative lawsuits but restricts shareholder standing to guarantee that corporate governance conflicts are addressed through existing legal frameworks.[122] British courts have clarified that, pursuant to English law, derivative lawsuits must adhere to stringent standing criteria, guaranteeing that shareholders represent the corporation rather than seeking personal claims.[123] This legal framework restricts judicial involvement and underscores corporate continuity.

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[120] 15 Pa. Cons. Stat. § 1792 (2025) (authorizing courts to order shareholder meetings when corporate governance procedures fail).
[121] 15 U.S.C. § 78ff (2018) ("Any person who willfully violates any provision of this chapter… shall upon conviction be fined… or imprisoned… or both.").
[122] *City of Harper Woods Emples. Ret. Sys. v. Olver*, 589 F.3d 1292, 1298 (D.C. Cir. 2009).
[123] *Id.*

### C. *Enforcement Authority*

In the United States, the authority for enforcement is bifurcated between administrative agencies and judicial courts. The Securities and Exchange Commission (SEC) possesses extensive statutory jurisdiction to enforce securities legislation and commence civil or administrative enforcement actions. The SEC may initiate enforcement actions in federal court or via administrative hearings overseen by administrative law judges.[124] In *Bandimere v. U.S. SEC* (2016), the U.S. Court of Appeals for the Tenth Circuit clarified that the SEC has the legal jurisdiction to enforce federal securities laws and to impose penalties, including financial and regulatory punishment.[125] This enforcement authority enables the SEC to guarantee adherence to federal securities legislation and safeguard investors.

Federal legislation additionally enforces criminal sanctions for corporate malfeasance. According to 15 U.S.C. § 78ff, people who intentionally contravene securities laws may face fines or incarceration.[126] This act imposes criminal culpability on corporate officers and other individuals involved in securities fraud. In contrast, European enforcement methods predominantly depend on statutory enforcement via regulatory agencies and judicial systems implementing legislative frameworks. English law permits courts to enforce corporate governance regulations and resolve derivative claims, provided these claims adhere to statutory limitations.[127] This statutory framework embodies a regulatory style where enforcement authority is predominantly based on legislative provisions rather than extensive equitable judicial jurisdiction.

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[124] *Bandimere v. United States SEC*, 844 F.3d 1168 (10th Cir. 2016).
[125] *Id.*
[126] 15 U.S.C. § 78ff (2026) ("Any person who willfully violates any provision of this chapter… shall upon conviction be fined… or imprisoned… or both.").
[127] *City of Harper Woods Emples. Ret. Sys. v. Olver*, 589 F.3d 1292 (D.C. Cir. 2009).

### *D. Role of Courts*

U.S. courts are crucial in enforcing corporate accountability and interpreting norms of corporate governance. Judicial bodies evaluate corporate activities, uphold fiduciary responsibilities, and guarantee adherence to legal mandates. Courts adjudicating company governance disputes assess whether directors fulfilled their fiduciary responsibilities and legal requirements. In First Union Corp. v. SunTrust Banks, Inc., the court elucidated that directors have fiduciary duties of care and loyalty and that judicial scrutiny of corporate decision-making is conducted to ascertain adherence to these responsibilities.[128]

Courts also have the jurisdiction to directly oversee corporate governance operations. Courts may mandate shareholder meetings and supervise adherence to corporate governance where required to safeguard shareholder rights.[129] These authorities enable courts to directly interfere in company governance when statutory obligations are unmet. In contrast, European courts often function within statutory frameworks and prioritize the enforcement of legislative mandates over the formulation of extensive equitable remedies. Under English law, courts enforce statutory regulations pertaining to corporate governance and shareholder rights, although they are constrained by statutory standing requirements and procedural regulations.[130] This indicates a more limited judicial role centered on statutory enforcement instead of equitable action.

[128] *First Union Corp. v. Suntrust Banks, Inc.*, No. 01-CVS-10075, 2001 NCBC 9A (N.C. Super. Ct. Aug. 10, 2001).
[129] 15 Pa. Cons. Stat. § 1792 (2025), (authorizing courts to order shareholder meetings when corporate governance procedures fail).
[130] *City of Harper Woods Emples. Ret. Sys. v. Olver*, 589 F.3d 1292, 1298 (D.C. Cir. 2009).

### E. *Divergent Accountability Models and Their Structural Implications*

The comparative analysis identifies systemic disparities between U.S. and European corporate accountability systems that have significant implications for the victims of racialized corporate harm. In the United States, jurisdiction is based on the corporation's principal place of business and the constraints of constitutional due process.[131] A framework that, while predictable, structurally limits access to remedies for communities harmed at sites of extraction and production far removed from corporate headquarters.

Remedies encompass equitable relief, statutory remedies, and criminal sanctions,[132] offering a broad but procedurally demanding arsenal of accountability tools. The authority for enforcement is allocated between judicial courts and administrative bodies,[133] creating a dual system that can be both robust and fragmented. Judicial bodies actively enforce corporate accountability and oversee corporate governance, [134] yet their reach remains constrained by jurisdictional doctrine and constitutional limitations.

In contrast, European systems prioritize legislative remedies, regulatory enforcement, and restricted judicial intervention, demonstrating a more organized statutory framework that governs corporate accountability. One that is increasingly receptive to mandatory due diligence obligations and preventative regulatory oversight. Together, these divergent models reveal that corporate accountability can be a function of institutional design, political will, and the

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[131] *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010).
[132] *Graydog Internet, Inc. v. Giller*, 362 Or. 177, 188, 406 P.3d 45, 52 (2017).
[133] *Bandimere v. United States SEC*, 844 F.3d 1168 (10th Cir. 2016).
[134] *First Union Corp. v. Suntrust Banks, Inc*., No. 01-CVS-10075, 2001 NCBC 9A (N.C. Super. Ct. Aug. 10, 2001).

degree to which legal systems are willing to subordinate economic interests to enforceable human rights obligations.

# VII. CRITIQUES AND COUNTERARGUMENTS: EVALUATING CORPORATE DUE DILIGENCE FRAMEWORKS

Corporate due diligence regimes have faced criticism for several reasons. These include potential investment discouragement, encroachment on sovereignty, inefficiencies in arbitration, and high compliance obligations. Nonetheless, statutory authority and court precedent indicate that these criticisms are predominantly baseless. Governing statutes and case law indicate that due diligence regimes aim to reconcile regulatory monitoring with economic efficiency, uphold international sovereignty, maintain arbitration efficacy, and enforce reasonable compliance requirements.[135]

## *A. Investment Chill*

Critics contend that corporate due diligence procedures deter international investment by imposing onerous regulatory obligations. However, the statutory text contradicts this assertion. Congress has explicitly stated that regulatory structures overseeing international investment are not designed to dissuade foreign investment.[136] According to 22 U.S.C. § 3101, the collecting of information pertaining to overseas investment is essential for informed

[135] *EEOC v. Ferrellgas, L.P.*, 97 F.4th 338 (6th Cir. 2024).
[136] 22 U.S.C. § 3101(c) (2018) ("Nothing in this Act is intended to restrain or deter foreign investment in the United States, United States investment abroad, or trade in services.").

policymaking while alleviating constraints on enterprises.[137] The statute additionally stipulates that information collection must occur "with minimal burden on businesses and other respondents and without unnecessary duplication of effort," and explicitly states that "[n]othing in this Act is intended to restrain or deter foreign investment in the United States, U.S. investment abroad, or trade in services."[138]

This statutory phrasing illustrates that due diligence and information-gathering mechanisms are intended to promote, rather than hinder, investment. The legislative objective is to get precise information essential for economic governance while upholding a regulatory framework that minimizes unwarranted disruption to company activities. By clearly stating its lack of intent to inhibit investment, Congress affirmed that due diligence standards fulfill informational and regulatory purposes rather than protectionist or deterrent roles.

### *B. Sovereignty Concerns*

Another argument contends that due diligence systems inappropriately expand domestic regulatory power into foreign jurisdictions, therefore violating foreign sovereignty. Statutory law explicitly restricts U.S. jurisdiction in accordance with international law and the principle of sovereign equality.[139] According to 30 U.S.C. § 1402, Congress has explicitly renounced any claim of sovereignty over foreign resources or territories. The act states that the United States "does not assert sovereignty, exclusive rights, jurisdiction, or ownership over any areas or resources in the deep seabed."[140]

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[137] *Id. § 3101.*
[138] *Id.* § 3101(c).
[139] 30 U.S.C. § 1402(a)(2) (2012) ("[T]he United States does not hereby assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any areas or resources in the deep seabed.").
[140] *Id.*

This statutory disclaimer illustrates that U.S. regulatory frameworks are meticulously designed to honor international sovereignty while governing domestic entities and activities under U.S. jurisdiction. The act underscores that U.S. jurisdiction predominantly pertains to U.S. citizens and boats operating under U.S. authority, demonstrating compliance with globally acknowledged jurisdictional norms.[141]

Judicial precedent further affirms that regulatory duties placed on domestic entities do not infringe upon the principles of foreign sovereignty.[142] Courts have repeatedly acknowledged that Congress can govern domestic entities and persons, even when their actions pertain to international conduct, as long as such regulation does not claim territorial authority over foreign states. These principles illustrate that due diligence regimes function within the parameters of international law and honor sovereign jurisdictional boundaries.

### C. *Arbitration Efficiency*

Critics contend that due diligence frameworks compromise arbitration efficiency by adding procedural complexity. Courts have frequently underscored that arbitration aims to facilitate dispute resolution and mitigate the procedural encumbrances linked to litigation. In *Capps v. Virrey* (2007), the court acknowledged that arbitration serves as an alternate conflict resolution method designed to facilitate speedy adjudication without the comprehensive procedural mandates of judicial litigation.[143]

The court has since clarified that arbitration is regulated by commercial agreements and procedures that differ from conventional litigation, highlighting

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[141] *Id.* § 1402.
[142] *United States v. Rife*, 33 F.4th 838, 845 (6th Cir. 2022).
[143] *Capps v. Virrey*, 184 N.C. App. 267, 645 S.E.2d 825, 826 (2007).

that arbitration aims to offer a more efficient and streamlined approach.[144] As arbitration procedures are dictated by the parties' agreement, regulatory due diligence responsibilities do not intrinsically disrupt the efficiency of arbitration. Arbitration maintains its procedural flexibility, enabling parties to resolve disputes efficiently in the presence of regulatory compliance restrictions. This court’s acknowledgment of arbitration's procedural autonomy affirms that due diligence frameworks do not compromise arbitral efficiency. Arbitration is a useful option for dispute resolution in conjunction with regulatory compliance.

### *D. Corporate Compliance Burden*

The predominant criticism of compliance responsibilities is that due diligence systems impose onerous compliance obligations on firms. Nonetheless, courts have repeatedly determined that compliance responsibilities are not excessively burdensome unless they impose disproportionate or unreasonable demands in relation to the entity's capacity. In *EEOC v. Ferrellgas, L.P.* (2024), the court upheld the implementation of an administrative subpoena, mandating corporate adherence to regulatory inquiry protocols.[145] The court clarified that the burden of compliance should be assessed in relation to whether it would create an undue hardship by considering the corporation's size and resources.[146] The court asserted that investigative subpoenas are legitimate when the sought material is pertinent and adherence does not place an excessive burden on the employer.

Courts have similarly acknowledged that regulatory compliance obligations are enforceable, provided they do not impose excessive or disproportionate burdens. In assessing compliance duties, courts determine if adherence disrupts standard company operations or imposes undue hardship.

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[144] *Id.*
[145] *EEOC v. Ferrellgas, L.P.*, 97 F.4th 338 (6th Cir. 2024)
[146] *Id.*

These principles guarantee that regulatory frameworks provide requirements commensurate with company capacity rather than imposing undue costs. This legal framework establishes that due diligence responsibilities are meticulously aligned with company operational capabilities. Courts mandate that corporations prove genuine undue hardship prior to being excused from compliance responsibilities, thus ensuring that regulatory requirements are reasonable and proportionate.[147]

Statutory authority and court precedent directly counter the main criticisms of corporate due diligence regimes. Congress has explicitly indicated that regulatory information gathering mandates are not designed to impede foreign investment and should be executed with minimal impact on enterprises.[148] Secondly, legislative disclaimers affirm that U.S. regulatory authority does not encroach upon foreign sovereignty and functions within internationally acknowledged jurisdictional boundaries.[149] Finally, courts have acknowledged that arbitration is an effective vehicle for dispute settlement, separate from regulatory compliance requirements.[150] Courts have generally affirmed compliance requirements where firms do not prove undue burden, ensuring that regulatory responsibilities are proportionate and reasonable.[151]

Collectively, these authorities illustrate that corporate due diligence frameworks are not onerous regulatory impositions but rather meticulously organized systems aimed at reconciling economic efficiency, respect for

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[147] *Id.* at 343.
[148] 22 U.S.C. § 3101(c) (2018) ("Nothing in this Act is intended to restrain or deter foreign investment in the United States, United States investment abroad, or trade in services.").
[149] 30 U.S.C. § 1402(a)(2) (2012) ("[T]he United States does not hereby assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any areas or resources in the deep seabed.").
[150] *Capps v. Virrey*, 184 N.C. App. 267, 645 S.E.2d 825, 826 (2007).
[151] *EEOC v. Ferrellgas, L.P.*, 97 F.4th 338, 342 (6th Cir. 2024)

sovereignty, effective dispute resolution, and appropriate corporate accountability.

## VIII. **Conclusion**

The contemporary global economy exceeds the legal frameworks intended to govern it, resulting in continuous disparity between corporate authority and legal responsibility. Transnational firms function across borders with unparalleled mobility; nonetheless, the enforcement mechanisms for human rights commitments are still restricted to territorial confines, state-centric frameworks, and procedural limitations. This structural disparity has enabled businesses to transfer the costs of global economic activities onto racially vulnerable areas, hence perpetuating environmental racism, worker exploitation, and economic exclusion. This essay illustrates that racial harm in global supply chains is not incidental but indicative of systematic shortcomings in both international and domestic legal systems, which fail to synchronize corporate power with enforceable legal accountability.

International human rights legislation explicitly forbids racial discrimination and mandates nations to oversee private entities; nonetheless, implementation is inconsistent and indirect.[152] Treaties like the International Convention on the Elimination of All Forms of Racial Discrimination put positive obligations on nations to combat racial discrimination. Nevertheless, these obligations are filtered via domestic institutions that frequently lack competence, resources, or political will. Consequently, businesses often exploit regulatory fragmentation, functioning in jurisdictions with less scrutiny while preserving economic integration across more robust legal frameworks. This enables

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[152] Howard-Hassmann, *supra* note 20, at 88.

corporate operations to maintain global integration while legal accountability is restricted locally, resulting in a system where victims of racial injury encounter substantial obstacles to justice.

The Alien Tort Statute formerly served as a conduit between domestic jurisdiction and the enforcement of international human rights, providing plaintiffs a venue to contest corporate complicity in breaches of international law.[153] Nonetheless, Supreme Court rulings have increasingly constrained its breadth, confirmed territorial boundaries, and underscored judicial caution in issues pertaining to international relations and extraterritorial actions. The Court emphasized that corporate culpability should be restricted and necessitate significant domestic actions, asserting that corporate accountability must derive from explicit legislative permission rather than judicial creativity.[154] This legal shift demonstrates that sovereignty-based jurisdiction remains an impediment to transnational accountability, depriving victims of effective judicial remedies despite well-documented corporate involvement in damaging actions.

Corporate human rights due diligence frameworks signify a key advancement in global governance, transitioning expectations from voluntary ethical pledges to nascent legal requirements.[155] These frameworks acknowledge that organizations have autonomous obligations to identify, avoid, and mitigate harm resulting from their activities and supply chains. Legislative advancements in Europe and other regions indicate a growing readiness to impose obligatory responsibilities on businesses, reflecting a shift towards enforceable accountability frameworks.[156] Despite ongoing enforcement issues, due diligence

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[153] *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 138 S.Ct. 1386, 200 L.Ed.2d 612 (2018).
[154] *Id.*
[155] Aaronson & Higham, *supra* note 9, at 335.
[156] *Id.* at 337.

frameworks provide a basis for incorporating human rights safeguards into economic governance. They indicate a developing agreement that views effects on human dignity, equality, and justice should be assessed—just like financial outcomes—when looking at business behavior.

International arbitration exemplifies the conflict between private economic governance and public accountability. Investor-state arbitration systems were established to safeguard investment stability, yet they favor investor interests at the expense of the rights of impacted populations. This structural disparity illustrates the emphasis on economic stability rather than genuine equality. Although arbitration improves enforceability and efficiency, it restricts access to remedies for individuals affected by corporate actions. Recent reforms, such as transparency initiatives and human rights-oriented procedural regulations, indicate an increasing acknowledgment that arbitration must adapt to preserve its validity. Arbitration must not be detached from human rights principles to serve as a credible global dispute settlement system.

A comparative examination indicates that corporate accountability is influenced by both international law and home legal frameworks and regulatory philosophies. The United States remains significantly dependent on judicial systems, procedural safeguards, and constitutional constraints, which may limit access to remedies. European systems are progressively adopting statutory due diligence requirements and administrative enforcement, indicating a more preventive and regulatory strategy. These disparities illustrate that corporate accountability is not guaranteed but dependent on legislative frameworks and political determination. In legal systems that emphasize enforceable responsibilities and regulatory control; business behavior is subjected to significant examination rather than just voluntary compliance.

The enduring nature of racialized corporate injury illustrates a fundamental disjunction between economic globalization and judicial accountability. Corporate power has transcended the limitations of conventional sovereignty-based regulation, yet accountability systems have not progressed correspondingly. Addressing this disparity necessitates acknowledging corporations as entities subject to enforceable legal duties rather than mere recipients of state regulation. Legal regimes must provide procedures to address cross-border harm, guarantee access to remedies, and incorporate human rights protections into economic governance. Corporate accountability should be perceived not as a discretionary ethical goal but as a mandatory legal obligation rooted in the values of racial justice, equality, and human dignity. International law can only realize its fundamental promise of fairness in a globalized society by linking legal duty with economic power. This transformation is crucial to ensure accountability, restore legitimacy, and safeguard vulnerable communities from ongoing systemic corporate injustice globally.

# Piercing the Corporate Veil Nationwide: Constitutional Limits of the Corporate Transparency Act

By: Alan Torres[1]

## Introduction

In 2021, Congress enacted the Corporate Transparency Act ("CTA") to combat the use of anonymous shell companies in money laundering, tax evasion, and other financial crimes.[2] The statute requires most corporations and limited liability companies formed in the United States to report identifying information about their "beneficial owners" to the Financial Crimes Enforcement Network (FinCEN), a bureau of the U.S. Department of the Treasury.[3] Failure to comply can result in significant civil and criminal penalties.[4]

The purpose of the CTA is straightforward: to prevent bad actors from hiding behind anonymous business entities. Congress determined that anonymous shell companies have been used to facilitate terrorism financing, drug trafficking, corruption, and other illicit activities.[5] By mandating the disclosure of beneficial ownership information, Congress sought to enhance transparency in the American

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[1] J.D. Candidate, Southern University Law Center (2027).
[2] Miranda Fraraccio, *What Small Businesses Need to Know About the Corporate Transparency Act*, U.S. Chamber of Com. (Feb. 19, 2025), https://www.uschamber.com/co/start/strategy/small-business-corporate-transparency-act.
[3] 31 U.S.C. § 5336 (2024).
[4] 31 U.S.C. § 5336(h)(3) (2024).
[5] Pub. L. No. 116-283, div. F. § 6402(1)–(14), 134 Stat. 3388, 4604 (2021).

financial system and bring the Untied States into alignment with global anti-money laundering standards.[6]

Yet, while the goal of transparency is widely supported, the CTA raises important constitutional questions regarding the extent of its authority. Corporate formation has traditionally been governed by state law. However, absent a qualifying exception, the CTA applies to entities formed under state law and imposes a nationwide federal reporting mandate, regardless of the entity's size, revenue, or participation in interstate commerce.[7] Nevertheless, the CTA imposes a nationwide federal reporting mandate on these entities, regardless of size, revenue, or actual connection to interstate commerce.

This expansion of federal oversight into traditional areas of state corporate regulation prompts a critical question: Does the Corporate Transparency Act exceed Congress's authority under the Commerce Clause when applied to purely intrastate entities? More broadly, what limits does the Constitution impose on Congress's power to mandate corporate ownership disclosure?

This article examines the unresolved concerns the CTA raises when applied to entities that lack a substantial connection to interstate commerce, despite the serious and important federal objective of combatting financial crimes. The first section provides an overview of the CTA structure and reporting requirements. The second section examines Congress's authority under the Commerce Clause and the historical role of states in corporate formation. Section three analyzes the constitutional tensions created by the CTA's broad application.

[6] Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59, 498 (Sept. 30, 2022), https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements#citation-75-p59506
[7] 31 U.S.C. § 5336(a)(11) (2024).

Finally, section four proposes a narrow framework that preserves the CTA's anti-money laundering objectives while respecting constitutional boundaries.

## The Corporate Transparency Act and Federal Corporate Disclosure

The CTA was enacted as part of the National Defense Authorization Act for Fiscal Year 2021.[8] Congress passed the statute in response to longstanding concerns that anonymous shell companies were being used to facilitate money laundering, terrorism financing, tax evasion, and other illicit financial activities.[9] Lawmakers concluded that the absence of a federal beneficial ownership reporting requirement had made the United States an attractive jurisdiction for the formation of anonymous entities.[10] The CTA was designed to close that gap by requiring greater transparency in corporate ownership.

The CTA created a new federal reporting regime codified at 31 U.S.C. § 5336. Under the statute, most corporations, limited liability companies, and similar entities formed or registered to do business in the United States must report beneficial ownership information to the Financial Crimes Enforcement Network ("FinCEN"), a bureau of the U.S. Department of the Treasury.[11] The reporting requirement applies to entities authorized to do business in the United States, including those formed by filing with the Secretary of State (or a similar office) and certain foreign entities registered to operate in the country.[12]

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[8] Pub. L. No. 116-283, div. F, §§ 6401–6403, 134 Stat. 3388 (2021).
[9] *Id*. at div. F, § 6402.
[10] *Id*.
[11] 31 U.S.C. § 5336(a)(5) (2024).
[12] 31 U.S.C. § 5336(a)(11) (2024).

The statute defines a "beneficial owner" as any individual who, directly or indirectly, either (1) exercises substantial control over the entity or (2) owns or controls at least twenty-five percent of the ownership interests of the entity.[13] Reporting companies must disclose each beneficial owner's full legal name, date of birth, current residential or business address, and a unique identifying number from an acceptable identification document, such as a passport or driver's license.[14] This information is submitted to FinCEN and maintained in a non-public federal database.[15]

The CTA contains numerous exceptions. Entities subject to significant federal or state regulations such as banks, credit unions, publicly traded companies, insurance companies, and certain large operating companies are excluded from the reporting requirement.[16] Congress intended the law to target smaller, less regulated entities that could otherwise be used to conceal illicit financial activity.[17]

The CTA imposes both civil and criminal penalties for noncompliance. Any person who willfully provides false or fraudulent beneficial ownership information or fails to report complete or updated information may be subject to civil penalties of up to $500 per day for continuing violations.[18] Additionally, willful violations may result in criminal penalties of up to two years' imprisonment and fines of up to $10,000.[19]

FinCEN is responsible for implementing and administering the reporting system. In September 2022, FinCEN issued a final rule establishing the reporting

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[13] 31 U.S.C. § 5336(a)(3) (2024).
[14] 31 U.S.C. § 5336(b)(2)(A) (2024).
[15] 31 U.S.C. § 5336(c) (2024).
[16] 31 U.S.C. § 5336(a)(11)(B) (2024).
[17] Pub. L. No. 116-283, div. F, § 6402, 134 Stat. 3388, 4604 (2021).
[18] 31 U.S.C. § 5336(h)(3)(A)(i) (2024).
[19] 31 U.S.C. § 5336(h)(3)(A)(ii) (2024).

framework and clarifying compliance obligations.[20] The reporting requirements took effect on January 1, 2024, with different filing deadlines depending on when an entity was formed.[21] Through this regulatory structure, the federal government has established a nationwide system of beneficial ownership disclosure aimed at increasing transparency within the corporate structure of the United States.

## Congressional Authority and the Limits of Federal Power

The Corporate Transparency Act rests on Congress's authority under the Commerce Clause. The Constitution grants Congress the power "to regulate Commerce… among the several States."[22] Over time, the Supreme Court has broadly interpreted this power, allowing Congress to regulate not only the channels and instrumentalities of interstate commerce but also certain intrastate activities that substantially affect interstate commerce.[23]

Modern Commerce Clause doctrine recognizes three primary categories of permissible federal regulation. First, Congress may regulate the channels of interstate commerce, such as highways, waterways, and air traffic. Second, Congress may regulate the instrumentalities of interstate commerce, including persons or things moving across state lines. Third, Congress may regulate intrastate activities that have a "substantial effect" on interstate commerce.[24] It is this third category that often creates constitutional controversy. Under the

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[20] *Beneficial Ownership Information Reporting Requirements*, 87 Fed. Reg. 59, 498 (Sept. 30, 2022), https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements#citation-75-p59506.
[21] *Id*.
[22] U.S. Const. art. I, § 8, cl. 3.
[23] See United States v. Lopez, 514 U.S. 549, 558–59 (1995).
[24] *Id*. at 558-59.

"substantial effects" doctrine, Congress may reach local conduct if, in the aggregate, that conduct has a significant impact on interstate markets. In *Wickard v. Filburn*, the Court upheld federal regulation of wheat grown for personal consumption because, when viewed collectively, similar conduct could affect national wheat prices.[25] More recently, in *Gonzales v. Raich*, the Court sustained federal regulation of locally cultivated marijuana on the ground that Congress may regulate intrastate activity as part of a comprehensive economic regulatory scheme.[26] These decisions reflect the Court's willingness to permit broad federal authority where Congress regulates economic activity connected to national markets.

At the same time, the Supreme Court emphasized that the Commerce Clause is not without limits. In *United States v. Lopez*, the Court invalidated a federal statute criminalizing gun possession near schools because it regulated non-economic activity with too attenuated a connection to interstate commerce.[27] Similarly, in *United States v. Morrison*, the Court struck down portions of the Violence Against Women Act, concluding that Congress may not rely on aggregated effects of non-economic activity to justify federal regulation.[28] Most recently, in *National Federation of Independent Business v. Sebelius*, the Court reaffirmed that the Commerce Clause does not permit Congress to compel individuals into economic activity in order to regulate them.[29]

Alongside these Commerce Clause principles lies a structural feature of American governance: corporate formation has traditionally been governed by

[25] *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).
[26] *Gonzales v. Raich*, 545 U.S. 1, 15-22 (2005).
[27] See *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).
[28] *United States v. Morrison*, 529 U.S. 598, 610, 617 (2000).
[29] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557-58 (2012).

state law.[30] States create and regulate corporations and limited liability companies through their own statutory schemes.[31] Corporate charters, fiduciary duties, and internal governance rules are matters of state authority.[32] While Congress may regulate corporations when they engage in interstate commerce, the creation of corporate entities themselves has historically been a matter of state concern.[33]

The Corporate Transparency Act operates at the intersection of these doctrines. By mandating beneficial ownership reporting from entities formed under state law, the Act extends federal regulatory authority into an area long administered by the states. Whether this expansion falls comfortably within Congress's Commerce Clause power or tests the outer boundary of federal authority depends on the courts' understanding of the relationship between local corporate formation and interstate economic activity. This constitutional tension frames the analysis that follows.

## Constitutional Tensions Raised by the Corporate Transparency Act

The CTA occupies a constitutional gray area since it regulates entities at the moment of their formation under state law, rather than in connection with interstate commercial activity. The statute applies to corporations and limited liability companies created by filing with a secretary of state unless they qualify for one of the enumerated exemptions.[34] It does not require proof that a reporting company has engaged in interstate commerce, generated revenue, or participated

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[30] Randy E. Barnett & Andrew Koppelman, *Commerce Clause*, Nat'l Const. Ctr., https://constitutioncenter.org/the-constitution/articles/article-i/clauses/752 (last visited Feb. 13, 2026).
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] 31 U.S.C. § 5336(a)(11) (2024).

in national markets. Instead, the reporting obligation is triggered solely by the existence of the entity, making the CTAs reach independent of any commercial activity that would normally fall under Congress's Commerce Clause authority.

This design raises a structural federalism question. Corporate formation has historically been governed by state law. States determine how entities are created, organized, and dissolved. While Congress clearly may regulate corporations when they participate in interstate commerce, the act of forming a business entity has traditionally fallen within state authority. The Supreme Court has emphasized that although the Commerce Clause is broad, it is not without limits. In *United States v. Lopez* and *United States v. Morrison*, the Court rejected federal regulation of activities that lacked a sufficiently direct connection to interstate commerce. These decisions reflect a core constitutional principle: federal authority must remain tied to economic activity that bears a meaningful connection to interstate commerce.

Supporters of the CTA argue that anonymous shell companies, even if locally formed, can facilitate interstate and international financial crime. Congress has found that anonymous entities have been used in money laundering, terrorism financing, and corruption.[35] These findings show that beneficial ownership reporting is part of a comprehensive national regulatory scheme addressing financial transparency.

Cases such as *Wickard v. Filburn* and *Gonzales v. Raich* have established that Congress may regulate local activity when it is part of a broader economic framework. Tension arises because the CTA reaches entities before any commercial conduct occurs, effectively treating corporate formation itself as activity sufficiently connected to interstate commerce.

[35] Pub. L. No. 116-283, div. F § 6402, 134 Stat. 3388, 4604 (2021).

The Act also compels the disclosure of personal identifying information from beneficial owners. Reporting companies must submit names, dates of birth, addresses, and identification numbers to FinCEN.[36] The information is stored in a secure, non-public federal database and may be accessed only by authorized government authorities and certain financial institutions under statutory conditions.[37] However, mandatory disclosure is not automatically unconstitutional. The Supreme Court has upheld disclosure regimes that the Court has also recognized serve legitimate governmental interests, including transparency in campaign finance.[38] At the same time, the Court has recognized that compelled disclosure can imply privacy and associational concerns, as seen in *NAACP v. Alabama*.[39]

In *NAACP v. Alabama*, the Supreme Court held that Alabama could not compel the NAACP to disclose its membership lists as a condition of permitting it to operate within the state.[40] The Court emphasized that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty protected by the Fourteenth Amendment.[41] Compelled disclosure of membership information, the Court explained, may constitute a restraint on freedom of association where it exposes members to economic reprisal. harassment, or other forms of intimidation.[42] Constitutional protections, therefore, extend not only against direct prohibitions on association but also against more subtle governmental interference that effectively chills participation.[43]

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[36] 31 U.S.C. § 5336(b)(2) (2024).
[37] 31 U.S.C. § 5336(c) (2024).
[38] *Buckley v. Valeo*, 424 U.S. , 64-68 (1976).
[39] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-62 (1958).
[40] *Id*. at 460-62.
[41] *Id*. at 460.
[42] *Id*. at 461-63.
[43] *Id*. at 463.

Importantly, the Court did not hold that disclosure regimes are per se unconstitutional. Rather, even where a state pursues a legitimate regulatory objective, it must employ means that do not unnecessarily burden protected freedoms.[44] When disclosure requirements substantially interfere with associational rights, the government must demonstrate a sufficiently important interest and a close fit between the means chosen and the objective pursued.[45]

Although the NAACP arose in the civil rights context, its doctrinal foundation is broader: compelled disclosure of identifying information may implicate constitutional protections when it meaningfully burdens lawful participation in civic or economic activity.[46] That principle informs modern compelled disclosure jurisprudence, including campaign finance regulation and reporting regimes.[47]

The CTA differs in material respects. Unlike public campaign finance disclosures, the CTA requires beneficial ownership information to be submitted to FinCEN and maintained in a non-public federal database accessible primarily to law enforcement and authorized governmental entities.[48] The statute therefore does not create the same public exposure risks that animated the Court's concerns in NAACP. Nevertheless, compelled submission of personal identifying information, particularly for small, closely held entities, implicates what the court has described as a constitutionally protected interest in avoiding disclosure of personal matters.

The constitutional question, therefore, is not whether Congress may ever require disclosure, but whether the breadth of the CTA's reporting mandate is

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[44] *Id*. at 463-64.
[45] *Id*. at 463-66.
[46] *Id*. at 460-62.
[47] *Id*.
[48] 31 U.S.C. § 5336 (2024).

proportionate to its stated goals. Congress identified significant national security and anti-money laundering interests in enacting the statute.[49] Yet, the CTA applies broadly to covered entities, including those that may never engage in interstate transactions. Courts reviewing the statute would likely weigh the strength of the federal interest against the scope of the reporting burden and the safeguards limiting public access to the data.

The enforcement structure of the CTA introduces due process considerations. The statute imposes civil penalties of up to $500 per day for willful violations and criminal penalties, including fines and imprisonment.[50] When criminal consequences attach to regulatory obligations, due process requires fair notice of what conduct is required or prohibited. The Supreme Court has long held that laws must provide clear standards to prevent arbitrary enforcement. The CTA defines "beneficial owner" in part as an individual who exercises "substantial control" over the entity.[51] Although FinCEN's regulations further define this concept, determining who qualifies may require legal judgment in close cases.[52]

These features do not automatically render the Act unconstitutional. Congress possesses significant authority to regulate economic structures that affect national markets. However, the CTA sits at the intersection of federal power and traditional state governance; of transparency interests, privacy concerns, regulatory compliance, and criminal enforcement. Whether the statute represents a permissible exercise of Commerce Clause authority or tests the outer limits of

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[49] Pub. L. No. 116-283, div. F, § 6402, 134 Stat. 3388, 4604 (2021).
[50] 31 U.S.C. § 5336(h) (2024).
[51] 31 U.S.C. § 5336(a)(3) (2024).
[52] 31 C.F.R. § 1010.380(d) (2025).

federal power depends on how courts reconcile these competing constitutional principles.

## Conclusion

The CTA reflects Congress's judgment that anonymous business entities pose a serious risk to the national financial system. Through detailed findings accompanying the Act, Congress identified money laundering, terrorism financing, tax fraud, and corruption as concerns linked to the misuse of shell companies.[53] The statute was enacted as part of a broader federal effort to increase transparency in beneficial ownership reporting.[54] The goal of increasing transparency in corporate ownership is therefore rooted in documented legislative findings rather than abstract policy preference. Courts reviewing the Act must begin with the recognition that Congress acted in an area it characterized as implicating substantial national interests.[55]

Simultaneously, constitutional structure requires more than the identification of an important policy objective. The Commerce Clause grants Congress authority to regulate commerce among several States, and the Supreme Court has long interpreted this authority to encompass intrastate economic activity that substantially affects interstate commerce.[56] Yet the Court has also emphasized that federal power must remain connected to activity bearing a meaningful connection to interstate commerce. In *United States v. Lopez* and *United States v. Morrison*, the Court invalidated federal statutes that exceeded those limits. When regulation extends into areas traditionally administered by the

[53] Miranda Fraraccio, *supra* note 2.
[54] 31 U.S.C. § 5336 (2021).
[55] Pub. L. No. 116-283, div. F, § 6402, 134 Stat. 3388, 4604 (2021).
[56] *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).

states, such as corporate formation and governance, courts must carefully examine whether the asserted federal interest justifies the reach of the regulation.

A workable limiting principle must identify when Congress may regulate intrastate entities under the Commerce Clause and when it may not. The Supreme Court has long recognized that Congress may regulate intrastate activity if that activity exerts a "substantial economic effect" on interstate commerce.[57] In *Wickard v. Filburn*, the Court upheld federal regulation of wheat grown for personal consumption because, in the aggregate, such production affected national supply and demand.[58] Even activity that is local and not itself commercial may fall within federal authority if its cumulative impact is substantial.[59]

The Court reaffirmed this principle in *Gonzales v. Raich*, sustaining application of the Controlled Substances Act to locally cultivated medical marijuana.[60] There, Congress had enacted a comprehensive regulatory authority governing the interstate market for controlled substances.[61] The Court emphasized that when Congress regulates an economic class of activities, individual instances may be reached if Congress has a rational basis for concluding that failure to regulate intrastate conduct would undercut the broader regulatory scheme.[62]

At the same time, the Court insists that the Commerce Clause does not confer a general police power. In *National Federation of Independent Business v. Sebelius*, the Court rejected the argument that Congress may regulate individuals simply because they are participants in the national economy.[63] The Commerce Clause, the Court explained, authorizes regulation of existing economic activity;

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[57] *Id*. at 127-28.
[58] *Id*. at 127-28.
[59] *Id*. at 127-28.
[60] *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).
[61] *Id*. at 15-17.
[62] *Id*. at 22.
[63] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557-58 (2012).

it does not permit Congress to compel individuals into commerce to regulate them.[64]

These precedents suggest that the question of constitutionality raised by the Corporate Transparency Act turns on whether corporate formation itself constitutes economic activity or whether it is merely a legal status antecedent to commercial participation. Under *Wickard* and *Raich*, Congress may regulate intrastate conduct when it forms part of an economic class of activities that substantially affects interstate markets.[65] However, under *NFIB*, Congress may not rely on the mere existence of individuals or, by analogy, entities to justify federal regulation absent meaningful economic engagement.[66]

To avoid converting the Commerce Clause into a general federal chartering power, the nexus requirement must demand more than mere theoretical access to interstate markets.[67] The fact that an entity could open a bank account or eventually engage in interstate transactions does not, by itself, establish a substantial effect on interstate commerce.[68] Rather, there must be actual economic participation or integration into federally regulated financial channels. Similarly, the aggregate-effects doctrine applies only if corporate formation is properly characterized as economic activity forming part of a broader regulatory scheme.[69] If formation is understood as a legal act antecedent to commerce, aggregation alone cannot supply the necessary constitutional connection.[70]

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[64] *Id*. at 557-58.
[65] *Gonzales v. Raich*, 545 U.S. 1, 15-22 (2005).
[66] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557-58 (2012).
[67] *Id*. at 557-58.
[68] *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).
[69] *Id*. at 127-28.
[70] *Id*. at 127-28.

# Rent-to-Own Housing and the Home Ownership and Equity Protection Act Blind Spot: Modernizing Federal Consumer Finance Protections for Seller-Financed Home Purchases

By: Miles Santiago and Kennedy James[1]

## I. INTRODUCTION

Imagine you are a low-income minority or immigrant family that has worked hard to save every penny you have in hopes of reaching the American Dream of buying a home. Enticing social media ads keep appearing on your phone saying that your dream is obtainable, promising you can purchase a fully developed lot in a prime subdivision with no income verification, no credit check, a low down payment, and an affordable note. After scheduling an appointment through the ad, you tour the property and fall in love with it. Being urged by the developer, you put your deposit down and secure your lot with a fixed-interest-rate, seller-financed contract. Although you may not understand the contract, you feel safe because you trust the notary and the translator provided are properly informing you of the loan terms. Congratulations! You have closed on your new lot and have achieved the American Dream. Or so you thought.

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Your dream quickly becomes a nightmare upon discovering the fully developed lot you purchased did not have the basic infrastructure of drainage, electricity, sewer, or water. After bearing these installation costs, you later discover that the developer never once verified whether you could actually afford the loan they placed you in, offering you a fixed interest rate five times higher than the market average with no regard for your ability to repay, setting you up to fail from the very beginning. When you default, the same developer that sold you your dream comes and takes it away, only to profit from your financial loss and to do it again to another family like yours.

Now this is not imagination; this is reality in Liberty County, Texas, where Colony Ridge developed more than 40,000 lots in residential subdivisions and discriminatorily targeted Hispanic home buyers.[2] In December 2023, the Consumer Financial Protection Bureau ("CFPB") sued Colony Ridge, alleging that they targeted Hispanic families that could not qualify for traditional financing and offered them seller-financed loans of up to 12.9%, at a time when market rates hovered between 2% and 4%, without examining their ability to repay.[3] When the families defaulted, Colony Ridge, accounting for 92% of foreclosures in the county, foreclosed and repurchased the lots, pocketed any deposits and improvements made by the buyer, and relisted the property at a higher price, thus starting the cycle over again.[4] Colony Ridge settled in February 2026, but the regulatory gap that allowed it to thrive for so long remains wide open.[5] Without federal reform, another Colony Ridge is not a matter of if but a matter of when.

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[2] Consumer Financial Protection Bureau v. Colony Ridge Development, LLC, No. 4:23-CV-04729, 2024 U.S. Dist. LEXIS 232360, at *4 (S.D. Tex. Sept. 13, 2024).
[3] *Id*. at *5-6.
[4] *Id*. at *10.
[5] Settlement Agreement and Release, Ex. A, Consumer Financial Protection Bureau v. Colony Ridge Development, LLC, No. 4:23-CV-04729 (S.D. Tex. Feb. 10, 2026).

Colony Ridge is not an isolated case. Across the country, more than three million families live in homes, disproportionately concentrated in minority communities, with similar seller-financed arrangements.[6] This Note argues that the Home Ownership and Equity Protection Act ("HOEPA") and related consumer finance laws fail to protect buyers in seller-financed housing, particularly rent-to-own and contract-for-deed agreements, from the same high-cost, high-risk practices that Congress sought to eliminate. By excluding seller-financed and installment-sale housing from their definitions of "credit" and "high-cost mortgage," Congress and the CFPB have left a significant regulatory gap that perpetuates modern forms of predatory lending. This note proposes that Congress or the CFPB amend HOEPA's implementing regulations to extend its disclosure, cost-cap, and enforcement protections to rent-to-own and other seller-financed housing arrangements.

Part II traces the evolution of the Truth in Lending Act ("TILA") and the Home Ownership and Equity Protection Act ("HOEPA") and examines the rise of rent-to-own and other seller-financed housing models. Part III analyzes how rent-to-own contracts function as disguised credit transactions but continue to evade statutory coverage. Part IV argues for legislative and regulatory reform to modernize federal consumer-finance protections for seller-financed housing.

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[6] Allison N. Kruschke, Comment, *Challenging Land Contracting on the Basis of Disparate Impact After* Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*: A Viable Option or a Dead End?,* 2020 Mich. St. L. Rev. 547, 567 (2020).

# II. BACKGROUND

## A. *Congress Enacted TILA and HOEPA to Protect Borrowers from Predatory Lending, But Left Critical Gaps That Persist Today.*

The Truth in Lending Act ("TILA")[7] was enacted in 1968 to establish consumer protections by requiring standardized information, relating to financing and credit products, to be fully disclosed to consumers. Congress specifically provided that the intention of TILA was to promote "economic stabilization" by the "informed use of credit" amongst borrowers.[8] The regulations imposed by TILA apply to both "open-end" and "closed-end" credit products.[9] Open-end credit, often referred to as revolving credit, is when consumers are able to borrow funds up to a certain amount, and as it is paid back, the funds are made readily available to use again.[10] This type of product usually allows borrowers to continually have access to funds that they can use and repay repeatedly without having to go through loan approval processes for each use.[11] Credit cards are among the most known forms of open-ended credit; however, personal lines of credit and home equity lines of credit fall within this category as well.[12] Closed-ended credit is when consumers are able to borrow a fixed amount of funds for a fixed time period.[13] This type of product typically provides borrowers with an upfront lump sum that is repaid, with interest, in monthly installments over the

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[7] 15 U.S.C. § 1601 *et seq*. (2025).
[8] 15 U.S.C. § 1601(a) (2025).
[9] See 15 U.S.C. § 1602 (2025) (defining open-end and closed-end credit).
[10] See 15 U.S.C. § 1602(j) (2025); see also Nefertara Clark, Casenote, *Finance and Other Charges: Is Disclosure for the Sake of Disclosure Sufficient? Discussing the Nature of Finance and Other Charges Under the Truth-in-Lending Act—Household Credit Services, Inc. v. Pfennig, 541 U.S. 232 (2004)*, 33 S.U. L. Rev. 313, 317–18 (2006).
[11] Clark, *supra* note 10.
[12] *Id*.
[13] 12 C.F.R. § 1026.2(a)(10) (2025) ("Closed-end credit means consumer credit other than 'open-end credit' as defined in this section."); see also 9 Matthew Bender & Co., *Banking Law* § 170.04 (2026) (defining closed-end credit).

specified term.[14] Today, home mortgage loans, auto loans, student loans, and personal loans make up the most common forms of closed-ended credit used by borrowers.[15] These forms of credit are central to TILA's regulatory framework, but the statute's definition of what constitutes "credit" is often ambiguous in practice.[16]

In addition to the type of credit being regulated, TILA creates a groundwork for uniform disclosures and provides enforceable consumer safeguards intended to ensure the informed use of credit.[17] Under TILA, creditors must provide borrowers with uniform information regarding finance charges, annual percentage rates (APR), payment schedules, and related fees at the time of origination.[18] These disclosures enable consumers to compare and shop credit terms. Further, TILA's protections impose the right of rescission for certain home-secured loans, limitations on balloon payments and unauthorized use of credit cards, and, through later amendments, ability-to-repay requirements for certain mortgages.[19] Though there are still gaps, these provisions of the Truth in Lending Act form the baseline of federal consumer protection in lending.

In an amendment to fill in the regulatory gaps of TILA, Congress enacted the Home Ownership and Equity Protection Act ("HOEPA") in 1994 to curb predatory conduct and ensure fair treatment of borrowers in residential

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[14] 14 Matthew Bender & Co., *Texas Transaction Guide—Legal Forms* § 65.20 (2026).

[15] 14 Matthew Bender & Co., *Texas Transaction Guide—Legal Forms* § 65.20 (2026) ("The most common closed-end credit arrangements are the direct loan of a specific amount [see [4], below] and the credit sale of a particular item [see [5], below].")

[16] See generally Clark, *supra* note 10, at *314 ("The law is known for its ambiguity and confusing nature. Many people, including those in the legal profession, are often confused when reading legal documents. But what about credit card terms and contracts?").

[17] *Id*.

[18] 15 U.S.C. § 1638(a) (2025).

[19] 15 U.S.C. § 1635 (2025) (right of rescission); 15 U.S.C. § 1639(e) (2025) (prohibiting balloon payments); 15 U.S.C. § 1639c (2025) (ability-to-repay requirements).

refinancing and home improvement loans.[20] HOEPA was created to address the numerous consumer complaints regarding pricey loans and insufficient loan disclosures that were leading to equity stripping and reverse redlining. Although TILA originally addressed poor disclosures by making them uniform, HOEPA took it a step further by extending waiting period timeframes, requiring specific warnings that borrowers risk losing their homes if they fail to comply with loan terms, introducing ability-to-repay screening for high-cost loans, and limiting balloon payments, negative amortization, and prepayment penalties.[21]

Despite Congress's intentions, HOEPA did not fully solve the problem because it only applied to high-cost mortgage refinances and home improvement loans, leaving traditional purchase mortgages outside of its grasp. Additionally, most subprime loans in the 2000s fell outside HOEPA's coverage thresholds because their annual percentage rates, points, and fees did not exceed the statutory limits. As a result, HOEPA ultimately covered only a negligible share of the mortgage market, regulating fewer than one percent of refinance and home improvement loans, approximately thirty-six thousand nationwide, in 2005.[22] Moreover, during this period, the Federal Reserve held rulemaking authority, and enforcement of the statute largely depended on its discretion. This limited oversight drew significant criticism and ultimately prompted Congress to act again.

Amending TILA once more, in 2010, Congress signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") into law.[23] In

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[20] Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160, 2190–97 (codified as amended at 15 U.S.C. § 1639).
[21] 15 U.S.C. § 1639(a)-(e) (2025).
[22] Neil Bhutta et al., *Residential Mortgage Lending from 2004 to 2015: Evidence from the Home Mortgage Disclosure Act Data*, 102 Fed. Rsrv. Bull. 1, 20 (2016).
[23] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C.).

an attempt to restore accountability and confidence back into the financial system after the Great Recession, Congress enacted Dodd-Frank to reduce the likelihood and severity of future financial crises. Dodd-Frank was intended to prevent the recurrence of "too big to fail" financial firms by ending taxpayer-funded bailouts and limiting excessive risk taken by financial firms.[24] One of the major changes brought by Dodd-Frank was the creation of the Consumer Financial Protection Bureau ("CFPB"), which was given independent authority to write and enforce rules for consumer financial products across both banks and nonbanks.[25] The CFPB consolidated the scattered consumer-protection powers previously divided among agencies, including the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Department of Housing and Urban Development, the National Credit Union Administration, and the Federal Trade Commission.[26] Consolidating the authority of these federal agencies into one CFPB ensures fast, swift, and consistent oversight of financial products and practices amongst lenders.

Further, the Dodd-Frank Act marked the most extensive and far-reaching reform of the U.S. financial system since the New Deal era of the 1930s.[27] The Act broadened and imposed the ability-to-repay requirement for nearly all residential mortgage loans and not just high-cost mortgages originally introduced by HOEPA.[28] Additionally, it curbs steering and prepayment penalties, expands protections for high-cost mortgages, and enhances disclosures for mortgage

[24] Dale B. Thompson, *Article: The Dodd-frank Act And Too-big-to-fail: What's Missing? A Survey Of The Current Literature*, 10 U. St. Thomas J.L. & Pub. Pol'y 53, 54-56 (2015) (One of the express purposes of Dodd-Frank, according to its preamble, was "to end 'too big to fail.'").
[25] 12 U.S.C. § 5491 (2024).
[26] 12 U.S.C. § 5581 (2024) (Transfer of consumer financial protection functions).
[27] Brittany M. Pace, Article, *An Unanticipated Consequence: Will Dodd-Frank Drown Out Small Businesses?*, 8 Entrepren. Bus. L.J. 159, 162–63 (2013).
[28] *Id.* at 164.

terms.[29] Dodd–Frank modernized consumer financial protection and systemic oversight by centralizing authority in the CFPB and by imposing stronger prudential and market conduct rules. Yet even with these reforms, seller-financed housing arrangements such as rent-to-own and contract for deed remain largely outside the federal framework because they are not structured as mortgage loans and often do not involve a traditional security interest. The result is a persistent gap in which transactions that function as high-cost credit fall beyond the core protections Dodd–Frank reinforced for mortgages.

### *B. The Modern Affordable Housing Crisis Has Pushed Vulnerable Buyers Toward Unregulated Alternative Financing Arrangements.*

Homeownership has long been central to the American Dream, yet the gap between income and home prices has reached record highs.[30] Nationally, the median home price now exceeds five times the median household income, while heightened interest rates make mortgage payments difficult to bear.[31] Now, the American Dream is harder to obtain than ever before as the housing market is under intense pressure due to the lack of supply for homes and the increased buyer demand for housing.[32] While families face increasing housing prices, there still

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[29] *Id.*

[30] Joint Ctr. for Hous. Stud. of Harvard Univ., *The State of the Nation's Housing 2025*, at 11 (2025), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2025.pdf ("In recent years, growth in home prices has greatly outpaced that of household incomes. In 2024, the price-to-income ratio hit 5.0, on par with the record high reached in 2022 and well above the pre-pandemic reading of 4.1 in 2019 (Figure 6).")

[31] *Id.* at 1. ("Consequently, the US median existing single-family home price hit a new high of $412,500 in 2024, according to the National Association of Realtors (NAR). This is a shocking five times the median household income and significantly above the price-to income ratio of 3 that has traditionally been considered affordable.")

[32] *Id. a*t 10.

remains a shortage of more than one and a half million homes.[33] As affordability declines, the American Dream is becoming harder to achieve, affecting the overall growth of the economy.

The Great Recession of 2008 has left one of the strongest impacts on today's housing market. Mortgage lending standards have tightened, interest rates have increased, there's an underbuilding of new homes, and high rates of employment turnover all combine to create the perfect storm we have today: the modern affordability crisis.[34] By 2023, the number of households burdened by housing costs had surged dramatically, growing from around 640,000 to over 20 million.[35]

In addition to this problem, there are barriers that prevent new housing supply from catching up with demand. High construction costs, restrictive zoning, slow regulatory approval processes, and elevated financing costs limit the supply of new housing.[36] These influences have directly impacted consumer finance. When developers face higher construction and loan costs, these costs are passed to buyers and renters. Potential homeowners are then faced with stricter lending standards, larger down payment requirements, and higher interest rates. The result is a gap between household income and the cost of purchasing or renting a home.

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[33] Id. At 15 (" Substantial supply shortages endure despite recent increases in housing construction, owing largely to underbuilding following the Great Recession. Estimates of the housing shortfall vary from 1.5 million units according to NAHB to Freddie Mac's 3.7 million. In any case, the underlying message is clear: the US faces a significant housing shortage, especially in the single family market.")

[34] See generally Joint Ctr. for Hous. Stud. of Harvard Univ., *The State of the Nation's Housing 2025* (2025), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2025.pdf

[35] Id. at 27 ("As of 2023, nearly a quarter (24 percent) of all homeowners are cost burdened. That year alone, the number of burdened homeowner households rose by 646,000 to 20.3 million.").

[36] *Supra,* Joint Ctr. for Hous. Studies of Harvard Univ., note 34.

These practices make it extremely difficult for borrowers to qualify and obtain traditional mortgage financing and force many families out of the housing market.

Ultimately, the affordable housing crisis is not simply a matter of supply and demand; it is also a question of financial protection. As the affordable housing crisis continues to grow, many families are turning to alternative financing arrangements, such as seller financing, to obtain their American Dream. Instead, buyers find themselves in an American nightmare as these arrangements often leave them at risk of high costs and deceptive financing terms and arrangements because they are not federally protected or regulated under federal consumer finance laws. These alternative home financing arrangements include rent-to-own and contract-for-deed agreements, which often offer buyers false hope in obtaining homeownership. This reality proves the urgent need for federal regulatory reform and stronger consumer finance protection laws to ensure that alternative homeownership pathways are fair, transparent, and safe for buyers.

### *C. Rent-to-Own and Contract for Deed Agreements Expose Buyers to the Same Predatory Risks Federal Law Was Designed to Eliminate.*

Seller financing, also known as owner financing, is a homeownership transaction that involves the property seller providing a loan to the home buyer, who pays for the property through agreed installments. This agreement allows flexibility in homeownership for buyers that may not meet the current standard lending requirements. In most seller financing transactions, the agreement is recorded through a promissory note, and a mortgage or deed of trust which allows the seller to hold a lien on the property as protection[37]. These seller financing agreements expose buyers to unforeseen pitfalls that jeopardize their financial

[37] *Id.*

stability and property interest. Pitfalls like title issues, housing defects and hazards, balloon payments, high interest rates, loss of property value, and the list goes on.[38] Buyers unknowingly assume these liabilities when entering seller financing agreements because, without federal oversight, seller financing lacks the consumer protections that govern traditional lending, leaving buyers vulnerable and exposed. In 2024, the seller's financing market continued to grow, with over 30 billion dollars in notes, an increase of 8 percent from the previous year, and almost 90,000 transactions completed.[39] On average, these residential notes were worth around 271,000 dollars, with buyers putting down about 27 percent of the property value, leaving an average loan-to-value ratio of 73 [40].[41]

Rent-to-own, also known as lease-to-own or rent options, is a common homeownership agreement that allows tenants to lease a property for a set period with the option of later purchasing the property.[42] In these agreements, the buyer leases a property from the seller, typically for a few months to several years, while working toward qualifying for traditional or alternative financing to execute the purchase option.[43] If the time lapses or in the event of default, buyers often lose their down payments, investments into the home, and all other credits and equities that were applied to the purchase price of the property.[44] Additionally, these arrangements are commonly one-sided toward the seller because they have "as-is" condition clauses, no appraisal clauses, forfeiture clauses, and inspection and title waivers.[45] Buyers find themselves in trouble when they discover that the seller does not own the house; taxes are owed on the property; or the house has

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[38] *Id*. at 148-49.
[39] Tracy Z., *Seller Financing Held Strong in 2024*, Note Investor (Mar. 26, 2025), https://noteinvestor.com/notes-101/seller-financing-held-strong-2024/
[40] *Id*.
[41] *Id*.
[42] Joint Ctr. for Hous. Studies of Harvard Univ., s*upra* note 34.
[43] *Id*.
[44] *Id*.
[45] Tracy, *supra* note 39.

serious and costly defects.[46] These risks all lead to financial and property instability that put seller-financed buyers in harm's way.

Contracts for deeds, also known as land contracts, are a common form of seller-financing for homebuyers.[47] This agreement involves homebuyers purchasing their property over time by making their payments directly to the seller. Contracts for deeds allow the seller to hold the legal title on the property until the buyer completes their fixed payment term.[48] Holding the legal title allows the seller to hold the ownership record and the security of interest on the property.[49] Throughout this agreement, the homebuyer holds an equitable title to the property and has the right to occupy, use, and benefit from the property.[50]

In 2022, the nonprofit and non-governmental organization The Pew Charitable Trusts conducted research on nearly 300 land contracts and 55 legal aid professionals that assisted homebuyers in these contracts. In their findings, they discovered that the majority of the reasons that contract for deeds fail are due to the lack of transparency and clear written terms, forfeiture of down payment and home equity, inclusion of balloon payments, unsafe or uninhabitable homes, and payment of property taxes without full ownership.[51] Because these agreements are rarely recorded or monitored by local governments, they often escape oversight entirely, leaving buyers vulnerable to poorly drafted contracts

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[46] *Id.*
[47] Restatement (Third) of Prop.: Mortgs. § 3.4 cmt. a (Am. L. Inst. 1997); see also Way, *supra* note 37, at 128–32 ("In installment contract transactions, also referred to as a 'poor man's mortgage,' a contract for deed, bond for deed, land contract, or executory contract for conveyance, the home purchaser enters into a contract with the seller whereby the seller promises to issue a deed to the purchaser upon payment of the entire purchase price.").
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] The Pew Charitable Trs., *Land Contracts Pose 5 Major Risks for Homebuyers* (July 18, 2024), https://www.pew.org/en/research-and-analysis/issue-briefs/2024/07/land-contracts-pose-5-major-risks-for-homebuyers.

and one-sided terms.[52] The Pew findings mirror the same consumer harms that TILA and HOEPA are meant to prevent. Yet, because these seller-financed contracts fall outside federal oversight, the same predatory conditions persist under a different name.

The current housing affordability crisis shows how difficult homeownership has become for Americans. Due to stricter standards and requirements on traditional mortgages, more people are turning to alternative options, like seller financing, including rent-to-own, and contract-for-deeds. By examining these seller financing agreements, one can understand how these alternatives give some families a chance at homeownership but, at the same time, expose them to serious financial risks. Understanding these risks is key to analyzing where policy changes and stronger federal consumer protections could address and reform these issues and risks.

These risks demonstrate how seller-financed agreements, though marketed as tools for expanding access to homeownership, replicate the very inequities federal lending laws were designed to eliminate. The persistence of these harms raises a central question: if rent-to-own and contract-for-deed arrangements function like high-cost credit, why do they remain beyond the reach of TILA and HOEPA? The following section analyzes that gap in statutory coverage.

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[52] *Id*.

# III. ANALYSIS

## *A. Rent-to-Own and Contract for Deed Agreements Function as Disguised Credit Transactions in Substance and Should Be Treated as Such Under TILA.*

Although rent-to-own and contract-for-deed agreements are often structured as leases or installment sales, they ultimately function in substance as extensions of credit. Under TILA, credit is defined as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."[53] When a buyer agrees to make long-term payments toward the acquisition of a home and faces penalties or acceleration for nonpayment, the arrangement operates like a credit sale even if it is drafted as a lease agreement with a purchase option or as a contract for deed rather than a traditional mortgage.[54]

Courts apply a substance-over-form approach to these types of transactions. In *O'Brien v. Cleveland*, 423 B.R. 477 (Bankr. D.N.J. 2010), in a sale leaseback foreclosure rescue scheme, the court held that the deal was in reality a financing arrangement subject to TILA and HOEPA because it created a debt secured by the home and deferred repayment over time, noting in equity that if a transaction resolves itself into a security, it is a mortgage regardless of its label.[55] In recent rent-to-own litigation, the same functional analysis appears in

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[53] 15 U.S.C.S. § 1602(f) (2025).
[54] 15 U.S.C.S. § 1602(h) (2025) ("The term 'credit sale' refers to any sale in which the seller is a creditor. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.").
[55] *O'Brien v. Cleveland,* 423 B.R. 477 (Bankr. D.N.J. 2010).

*James v. Detroit Property Exchange*, where the court declined to exempt rent-to-own and land contracts from TILA and HOEPA, emphasizing that multi-year payment obligations and acceleration clauses can have the characteristics of a credit sale. The court in *James* further rejected the argument that pending legislation implies present statutory exclusion.[56]

Likewise, another recent class decision, *Fair Housing Ctr. of Central Ind. v. Rainbow Realty Grp.,* recognized that two-phase rent-to-buy programs can operate as leases initially but may become credit sales once termination is restricted or payments continue beyond[57] coverage when buyers effectively bear ownership risks and cannot freely walk away. Boundary cases, like *Ysasi v. Nucentrix Broadband Networks*, help clarify the limit.[58] In *Ysasi*, the court dismissed TILA and Consumer Leasing Act claims where equipment payments were made in advance and the lessee could terminate at any time without penalty because no payment obligation was deferred; thus, no credit existed within TILA's meaning. ￼Together, these authorities draw a workable line. If the buyer can truly terminate at will without forfeiture or acceleration, TILA does not apply. If termination entails loss of accumulated equity or triggers acceleration of the unpaid balance, the arrangement operates as a credit sale and falls within TILA and HOEPA.

This case law is consistent with federal agency guidance from the Consumer Financial Protection Bureau. The CFPB's 2024 Advisory Opinion on contracts for deed explains that these arrangements typically constitute consumer credit because they create debt and defer its payment, and they are residential

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[56] *James v. Detroit Property Exchange*, No. 18-13601, 2020 WL 4583946 (E.D. Mich. Aug. 10, 2020).
[57] *Fair Housing Center of Central Indiana, Inc. v. M & J Management Co., LLC*, No. 1:22-cv-00612-TAB-JPH (S.D. Ind. Aug. 19, 2024).
[58] *Ysasi v. Nucentrix Broadband Networks, Inc.*, 205 F. Supp. 2d 683, 688–89 (S.D. Tex. 2002).

mortgage transactions for purposes of Regulation Z when used to finance a principal dwelling.[59] Congress has now echoed that understanding through the *Preserving Pathways to Homeownership Act,* which expressly finds that land installment contracts are a form of consumer credit transaction under the Truth in Lending Act and proceeds from that premise to impose baseline protections.[60]

### *B. Sellers Exploit Formal Distinctions in Federal Law to Structure Transactions That Replicate Mortgage Credit While Avoiding Its Protections.*

Despite these legislative recognitions, seller-financed housing continues to slip past TILA and HOEPA because it avoids the formal attributes of a mortgage. Many agreements are drafted as leases with options, land contracts with retained title, or other forms that omit a recorded security interest.[61] That formal structure complicates coverage under provisions that assume a conventional mortgage lien and permits drafting choices that aim to preserve easy eviction and forfeiture rather than foreclosure.[62] Scholars describe these products as part of a shadow credit market that replicates loan economics while eluding federal disclosure and ability-to-repay requirements through careful design and jurisdictional fragmentation.[63]

This results in inconsistent treatment across jurisdictions and financing product types. Even where courts are prepared to look through form to substance,

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[59] Consumer Fin. Prot. Bureau, *Advisory Opinion on Contracts for Deed* (Aug. 13, 2024), https://files.consumerfinance.gov/f/documents/cfpb_contract-for-deed_advisory-opinion_2024-08.pdf.
[60] Land Installment Contract Consumer Protection Act, S. 3720, 118th Cong. (2024), https://www.congress.gov/bill/118th-congress/senate-bill/3720/text/is (also known as the Preserving Pathways to Homeownership Act of 2024).
[61] Nathalie Martin & Lydia Pizzonia, *Shadow Credit and the Devolution of Consumer Credit Regulation*, 24 Lewis & Clark L. Rev. 1439, 1448–53 (2020).
[62] *Id*.
[63] *Id*.

fact-intensive inquiries and heterogeneous contract terms lead to uneven outcomes. Sellers can exploit these gray zones by inserting forfeiture clauses, acceleration provisions, and "as is" terms while avoiding appraisal, rescission, and ability-to-repay standards that would apply to a comparable mortgage loan. This is the HOEPA blind spot in practice.

### *C. The Absence of Federal Oversight Produces Predictable and Systematic Harms That Disproportionately Burden Low-Income and Minority Buyers.*

The absence of uniform federal treatment creates predictable harms that mirror the problems HOEPA was designed to address. Buyers face above-market interest costs and fees without standardized disclosures; lose accumulated equity through forfeiture following minor default; assume repair and tax burdens while lacking title protections; and can be removed through eviction rather than foreclosure even when years of payments have been made.[64] These features concentrate risk on lower-income and minority buyers who disproportionately use rent-to-own and land contracts when credit conditions are tight and they cannot qualify for traditional financing. Courts and regulators have begun to address this issue; however, the lack of codified national standards still leaves too much to contract drafting and venue. The doctrinal pieces are on the table in *O'Brien*, *James*, and *Rainbow Realty,* and they are now reinforced by the CFPB Advisory Opinion and by Congress's findings in the *Preserving Pathways to Homeownership Act*, yet implementation remains incomplete.

[64] Joint Ctr. for Hous. Studies of Harvard Univ., s*upra* note 34.

# IV. REFORM

### *A. Congress Should Amend HOEPA to Extend Its Protections to Any Seller-Financed Arrangement That Functions as Mortgage Credit.*

The issue between substance and form calls for coordinated legislative and regulatory action. The most immediate resolution for underprotected seller-financed transactions is to amend the Truth in Lending Act (TILA) regarding the Home Ownership and Equity Protection (HOEPA). In this reform, Congress can ensure that an obligation means a "mortgage loan" if a buyer assumes long-term payment obligations that are tied to residential properties, regardless of if it a traditional mortgage, deed of trust, or other security interest are recorded.[65] In other words, Congress should modernize HOEPA by explicitly extending its protections to any seller-financed or rent-to-own arrangement that creates a long-term payment obligation tied to a residence, regardless of how title is held or whether a mortgage is recorded.

This amendment would federally protect buyers in rent-to-own and contract-for-deed agreements as if they were in a traditional mortgage. The reform would include standardized disclosures, restrictions on balloon payments, restrictions on prepayment penalties, and mandatory counseling for high-cost loans.[66] Congress would assert TILA's foundational principle being that borrowers are to be provided clear and comparable information before entering into any type of credit arrangement.

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[65] Genevieve Hébert Fajardo, Article, *"Owner Finance! No Banks Needed!" Consumer Protection Analysis of Seller-Financed Home Sales: A Texas Case Study*, 20 Geo. J. Poverty L. & Pol'y 429, 441–42 (2013).
[66] *Id.*

The *Preserving Pathways to Homeownership Act* offers the best starting framework.[67] The bill requires sellers to record land-installment contracts within five days of execution, mandates judicial foreclosure rather than forfeiture, and directs states to adopt equivalent standards within two years or face CFPB rulemaking.[68] Its findings codify the functional test already used by courts and confirm congressional intent to protect buyers' equity and access to information. Implementing these provisions would harmonize seller financing with the baseline consumer protections that already govern mortgages while preserving legitimate owner financing as an alternative path to homeownership. Beyond consumer protection, extending HOEPA's reach would also promote economic stability by reducing default rates and protecting equity accumulation in underserved communities. Standardized oversight would narrow racial and income-based gaps in homeownership, ensuring that alternative financing options empower rather than exploit buyers who turn to these arrangements out of necessity.

### *B. The CFPB Should Amend Regulation Z to Codify That Deferred Payment Arrangements for Residential Property Are Presumptively Credit.*

Complementing congressional reform, the CFPB should amend Regulation Z to codify that any transaction involving deferred payment for residential property is presumptively "credit." A lease is deemed a credit sale when it is not terminable without penalty or when termination forfeits accrued equity.[69] This rule would align federal regulation with judicial precedent and the Bureau's own 2024 Advisory Opinion. The CFPB could further clarify that such

[67] Land Installment Contract Consumer Protection Act, *Supra* note 60.
[68] *Id*.
[69] Ysasi, *supra* note 58.

transactions are “residential-mortgage transactions” for HOEPA and ability-to-repay purposes, with proportionate standards for small-balance or short-term arrangements.

### *C. Extending Existing Mortgage Protections to Seller-Financed Credit Would Standardize the Market Without Eliminating Legitimate Private Financing.*

Extending HOEPA’s structure to seller-financed credit would not eliminate these products; it would standardize them. Implementing uniform disclosures and ability-to-repay requirements; limiting prepayment penalties and balloon payments; requiring title verification and recording; and implementing judicial foreclosure procedures over forfeiture are all existing safeguards for traditional mortgages that should be mirrored in seller-financed transactions. These measures translate the informed-use principle of TILA into the seller-financing context, ensuring transparency and fairness without dismantling legitimate private-credit channels.

Judicial precedent has already supplied the doctrinal foundation: *O’Brien’s* substance-over-form rule, *Ysasi’s* limiting principle, *James’s* modern functional analysis, and *Rainbow Realty’s* recognition of hybrid leases together delineate when seller-financed housing is credit. The CFPB has now provided administrative confirmation, and Congress, through the *Preserving Pathways Act*, has acknowledged the same in legislative form. Aligning these three levels of authority through statutory amendment and regulatory codification would finally close the HOEPA blind spot and restore the central goal of federal consumer-finance law, which is to promote the informed use of credit and to protect households from predatory lending practices disguised as pathways to homeownership.

# V. CONCLUSION

Seller-financed housing promises a path to ownership when traditional mortgage credit is out of reach, yet the form of these transactions has too often skirted the purview of federal consumer protection laws. Rent-to-own agreements and contracts for deed replicate the essential features of credit by creating debts that are repaid over time, frequently with penalties, forfeitures, and acceleration provisions that mirror high-cost loans. The problem is not simply affordability. It is the absence of uniform federal rules that allow these transactions to operate outside the safeguards that TILA and HOEPA were designed to provide.

The emerging consensus across courts and regulators now points toward one outcome. Courts applying a substance-over-form approach have recognized that when buyers bear the risks and obligations of ownership and repayment is deferred, these arrangements function as credit. Federal regulators have reached the same conclusion in modern guidance. Congress has acknowledged the same reality in recent findings and proposals. What remains is to align doctrine, regulation, and legislation so that the label on a contract does not decide whether a homebuyer receives basic protections.

This Note's proposal is both modest and practical. Congress should modernize HOEPA to extend its protections to seller-financed housing that functions as credit, and the CFPB should issue guidance clarifying that these arrangements fall within existing consumer-credit laws. With this clarification, familiar mortgage protections would follow naturally: standardized disclosures, reasonable ability-to-repay requirements, title verification and recording, and foreclosure procedures that protect equity rather than forfeit it. These measures would not eliminate seller financing; they would legitimize it.

Establishing uniform rules would enhance market fairness and consumer protection. Sellers would compete through transparency rather than complexity, and buyers would be able to evaluate offers confidently and build lasting equity in their homes. Courts would apply predictable standards rather than conduct case-by-case reconstructions of mislabeled agreements. Most importantly, families who turn to these products because they cannot yet qualify for a conventional mortgage would no longer trade away the core protections that define fair credit.

The Truth in Lending Act and its later amendments were enacted to promote the informed use of credit and to prevent predatory terms in home-secured transactions. Rent-to-own and contract-for-deed arrangements are part of today's credit market and should be treated as such. Extending federal protections to these agreements would strengthen housing markets, prevent exploitative practices, and ensure that buyers have clear, fair, and transparent terms when pursuing homeownership. Closing the HOEPA blind spot will not solve the affordability crisis, but it will ensure that alternative paths to homeownership are transparent, lawful, and worthy of the families who rely on them in order to achieve their American Dream.

# Digital Personas in the Creator Economy

By Tamira Powe[1]

## Introduction

The creator economy, also known as the influencer economy, is a platform-driven economy in which creators produce content, products, or services and distribute them directly to their audience through social media platforms and emerging technologies.[2] The creator economy has transformed online identity into a form of labor, capital, and brand. Social media influencers and digital content creators cultivate recognizable personas that generate economic value through sponsorships, platform monetization, and audience engagement. These personas are not merely collections of copyrighted works or trademarks but carefully constructed identities that combine aesthetics, tone, personal narrative, and social credibility. For many creators, identity itself has become the product.[3] The rapid expansion of the creator economy has fundamentally reshaped how cultural, aesthetic, and commercial value is produced and distributed.[4] Social media platforms now enable millions of individuals to function simultaneously as artists and advertisers, generating a massive collection of user-generated content that circulates at unprecedented speed and scale.

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[1] J.D. Candidate, Southern University Law Center (2026).

[2] Alexander Bleier, Beth L. Fossen & Michal Shapira, *On the Role of Social Media Platforms in the Creator Economy*, 41 Int'l J. Res. Mktg. 411 (2024).

[3] Mike Murphy, *The Creator Economy Is Shaped by Algorithms, Unpaid Labor, and Privacy Risks*, Time (Dec. 7, 2023), https://time.com/7332708/creator-economy-algorithm-unpaid-labor-privacy/

[4] *The Impact of the Creator Economy*, Wash. Post Creative Grp. (in partnership with YouTube), https://www.washingtonpost.com/creativegroup/youtube/the-impact-of-the-creator-economy/ (last visited May 24, 2026) (describing the rapid growth of the creator economy, its contribution of billions of dollars to the U.S. economy, and its role in generating millions of jobs through user-generated digital content).

As the economic stakes of digital identity rise, so too do disputes over imitation. Creators increasingly accuse others of copying their "vibe," aesthetic, or content concept, arguing that such conduct diverts audiences and undermines brand value. These conflicts often play out on social media platforms and in the court of public opinion rather than in formal legal proceedings. Existing legal doctrines span from intellectual property (copyright and trademark, specifically) and the common law rights to Name, Image and Likeness under the right to publicity framework to criminal statutes that address identity theft and attempts to address online identity misappropriation use such doctrines to form a basis of a cause of action. However, these existing authorities struggle to address harms rooted in digital persona imitation rather than discrete acts of copying.

This article argues that current intellectual property frameworks are ill-suited to regulate digital persona imitation and that a more coherent policy approach should focus on deception and identity substitution rather than similarity of expression. Drawing on parallels between influencer disputes and the phenomenon of catfishing, this article suggests the development of a narrow, conduct-based framework that balances the economic realities of content creators and online persona protection with First Amendment safeguards for content that serves as critique, parody, and creative use of elements within the public domain.

## The Rise of the Creator Economy and Digital Persona as Property

The creator economy has carved out a path to monetize online self-presentation. Social media platforms reward recognizable and consistent personas that foster parasocial relationships and audience trust.[5] Over time, creators invest

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[5] Nat'l Rsch. Grp., Inc., *Building Trust, Credibility, and Relationships Through Brand Content* (Apr. 17, 2024), https://www.nrgmr.com/our-

substantial labor in building a persona that functions as both an expressive identity and a commercial asset.

Unlike traditional copyrights and trademarks, digital personas themselves are not fixed tangible works (though they may register works produced) or marks registerable (though some may register marks for use in commerce). Digital personas are curated through combinations of visual style, speech patterns, values, and perceived authenticity. This hybrid nature complicates legal protection. A creator's persona may be recognizable to millions of followers while remaining legally unprotected under existing doctrines. Meanwhile, the right of publicity (colloquially referred to as Name, Image, and Likeness ("NIL") rights) remains unevenly developed across jurisdictions in the United States and does not directly address the digital performance of identity.

As imitation becomes easier through generative artificial intelligence, such as "deepfakes,"[6] creators may experience harm not just through the copying of individual videos or posts but through the replication of identity itself. These harms include loss of sponsorship opportunities, dilution of personal branding, and erosion of audience trust. These conflicts do not arise in a vacuum. They emerge from an industry that treats digital personas as labor while denying creators many of the structural protections associated with professional performance industries.

The disconnect between legal doctrine and creator expectations is further intensified by platform enforcement systems. Especially platforms that have grown too large for human oversight. On YouTube in particular, copyright has

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thinking/lifestyle/building-trust-credibility-and-relationships-through-quality-brand-content/

[6] Univ. of Va. Info. Sec. Off., *What the Heck Is a Deepfake?*, Univ. of Va. (Feb. 2026), https://security.virginia.edu/deepfakes ("A deepfake is an artificial image or video [a series of images] generated by a special kind of machine learning called 'deep' learning (hence the name)")

been operationalized through automated tools and simplified explanations that reshape how creators understand ownership and infringement. The problem is that these automated processes are used as judge, jury, and executioner. YouTube acts as a more aggressive enforcer of copyrights than the actual copyright holders. If something gets flagged by YouTube's proprietary Content ID system, the process blocks the content from being shared or monetized, and then human oversight comes in to double-check the automated claims. As a result, many content creators feel at odds with the platform's copyright management system and have a distorted outlook on fair use, public domain, and copyright in general.

Scholars have observed that efforts to "explain" copyright to users ultimately distorted its application, encouraging creators to view similarity and reuse as inherently wrongful even when such conduct falls outside the scope of legal protection.[7] Platforms thus become de facto regulators of creative disputes, fostering norms of exclusivity that exceed what copyright law itself recognizes. As a result, creators increasingly interpret slight similarities in content as theft, not because doctrine supports that conclusion, but because platform governance has trained them to do so.

## Branding, NIL, and the Professionalization of Online Identity

The commercialization of digital personas is not confined to social media influencers. Recent developments in collegiate athletics provide a parallel example of how identity has been formally transformed into an economic asset

[7] Mike Masnick, *How Explaining Copyright Broke the YouTube Copyright System*, Engelberg Ctr. for Innovation L. & Pol'y (June 6, 2023), https://www.nyuengelberg.org/news/how-explaining-copyright-broke-the-youtube-copyright-system/ (describing how platform explanations of copyright and automated enforcement systems contributed to enforcement outcomes that deviate from doctrinal principles).

through legal and institutional reform. The emergence of NIL rights for student-athletes reflects a broader recognition that personal identity now functions as a form of market labor. Athletes are encouraged to cultivate recognizable brands, develop online followings, and monetize their public personas through sponsorships and digital content. This shift reframes identity as both personal expression and commercial asset.

In 2021, the U.S. Supreme Court unanimously ruled that the NCAA could not prohibit student athletes from profiting off education-related payments.[8] Now, we are living in a new era of college athletics where student athletes can cash in and have more agency. With the *House v. NCAA* settlement, approved in June of 2025, colleges are now permitted to pay up to roughly $20.5 million directly to athletes across all their athletic programs in revenue sharing.[9] In the NIL era, student-athletes are encouraged to cultivate recognizable personal brands and monetize their public personas through sponsorships and digital content. Universities and private collectives increasingly provide resources aimed at brand development, including marketing consultants and social media training.[10] Athletes are instructed to project authenticity while shaping an image that attracts commercial partnerships.

Despite this institutional embrace of personal branding, the legal status of digital personas remains uncertain. NIL policy permits athletes to profit from their identity but does not define what aspects of that identity are protected against

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[8] National Collegiate Athletic Association v. Alston, 141 S. Ct. 2141 (2021).

[9] Cong. Rsch. Serv., *College Athlete Compensation: Impacts of the House Settlement*, CRS Legal Sidebar No. LSB11349 (Aug. 15, 2025), https://www.congress.gov/crs-product/LSB11349

[10] See LSU Athletics, *NILSU*, LSU Sports (2026), https://lsusports.net/nilsu/; ; Univ. of S.C. Athletics, *Gamecock NIL Hub*, GamecocksOnline.com (2026), https://gamecocksonline.com/nil-hub-home/; ; *Champions Circle® Home*, Champions Circle®, https://www.championscircleuofm.com/ (last visited May 24, 2026).

imitation. While trademarks may be registered for slogans[11], their names[12], or logos[13]; the broader contours of an athlete's online persona remain unprotected. An athlete may invest significant labor into cultivating a recognizable style, tone, or narrative, only to find that competitors or third parties can lawfully adopt similar or identical branding strategies without consequence.

This gap mirrors the experience of content creators in the broader creator economy. Influencers similarly rely on distinctive personas composed of visual presentation, narrative voice, and recurring themes. Their economic value derives not from isolated works but from the sustained performance of identity over time. However, like athletes, creators encounter doctrinal barriers when seeking to prevent imitation. Copyright law protects discrete expressions but not personal branding. Trademark law protects source identifiers but not stylistic coherence. The right of publicity protects name and likeness but not the composite persona that audiences recognize and trust.

The NIL framework thus exposes a central tension in modern identity markets: the law encourages individuals to commercialize their personas while declining to articulate when that persona has been unfairly appropriated. Both NIL athletes and social media creators operate in hybrid spaces where identity is expressive and commercial. In both contexts, legal doctrine struggles to address imitation that is harmful but not clearly infringing. NIL thus provides a useful

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[11] *Breaking Down How NIL & the Transfer Portal Affect Coaching . . .*, YouTube (uploaded by NILOSOPHY Oct. 14, 2024), https://www.youtube.com/watch?v=EnwXn2Kl6Sk; ; see also #NOCEILINGS, Registration No. 7,593,774 (registered Dec. 10, 2024); DICTATE & DISRUPT, Registration No. 7,641,908 (registered Jan. 7, 2025).

[12] Nick Kosko, *Angel Reese Files Trademark for Her Own Name*, On3 (Oct. 29, 2025), https://www.on3.com/her/news/angel-reese-files-trademark-for-her-own-name/

[13] Jose Martinez, *Stephen Curry to Own Logo, Trademark, and Brand After Under Armour Split*, Complex (Nov. 14, 2025), https://www.complex.com/sports/a/jose-martinez/stephen-curry-thanks-under-armour-after-ending-longtime-partnership

comparative framework for understanding how law can acknowledge identity as economic value while avoiding overprotection. Granting exclusive rights over personal style or character would risk monopolizing cultural trends and suppressing creative exchange. Rather, the NIL experience illustrates the need for a narrower inquiry focused on conduct rather than ownership. The question is not whether individuals possess property rights in their identities but whether certain forms of identity substitution constitute deceptive or unfair market behavior.

The creator economy has enabled identity to become labor, brand, and commodity. Athletes and creators alike are incentivized to invest in identity construction and can lead the charge towards shifting policy to carve out recourse when others adopt confusingly similar personas or appropriate unique content elements to capture audience attention or commercial opportunities. Much like disputes among creators, policies used to regulate catfishing reveal that the law attaches criminal penalties to certain acts of imitation. However, liability attaches only when the identity deception intersects with established categories of harm, rather than recognizing identity manipulation as a standalone legal injury.

## *Catfishing[14] and the Policies on Online Identity Deception*

The law has long confronted one form of digital persona manipulation through the concept of catfishing.[15] Catfishing involves the deliberate creation of a false digital persona with the intent to induce trust and reliance. The resulting

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[14] *Catfish* (film), Wikipedia, https://en.wikipedia.org/wiki/Catfish_(film) (last visited May 24, 2026) (noting that the 2010 film *Catfish* is credited with popularizing the term "catfishing," referring to deceptive online impersonation through fake social media identities).

[15] Antonella Santi, *"Catfishing": A Comparative Analysis of U.S. v. Canadian Catfishing Laws & Their Limitations*, 44 S. Ill. U. L.J. 73 (2019), https://law.siu.edu/_common/documents/law-journal/articles-2019/fall-2019/5-santi-jr-a.pdf (analyzing legal approaches to online identity deception commonly referred to as "catfishing").

harms are typically framed in terms of emotional distress, fraud, or reputational injury rather than intellectual property infringement.

Notably, impersonation alone is generally not unlawful. Liability arises only when false identity intersects with recognized categories such as fraud, defamation, or intellectual property infringement. The law does not recognize deception about identity itself as a standalone injury unless it produces tangible harm. Existing legal responses to the actual act of online identity deception on its own are fragmented. Criminal statutes address the conduct *indirectly* through identity theft, wire fraud, or impersonation laws, while civil remedies may be available under theories of misrepresentation, defamation, or invasion of privacy.[16] Florida leads the United States in providing victims of deepfake abuse a pathway for the removal and punishment of perpetrators that not only publishes but also solicits, distributes, and amplifies such content.[17] With a current landscape of relaxed regulations, generative artificial intelligence has the potential to uniquely harm the reputations of individuals as well as their overall mental well-being.

The statute describes deepfake images as "[a]ny visual depiction that, as a result of any type of digital, electronic, mechanical, or other modification, alteration, or adaptation, depicts a realistic version of an identifiable person."[18] The creation (or generation), possession, and promotion of this material is a criminal offense in the state of Florida. Recently, Grammy Award-winning artist Megan Thee Stallion utilized the newly enacted section of Florida law to file a civil suit in her personal capacity as Megan Pete against a Texas blogger, accusing the blogger of using her platform to spread false claims and amplify a sexually

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[16] *Id.*
[17] See Fla. Stat. § 836.13 (2025) (altered sexual depictions; prohibited acts; penalties; applicability).
[18] Fla. Stat. § 836.13(1)(a) (2025) (“altered sexual depiction”).

explicit deepfake video of the artist.[19] The Florida law carves out a space for parties aggrieved by such material to recover relief in the form of injunctive relief and monetary damages (at least $10,000) as well as reasonable attorney fees and costs.[20] At trial, Ms. Pete testified that the deepfake video severely harmed both her mental health and career, leading to the loss of at least four music contracts worth approximately $1 million each and requiring her to complete a four-week therapy program costing $240,000 while she struggled with feelings of hopelessness.[21] Taken together, this case illustrates how emerging deepfake-specific statutes address personal and reputational harms.

While policies to address catfishing and address instances of extreme identity deception exist, subtler forms of persona substitution are still in a gray area. The same gap appears in influencer disputes. This doctrinal focus reveals an important consideration: that maybe protections for the value of a digital persona, whether emotional, reputational, or economic, could be carved out and developed with legislation. But this also reveals a limitation that may be intentional; the law treats identity primarily as a fixed biographical fact rather than as a constructed and economically valuable digital presence.

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[19] Pete v. Cooper, No. 1:24-cv-24228, slip op. (S.D. Fla. 2024).

[20] Fla. Stat. § 836.13(7) (2025).

[21] Steven Yablonski & Ivan Taylor, *Jurors Rule in Favor of Megan Thee Stallion in Miami Deepfake Porn Case, Order Milagro Gramz to Pay $75,000 in Damages*, CBS Miami (Dec. 1, 2025), https://www.cbsnews.com/miami/news/miami-meghan-thee-stallion-defamation-case-verdict/.

## *Limits of Protection for The Digital Persona Under Existing Intellectual Property Doctrine*

**Not Copyright or Trademark, but a secret third thing?**

Copyright law is the most frequently invoked doctrinal framework in disputes between influencers that allege aesthetic copying or digital imitation. However, the federal copyright framework is also the most consistently unsuccessful at addressing the growing concerns from content creators who have monetized and structured businesses around a curated digital identity. The U.S. Copyright Act grants exclusive rights in reproduction, distribution, and derivative works, yet it expressly excludes ideas, concepts, and styles from protection.[22] As a result, copyright doctrine is structurally hostile to claims grounded in aesthetic similarity rather than in discrete, identifiable expression. Courts require plaintiffs to isolate specific protectable elements and demonstrate substantial similarities as to those elements alone.

Looking at recent litigation between influencers where claims have relied on alleged copies of mood, curation choices, or stylistic coherence, copyright law offers no remedy. In *Gifford v. Sheil*, a case from the Western District of Texas, influencer Sydney Nicole Gifford sued fellow influencer Alyssa Sheil for copyright infringement based on Sheil's alleged copying of Guifford's largely beige and neutral-toned online fashion style.[23] Included in Gifford's complaint were numerous screenshots of social media posts that incorporated substantially similar elements to promote brand-sponsored content. A casual viewer could very well believe that the content included came from a uniform source, that source being a social media profile. However, issues of consumer

[22] Copyright Act of 1976, 17 U.S.C. §§ 101–1332 (2012).
[23] *Sydney Nicole LLC v. Alyssa Sheil LLC*, No. 1:24-cv-00423 (W.D. Tex. filed Apr. 19, 2024).

confusion regarding source identification requires a registered trademark. It should also be noted that whomever takes a photograph is the photograph's author, meaning two photographs with seemingly identical visual content may have different copyright owners. Moreover, the right to attribution is available under copyright principles, but attribution is a non-economic right limited to works of visual art that fit within the criteria listed in the Visual Artists Rights Act of 1990.[24] Keeping in mind the narrow road to recovery in this scenario, Gifford struggled to adequately identify what specific elements of her particular social media content are unique and original to her. Gifford's claims heavily relied on emphasizing the cumulative effect of numerous small similarities, essentially arguing that the "vibe" of Sheil's work mirrored her own. Ultimately, the lack of protection for aesthetics led to Sheil prevailing on a motion to dismiss most of Gifford's claims and both parties settling out of court rather quickly.

Similarly, the issue at the heart of *Neal v. Gooding, et al.*,[25] highlights the importance of registering unique, identifiable brand identity as a content creator and prioritizing protections for distinguishable elements. Neal and Gooding are both influencers living in California who specialize in afro-sculpture art, meaning they mold the hair on their heads into sculptures like hearts, stars, and flowers. The importance of registration becomes particularly relevant where shared elements (such as posing and color palette choices or hair styling ideas) are individually unprotectable. Neal took action against Gooding and her business associates, attempting to enforce her registered copyrights in her afro-sculptures. Neal also included a claim that asserts trademark rights over brand materials that were still pending registration with the U.S. Patent and Trademark Office.[26] Neal

[24] 17 U.S.C. § 106A (2024).
[25] *Neal v. Gooding*, No. 2:25-cv-09475 (C.D. Cal. filed Oct. 15, 2025).
[26] The assertion of trademark rights here is significant because the Supreme Court in Dastar Corp. v. Twentieth Century Fox Film Corp. declined to interpret the Lanham Act as an "end-run" around the fundamental principle that copyright

included in her complaint a right to publicity claim based on Gooding allegedly appropriating Neal's distinctive identity and presentation for Gooding's commercial and promotional advantage by using those identity cues in advertising, shoppable posts, product pages, and the Kickstarter campaign to solicit purchases and pledges.

Unlike Texas, California duly recognizes common law right of privacy claims while also maintaining an express statutory scheme to prohibit individuals from misappropriating an individual's name, voice, signature, photograph, and likeness to sell, advertise, or solicit merchandise.[27] Yet, these frameworks have not succeeded in protecting any intellectual property rights in a digital persona or aesthetic that has been monetized within the creator economy. Under the 1998 Digital Millennium Copyright Act (DMCA), parties are able to issue, and dispute, DMCA takedown notices that are enforceable on most internet websites. The takedown process allows creators to protect their work without immediate litigation, requiring providers to expeditiously disable access to infringing content to maintain safe harbor protection.[28] Depending on how resourced a copyright holder is, the speed at which the holder can identify and execute a DMCA takedown notice will impact how much the alleged infringer is enriched by the content. Otherwise, courts find it difficult to justify punitive measures against the way artists choose to curate their digital personas, especially when there are no clear, unique, or distinguishable elements aside from perhaps the idea to sculpt a particular shape.

While these disputes are not the first of their kind, influencers frequently litigate in the court of public opinion about whether inspiration should be

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and patent protections are subject to limited durations. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33–34 (2003).

[27] Cal. Civ. Code § 3344(a).
[28] Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

considered theft.[29] On the rare occasion that these issues are litigated through legal channels, parties often opt to resolve their issues privately before any findings of fact have been made. The absence of a dedicated authority furthers the perception that the law lacks tools to address identity-based harms in broader digital markets. Perhaps the remedy would be more clear if a plaintiff were asserting a right to protect registered, distinct, and original expressions in her content (perhaps a registered watermark of some expression, like a stylized signature) that are uniquely attributable to their digital brand identity rather than trying to harness and protect an amorphous blended "vibe" of an online persona across platforms at large. Copyright law as a framework does not provide the protections that many influencers believe they should enjoy, because the registered element would still have to appear in the alleged copied content to set a foundation for infringement.

Guifford, Neal, and other influencers like them would perhaps like to enjoy trademark-like protections for works registered in the U.S. Copyright Office. However, even in obtaining and enforcing trademark rights, influencers may still struggle in these disputes, likely due to the requirement of inherent distinctiveness. If content creators already struggle to establish distinguishable, protectable elements of their content, it is unlikely that a Trademark would even provide the scope of protection desired.

Trademark owners receive the right to exclusively use their unique brand assets to sell or market their products or services as source identifiers. The Lanham Act governs U.S. trademarks, service marks, and unfair competition. The Act establishes a national registration system, protects against consumer

[29] Katie Hawkinson, *A TikToker Attempted to Defend Their Home Decor Account. Now the DIY Influencer Drama Has Exploded*, The Independent (Aug. 8, 2023), https://www.the-independent.com/life-style/taybeepboop-tiktok-diy-kaarinjoy-video-b2389144.html (describing a high-profile online dispute over alleged copying and reflecting how content creators increasingly resolve claims of imitation through public commentary rather than formal legal processes).

confusion, prohibits trademark dilution, and addresses false advertising. Under Section 43(a) of the Lanham Act, owners of registered marks can sue for infringement, providing remedies like injunctions, monetary damages, and profits.[30] False endorsement under the Lanham Act involves the unauthorized use of a trademark in a manner that misleads consumers into believing that the plaintiff endorses or sponsors the defendant's product or service.[31] Such claims require demonstrating a likelihood of confusion by a reasonably prudent customer regarding sponsorship or affiliation, not necessarily actual confusion, though evidence of the latter strengthens the claim.

In a decision from the Paris Court of Appeal, Mercredie, an influencer who regularly publishes selfies taken in an elevator, showing off her outfit of the day (OOTD), accompanied by her dog on her blog, brought an action for copyright infringement and parasitic conduct (France's version of unfair competition) against Maje, a ready-to-wear fashion company.[32] Maje ran a fall-winter advertising campaign featuring various models taking a selfie in an elevator holding a dog leash. Mercredie underlined that she made a number of artistic choices, including as regards the setting (a silver-tiled elevator shaft lit by artificial light rather than an outdoor location with natural light); the subject (a selfie, meaning she's taking the photograph of herself); a particular posture (her dog's leash in one hand, a mobile phone in the other); and the framing (by opting for a vertical format and publishing the photograph as *an Instagram story* without retouching).[33] The court did not find these arguments to be convincing evidence of originality; rather, these artistic choices were technical considerations that do

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[30] 15 U.S.C. § 1125(a) (2024).
[31] *Id.*
[32] Cour d'appel [CA] de Paris, Pôle 5 – Chambre 2, Arrêt du 12 mai 2023, RG n° 21/16270 (Fr.).
[33] *Id.*

not justify granting a monopoly of protection to a trend posted to a public social media platform, like Instagram.

Platform liability under trademark law implicates whether online intermediaries can be held liable for trademark infringement committed by users. The DMCA safe harbor provisions provide immunity from copyright infringement liability but do not extend to trademark claims.[34] Liability depends on factors including the platform's knowledge and degree of control over infringing content, and doctrines like nominative fair use provide defenses when marks are used to refer to the trademark owner's products without suggesting false affiliation. The Supreme Court established contributory trademark infringement liability in *Inwood Laboratories*, holding that "if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily (sic) responsible for any harm done as a result of the deceit."[35]

Depending on the facts of a particular circumstance, perhaps the argument can be made that the choices characterizing originality (namely, curating content for an audience) are guided by technical considerations that are uniquely personal, rather than just part of an aesthetic presentation, style, or a simple repetition of well-established trends.

**Balancing Creative Freedom & Ownership**

In constitutional terms, creative freedom is protected in two complementary ways: the First Amendment limits what the government can do to censor or punish expression, while the IP Clause authorizes laws that reward and

[34] 17 U.S.C. § 512 (2024).
[35] Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982).

thus stimulate creative production.[36] Article I, Section 8, Clause 8 gives Congress power "to promote the Progress of Science and useful Arts" by granting authors and inventors exclusive rights for limited times to their writings and discoveries.[37] This is the constitutional foundation for federal copyright and patent law, and it reflects the idea that temporary monopolies over copying and use will encourage the production and dissemination of creative works. Cultural contributions in the creator economy expose the limits of ownership-based frameworks.

The controversy surrounding TikTok's "Renegade" dance demonstrates how viral expression depends on repetition and remix rather than exclusive control. Although Jalaiah Harmon originated the choreography, the dance achieved prominence through replication by other content creators who received disproportionate attention and commercial benefit, without even giving attribution to Ms. Harmon for creating the dance.[38] The resulting dispute centered less on legal infringement than on norms of attribution and fairness, revealing once again a gap between community expectations and doctrinal remedies. This incident underscores why similarity alone cannot serve as a basis for liability: Many forms of digital creativity are inherently communal and iterative, blurring the line between inspiration and appropriation. YouTube creators have largely

Otherwise, courts are placed in a very tough position, having to navigate nuances of a creator economy that were not apparent at the time regulations were developed. Or, perhaps suggested by the explicit exclusion from legislative drafting, imitation of a digital persona is not recognized as a recoverable offense in any jurisdiction. As a result, disputes between influencers over alleged

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[36] U.S. Const. amend. I

[37] U.S. Const. art. I, § 8, cl. 8.

[38] Russell Brandom, *The True Story Behind TikTok's "Renegade" Dance*, Vox (Feb. 4, 2020), https://www.vox.com/the-goods/2020/2/4/21112444/renegade-tiktok-song-dance (discussing the contested attribution and remix culture dynamics of virally shared dance content on TikTok).

imitation often fail to fit into a proper cause of action, falling through the doctrinal gaps. All in all, a creator may feel that another account has copied their persona in ways that divert audience trust or brand opportunities yet find no clear legal remedy.

**So, What Now?**

Any policy framework addressing digital persona imitation must confront constitutional protections for parody, satire, and transformative use. Online culture is built on imitation as a form of commentary. Memes, trends, remixes, and stylistic mimicry are central to digital creativity. The distinction between homage and exploitation is often blurred, raising concerns that legal intervention could chill speech and suppress cultural dialogue. Social media platforms are incentivized to keep users actively using their apps with low barriers for users to generate and consume content.[39]

Social media platforms are incentivized to promote rapid replication and engagement. At the same time, creators are encouraged to invest in identity construction without meaningful protection against deceptive substitution. These conflicting pressures reveal the need for a framework grounded not in resemblance but in deception. Rather than granting ownership over digital personas, the law should focus on intentional identity misrepresentation that causes audience confusion and concrete harm. Borrowing from deepfake statutes, policy should be drafted to establish punitive harms for entering into commercial agreements, brand deals, sponsorships, or promotions while operating an account that publishes visual depictions that, as a result of any type of digital, electronic, mechanical, or other modification, alteration, or adaptation, depict a realistic

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[39] Aaron M. McGonagle et al., *Social Media Platforms Generate Billions of Dollars in Revenue from U.S. Youth: Findings from a Simulated Revenue Model*, PLOS ONE (Dec. 27, 2023), https://doi.org/10.1371/journal.pone.0295337

version of an identifiable person. The challenge should be limited to the identifiable individual and their estate.

Additionally, comments noting that content creators have copied without attribution (such as those frequently seen in comment sections) should be considered as a factor weighing in favor of the challenger. The burden should be on the alleged infringer to prove that the content was originally created by them or authorized by a licensing agreement and does not intentionally copy key identifiable features of the challenger. Looking at the issue in *Guifford*, this would allow a framework for their facts to be presented in a way that saddles the ambiguous concept of a vibe while preserving creative freedom for original content that has minimal connections to a prior work outside of critique or parody. Such an approach would align with unfair competition principles while preserving First Amendment space for memes and remix culture.

Together, the shortcomings of intellectual property doctrine, the lessons of NIL policy, the realities of catfishing law, and the dynamics of viral remix culture demonstrate a recurring pattern: disputes over digital persona are not about copying expressions but about *misleading audiences through identity substitution*. Rather than expanding ownership rights over digital personas, perhaps a narrow, conduct-based framework grounded in principles of deception and unfair competition. This framework targets identity misuse only when it functions as a mechanism of substitution rather than expression. The goal is not to prohibit imitation, parody, or aesthetic borrowing, but to regulate conduct that intentionally exploits the trust associated with another's digital identity.

# Conclusion

The creator economy has transformed digital personas into valuable commercial assets, yet existing legal doctrines remain poorly equipped to address

harms rooted in identity imitation rather than discrete acts of copying. Copyright, trademark, and right of publicity law protect works, marks, and likenesses, but not the curated online personas through which creators build trust, audience loyalty, and economic opportunity. As a result, disputes over imitation increasingly unfold through platform moderation systems and public controversy rather than formal legal remedies. The comparison between influencer disputes and catfishing reveals a shared regulatory gap: both involve the strategic construction of deceptive online identities, but the law intervenes only at its most extreme margins. Platform governance has attempted to fill this void through private enforcement mechanisms that lack transparency and constitutional accountability, further blurring the line between expression and exploitation.

A coherent policy response should not seek to grant ownership over style, personality, or cultural trends. Instead, it should focus on conduct that involves intentional identity substitution and audience deception. By adopting a narrow, deception-based framework grounded in unfair competition principles and constrained by First Amendment protections for parody and expressive borrowing, the law can better address digital persona misuse while preserving the creative freedom that defines online culture.

As user-generated content continues to dominate cultural production, the pressure on legal systems to conceptualize identity as a site of market harm will only intensify. Addressing digital persona imitation is not an expansion of intellectual property for its own sake but an adaptation of legal policy to a world in which identity itself has gone digital and commercial.

# The NIL Paradox: How Immigration Law Undermines the Economic Rights of International Student-Athletes

By Randi Wright[1]

## INTRODUCTION

College sports are a big part of American households. Sports bring families together and can cause family divides; the game brings a different feeling to each person who watches. The game captivates everyone in the room as they pray that their team wins the game and ultimately the championship. College sports have a significant impact on the college atmosphere and the state in which the school resides. College athletes bring their athleticism, dedication, and competitive nature that captivate the hearts of millions. Watching your favorite college athlete enlist and subsequently be drafted to a professional team elicits such pride in their achievement; it is almost as if you know them personally.

In recent years, the rise of Name, Image, and Likeness (NIL) opportunities has reshaped this landscape, opening unprecedented economic doors for student-athletes who fuel this passion and generate billions in revenue. Yet behind the excitement of NIL deals and newfound athlete autonomy lies a striking inequity that rarely reaches the headlines. International student-athletes, who make up a growing and essential part of NCAA rosters, are largely prohibited from participating in NIL activities because of restrictions tied to the F-1 student visa.

[1] J.D. Candidate, Southern University Law Center (2027).

Although NIL reform significantly expanded economic rights for collegiate athletes, U.S. immigration law, particularly the F-1 visa's employment restrictions, systematically denies international student-athletes equal access to these benefits. This paper argues that the resulting two-tiered system is legally inconsistent, economically inequitable, and politically unsustainable, and targeted statutory and NCAA reforms are necessary to restore parity.

The paper will proceed in four parts. Part I traces the historical and legal evolution of the NCAA and NIL reform, showing how antitrust litigation dismantled the amateurism model. Part II examines the immigration framework governing international student-athletes, particularly the F-1 and P-1A visas, and explains why these rules conflict with the economic freedoms newly granted under NIL. Part III compares the U.S. model with athlete-compensation systems in Canada, Europe, and Australia to illustrate how other jurisdictions reconcile education, immigration, and commercial rights. Part IV proposes targeted legal and policy reforms that seek to harmonize NIL and immigration law and ensure international student-athletes receive equal economic opportunity.

# WHAT IS THE NCAA?

The majority of college sports have been governed by the National Collegiate Athletic Association (NCAA) since its conception in 1906. The NCAA was founded to regulate college sports and protect the athletes[2]. Before the NCAA was created, there were many deaths and serious injuries in football. In the 1904 season alone, there were 18 deaths and 159 serious injuries[3]. President Theodore Roosevelt called for reform in football by having a discussion with the top football schools at the time. Soon after, 62 colleges and universities chartered the

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[2] NCAA, *History*, NCAA.org, https://www.ncaa.org/sports/2021/5/4/history.aspx (last visited Oct. 31, 2025).
[3] *Id.*

Intercollegiate Athletic Association of the United States, later known as the National Collegiate Athletic Association (NCAA)[4]. Since the creation of the NCAA, college sports have been regulated to promote a safe and enjoyable game for fans to watch their favorite team and athletes.

The NCAA has to abide by the Sherman Antitrust Act of 1890, which is a federal statute that prohibits activities that restrict interstate commerce and competition in the marketplace[5]. The Sherman Antitrust Act is one of the determining factors in many cases that are brought against the NCAA. The act applies the rule-of-reason 3-prong test to ensure the NCAA does not violate the law in college sports. The prongs are (1) the plaintiff must prove the restraint has a substantial anticompetitive effect; if proven, (2) the defendant must show a procompetitive justification; and if successful, (3) the plaintiff must demonstrate that the efficiencies could be achieved with less restrictive means[6].

As the NCAA continues to evolve, so do the players' requests. In the late 2000s, college athletes began requesting compensation from the NCAA for their Name, Image, and Likeness. "For more than a century, the National Collegiate Athletic Association (NCAA) has prescribed rules governing the eligibility of athletes at its more than 1,000 member colleges and universities. Those rules prohibit student-athletes from being paid for the use of their names, images, and likenesses (NIL).[7]"

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[4] *Id.*
[5] Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified at 15 U.S.C. §§ 1–7).
[6] *See* NCAA's Continued Antitrust Battles, Snell & Wilmer, https://www.swlaw.com/publication/the-ncaas-continued-antitrust-battles (last visited Oct. 31, 2025).
[7] *O'Bannon v. NCAA*, 802 F.3d 1049, 1052 (9th Cir. 2015).

# BACKGROUND OF NIL

The rise of Name, Image, and Likeness (NIL) rights in college athletics is reshaping not only the student-athlete experience in the U.S. but also creating complex challenges for international athletes and influencing the trajectory of professional sports. The NCAA has banned student-athletes from profiting off their NIL since its inception. NIL is the legal right of an individual, such as a student-athlete, to control and profit from the use of their personal identity.[8]

Before NIL rules, the NCAA had strict regulations prohibiting student-athletes from profiting from their athletic careers while in college. “Colleges and universities across the country have leveraged sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. That profitable enterprise relies on “amateur” student-athletes who compete under horizontal restraints that restrict how the schools may compensate them for their play.[9]”

The term "amateur" in sports meant “someone who participated purely for the love of the sport and did not expect compensation for athletic performance.[10]” The NCAA’s classification of student-athletes as amateurs created a loophole that allowed schools not to compensate players. “The governing body of college athletics, the NCAA, views these individuals as students, not as professionals or employees of their member schools.[11]” Student-

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[8] Dan Murphy, *What Is NIL in College Sports?*, ESPN (July 1, 2021), https://www.espn.com/college-sports/story/_/id/41040485/what-nil-college-sports-how-do-athlete-deals-work.
[9] *NCAA v. Alston*, 594 U.S. 69, 73 (2021).
[10] *NCAA Sports Contracts and Amateurism*, Sports Law Encyclopedia, USLegal.com, https://sportslaw.uslegal.com/sports-agents-and-contracts/ncaa-sports-contracts-and-amateurism (last visited Oct. 31, 2025).
[11] *NCAA Division I Athletics: Amateurism and Exploitation*, Sport J., https://thesportjournal.org/article/ncaa-division-i-athletics-amateurism-and-exploitation (last visited Oct. 31, 2025).

athletes' first success in demanding compensation for their NIL came in the 2015 case of *O'Bannon v. NCAA*.

## O'Bannon v. NCAA

The O'Bannon case was the first class-action lawsuit, dating back to the late 2000s, that marked the beginning of the movement for college athletes to be paid[12]. In O'Bannon v. NCAA[13], Ed O'Bannon, a former University of California, Los Angeles All-American basketball player, was notified by one of his friend's sons that he was featured on a college basketball video game. Ed was not aware of any of this since he did not approve of the use of his likeness for the game and was not compensated for it. Around the same time, Sam Keller, a former quarterback for Arizona State University and the University of Nebraska football teams, filed a separate suit against the NCAA, CLC, and EA alleging that EA used his NIL without consent and did not receive compensation[14].

This case presented two issues: "Whether the NCAA's amateurism rules prohibiting student-athletes from receiving compensation for their NILs violate Section 1 of the Sherman Antitrust Act. Whether the district court erred in identifying less restrictive alternatives to the NCAA's current rules, including allowing scholarships up to the full cost of attendance and deferred compensation of up to $5,000 per year.[15]" "The court ruled that the NCAA must allow schools to provide scholarships up to the full cost of attendance[16]." "The court also held that the NCAA's rules had significant anticompetitive effects by fixing the price of NIL rights at zero, thereby restraining competition in the college education

[12] *Everything About NIL*, Icon Source, https://iconsource.com/everything-about-nil (last visited Oct. 31, 2025).
[13] O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).
[14] O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).
[15] *Id*. at 1052.
[16] *Id. at 1076.*

market.[17]" The regulations that the NCAA had on student athletes not being compensated for their NIL were unjust, and O'Bannon's players did not stop until they received what they deserved, which is actual monetary compensation. This landmark case in 2015 got the ball rolling for athletes to continue the fight for their rights when it comes to compensation from schools profiting off their athletic abilities.

College athletes have demanded for years that they should receive payment from their institutions for earning millions from their athletic abilities. Now that college athletes can receive money for partnerships with companies in exchange for their NIL. Building on the momentum from O'Bannon, the Supreme Court's decision in *NCAA v. Alston*[18] further challenged the NCAAA's compensation restrictions.

## NCAA v. Alston

In NCAA v. Alston, student-athletes filed a class action lawsuit claiming that the NCAA and eleven D1 conferences violated section 1 of the Sherman Act[19]. Specifically, the plaintiffs argued that the NCAA rules improperly restrained their ability to receive compensation for their roles[20]. The primary issue presented is whether the district court properly subjected the NCAA's compensation restrictions to a rule of reason analysis.[18] The NCAA argued that even if the rule of reason were the proper framework, it was applied incorrectly in the case at hand.[19] Specifically, it claimed that the district court erroneously applied the "least restrictive means" test to its restraints, that the court replaced

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[17] *Id.*
[18] *NCAA v. Alston*, 594 U.S. 69 (2021).
[19] *Emma S. Fowler, NCAA v. Alston,* 90 Tenn. L. Rev. 447, 447 (2023).
[20] *Id*. at 448.

the NCAA's definition of amateurism with its own, and that the court was exercising too great an interference with the business of the NCAA.[21]

The rule of reason analysis is one of two ways courts may approach a challenged restraint under the Sherman Act. The Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations . . . .” This section could seemingly be interpreted to outlaw even “ordinary business agreements" by its use of the word “every.”[23] And, in fact, in *United States v. Trans-Missouri Freight Association*, the Court found “that the Sherman Act automatically condemned *all* horizontal restraints.” However, in *Standard Oil Co. v. United States*, the Court held that antitrust cases must be decided using “reason," apparently taking a step back from the *Trans-Missouri* decision. The Court finally clarified the framework for antitrust analysis in *United States v. Trenton Potteries, Co.*, establishing “that although restraints generally are subjected to a rule of reason, specific types of restraints such as ‘agreements to fix and maintain prices' are automatically deemed unreasonable.[22]”

The National Collegiate Athletic Association (NCAA) rules limit education-related benefits for student-athletes who played football and basketball and were subject to a rule of reason analysis, rather than a quick look, under the Sherman Act section prohibiting undue restraints of trade, even if the NCAA was a joint venture with its member conferences and schools and some degree of coordination between competitors within sports leagues could be procompetitive, since the dispute was over whether and to what extent the NCAA's restrictions on education-related compensation or benefits in its labor market yielded benefits to its consumer market that could be attained using substantially less restrictive

[21] Emma S. Fowler, *NCAA v. Alston*, 90 Tenn. L. Rev. 447, 448–49 (2023).
[22] *Id*. at 449.

means, and such a dispute presented complex questions requiring more than a blink to answer. Sherman Act § 1, 15 U.S.C.A. § 1[23].

The court would find the NCAA's restrictions on education-related benefits to be overly limiting. These rules negatively impacted student-athletes' opportunities. "In a concurring opinion, Justice Brett Kavanaugh noted that while other rules limiting student-athlete compensation unrelated to academics remain in place because they were not properly before the Court, this decision makes clear that the same traditional 'rule of reason' analysis would apply. He concluded, "There are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rules of reason scrutiny.[24]" Justice Kavanaugh's opinion alluded to a future case that would be brought in *House v. NCAA*.

## HOUSE v. NCAA

While Alston opened the door for education-related benefits, House v. NCAA directly tackled NIL compensation. This case dismantled the NCAA regulation on NIL, leading to the current and evolving college athletic programs we see today. The case first started as a two-person suit and then turned into a class action suit against the NCAA's antitrust regulations. "Grant House is a current student-athlete at Arizona State University who competes in Division I swimming and diving. House Compl. ¶ 27. Sedona Price is a current student-athlete at the University of Oregon who competes in Division I women's basketball. Id. ¶ 39. Tymir Oliver is a student-athlete who competed in Division I football for the University of Illinois. Oliver Compl. ¶ 27. These athletes allege that they have not derived any personal profit from the use of their NIL in

[23] *NCAA v. Alston*, 594 U.S. 69, 96–99 (2021).
[24] *NCAA v. Alston*, 594 U.S. 69, 108–12 (2021) (Kavanaugh, J., concurring).

advertisements for their school teams, in their social media posts, or otherwise, as a result of the NCAA rules they challenge here.[25]"

The challenged rules, among other things, prohibit student-athletes from endorsing any commercial product or service while they are in school, regardless of whether they receive any compensation for doing so (Division I Bylaw 12.5.2.1); prohibit student-athletes from receiving compensation for their NIL from outside employment (Division I Bylaws 12.4.1, 12.4.1.1, 12.4.2.3); and prohibit student-athletes from using their NIL to promote their own business ventures or engage in self-employment (Division I Bylaw 12.4.4)[26].

The challenged rules also allegedly preclude student-athletes from benefitting financially from their social media posts, personal brands, viral videos depicting their athletic performances, apparel sponsorships, and other opportunities related to the use of their NIL. House Compl. ¶¶ 116-149; Oliver Compl. ¶¶ 98-130. The challenged rules also allegedly prohibit NCAA member conferences and schools from sharing the revenue they make from their broadcasting contracts with networks, marketing contracts with companies that make sports apparel, social media sponsorships, and other commercial activities that involve the use of student-athletes' ***809** NIL. House Compl. ¶¶ 120-149, 237; Oliver Compl. ¶¶ 101-17, 216[27].

The now-approved settlement covers three combined class action lawsuits brought against the *NCAA: House v. NCAA*, *Hubbard v. NCAA,* and *Carter v. NCAA.*[4] In 2024, the parties to all three suits agreed to consolidate these cases and settle as part of a broad, 10-year agreement.[28] For the

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[25] *Grant House v. Nat'l Collegiate Athletic Ass'n*, 545 F. Supp. 3d 804, 809 (N.D. Cal. 2021).
[26] *Id.* at 808.
[27] *Id.* at 808–09.
[28] *In re* Coll. Athlete NIL Litig., No. 4:20-cv-03919-CW (N.D. Cal. June 6, 2025) (order granting final approval of settlement).

House Settlement, the Defendants (NCAA and Power Five Conferences) have agreed to pay $2,576,000,000 into a settlement fund ("damages settlement"). This money will be divided among class members (according to a Distribution Plan) and will also be used to pay for attorneys' costs and fees approved by the court, including the cost of administering this settlement and awards to the class representatives for their help in the lawsuit. For the Hubbard settlement, the Defendants (NCAA and Power Five Conferences) have agreed to pay $200,000,000 into a settlement fund. This money will be divided among class members who competed between 2019 and 2022 (according to a Distribution Plan) and will also be used to pay for costs and fees approved by the court, including the cost of administering this settlement and awards to the class representatives for their help in the lawsuit[29]." This settlement for former student-athletes shows the evolution of college sports and the demand for payment from the NCAA for making billions off the NIL of athletes since the conception of the association.

## NIL CURRENTLY

Following the 2021 ruling in NCAA v. Alston, NIL became a major topic in sports, particularly regarding the status of student-athletes as employees, immigration law for international students, taxation, and whether they should be considered amateurs or professional athletes. In July 2021, student-athletes began being paid for their NIL, and the NCAA now has to put rules in place that do not go against the ruling of this case.

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[29] College Athlete Compensation Settlement Administration, *Settlement Overview*, https://www.collegeathletecompensation.com (last visited Oct. 31, 2025).

We now see college athletes in commercials and partnering with different companies. For many student-athletes, this ruling represented long-overdue compensation so they could profit off their name, image, and likeness just like their college or university had been doing. The NCAA is constantly creating rules to ensure the integrity of the game, and each team has a fair chance of receiving good players, even if they do not have the same revenue as other schools. "The NCAA just made a new rule that prohibits schools from assuring players that they will receive third-party deals, whether verbal or written. In addition, it also mandates that all collective or booster contracts contain a clear, direct activation element based on payment.[30]" This new rule basically ensures that teams are not giving athletes false hope on how much money they will receive just so they will sign with them. Also, making sure that if boosters want to give players bonuses, the player must achieve a goal or perform well to receive the money.

Student-athletes are now monetizing their personal brand just as much as first-year professional athletes. The current highest-paid student athlete is Arch Manning, with an estimated value of $6.8 million[31]. Student-athletes are profiting from their identity to an enormous amount that now athletes would rather stay in college than get drafted to a professional sports team. Flau'jae Johnson, LSU women's star basketball player, stated in an interview that her NIL success was a key factor in her decision to forgo the WNBA draft and return to LSU for another season.[32] "While the end of the vast majority of COVID-year players has made

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[30] *NCAA Adopts New NIL Rules*, Devils in Detail, https://devilsindetail.com/ncaa-adopts-new-nil-rules-no-guarantees-direct-activations-now-required (last visited Oct. 31, 2025).
[31] *Highest Paid College Athletes via NIL Deals*, Sports Illustrated, https://www.si.com/college-basketball/highest-paid-college-athletes-via-nil-deals (last visited Oct. 31, 2025).
[32] *Flau'jae Johnson Reveals NIL Impact*, Yahoo Sports, https://sports.yahoo.com/article/flau-jae-johnson-reveals-nil-032758733.html (last visited Oct. 31, 2025).

the sport a bit younger, many top players are staying in school longer thanks to the explosion of the NIL/revenue-share market that has made it as lucrative, if not more, to play in college than be a second-round pick in the NBA[33]." NIL has impacted the sports world by creating space for players who are still developing their skills to earn a livable income while perfecting their craft. Unfortunately, this reality was not the same for international student-athletes who came to America on a visa to play sports in hopes of being drafted.

# EFFECTS ON INTERNATIONAL STUDENTS

## *F-1 VISA*

The current F-1 visa framework is incompatible with NIL rights and creates an unlawful and irrational regulatory conflict that Congress, DHS, or the NCAA must resolve through targeted statutory or administrative reform. Most international student-athletes attend U.S. universities on an F-1 student visa. "The F-1 Visa (Academic Student) allows you to enter the United States as a full-time student at an accredited college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program. You must be enrolled in a program or course of study that culminates in a degree, diploma, or certificate, and your school must be authorized by the U.S. government to accept foreign students[34]."

"International students and their educational institutions are subject to a bevy of immigration laws and regulations, all of which are silent regarding NIL

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[33] *2025–26 College Basketball Preseason All-Americans*, Sports Illustrated, https://www.si.com/college-basketball/sports-illustrated-2025-26-college-basketball-preseason-all-americans (last visited Oct. 31, 2025).

[34] U.S. Citizenship & Immigr. Servs., *Students and Employment*, https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/students-and-employment (last visited Oct. 31, 2025).

but loud when it comes to penalties, including for unauthorized employment. Such penalties may include immediate termination of student visa status, removal/deportation, and the inability to obtain future visa statuses or permanent legal status in the U.S., including P-1 status for professional athletes (8 U.S.C. § 1182)[35]. These laws are very restrictive and create a harsh reality for international student-athletes, as twelve percent of student-athletes in America are international. This is a significant number of athletes not being compensated for their NIL, which the team profits from daily. As a result, international student-athletes usually avoid NIL altogether in fear of the risk of possibly getting their visas revoked and not being able to play sports professionally in America. For students on an F-1 student visa, for them to receive off-campus employment, the student would have to have a severe economic hardship, which the USCIS defines as, "Severe economic hardship may include a loss of financial aid or on-campus employment through no fault of the student; substantial fluctuations in the value of currency or exchange rate; inordinate increases in tuition or living costs; or unexpected changes in the financial condition of the student's source of support, medical bills, or other substantial and unexpected expenses.[36]"

Due to most student-athletes being on an athletic scholarship, the likelihood of their application being approved is highly unlikely. As regulations regarding NIL changes daily and laws on immigration are becoming more restrictive, students will have a harder time fighting to receive NIL money. International student-athletes must jump through so many hoops to attempt to get NIL money that if they accidentally do not follow a requirement, they have a very

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[35] Univ. of Or. Office of Gen. Counsel, *NIL & International Student-Athletes*, https://generalcounsel.uoregon.edu/name-image-and-likeness-international-student-athletes (last visited Oct. 31, 2025).

[36] 8 C.F.R. § 214.2(f)(9)(ii)(C) (2025).

likely chance of being deported. Many international students come to America to pursue their dreams that they could not achieve back in their home country.

### *P-1A VISA*

"Ideally, international student-athletes should seek to obtain P-1A visas, which are granted to internationally recognized athletes and do not provide the same employment constraints as F-1 visas.[37]" "The P-1 visa is a non-immigrant U.S. visa for internationally recognized athletes, entertainment groups, and their essential support personnel to perform, compete, or entertain for a specific event, tour, or season.[38]" However, this visa has strict guidelines, and many student-athletes are not approved for this visa.

"The P-1A classification applies to individuals who are coming temporarily to the United States solely for the purpose of performing at a specific athletic competition. Eligibility includes an individual athlete at an internationally recognized level of performance; part of a group or team at an internationally recognized level of performance; a professional athlete; or an athlete or coach as part of a team or franchise that is located in the United States and is a member of a foreign league or association. Additionally, the P-1A classification also applies to professional or amateur athletes coming temporarily to the United States solely to perform in a specific theatrical ice-skating production or tour, either individually or as part of a group.[39]"

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[37] *International Student-Athletes in the Post-House NIL Era*, We Are NIL, https://www.wearenil.com/resources/international-student-athletes-in-the-post-house-nil-era/ (last visited Oct. 31, 2025).
[38] 8 C.F.R. § 214.2(p)(4)(i)(B) (2025).
[39] U.S. Citizenship & Immigr. Servs., *P-1A: Internationally Recognized Athlete*, https://www.uscis.gov/working-in-the-united-states/temporary-workers/p-1a-athlete (last visited Feb. 19, 2026).

For international student-athletes to qualify for this visa, “participation in the league must make players temporarily or permanently ineligible under National Collegiate Athletic Association rules to earn a scholarship in the sport at a U.S. college or university or to participate in the sport at a U.S. college or university." These eligibility restrictions further limit the feasibility of the P-1A visa for many international student-athletes despite its advantages over the F-1 visa[40]."

This creates a challenge for international students because they more than likely come to America before playing for a professional team in their home country. Even though this visa is appealing, it does not create a space for student-athletes to play for a college team and receive NIL money since this visa makes them ineligible to earn a scholarship for the sport at any US college or university.

## STUDENT ATHLETES FIGHTING THE ISSUE

International student-athletes have begun challenging the legal and immigration barriers that prevent them from accessing NIL opportunities. While NIL has opened financial doors for American athletes, international athletes must navigate a much more complex system of visa restrictions, federal regulations, and NCAA limitations. The experiences of several high-profile athletes illustrate both the progress made and the obstacles that remain.

### *HANSEL ENMANUEL*

Hansel Enmanuel is a Dominican-born basketball player who transferred from Northwestern State University to Austin Peay University. He wanted to partake in compensating from his NIL, so he worked with attorneys to figure out

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[40] *Id*.

a way. “Hansel Enmanuel is now the first athlete with extraordinary abilities to be granted an O-1 visa, allowing Enmanuel to enter into more NIL agreements with American-based corporations. O-1 visas are visas granted to individuals who possess extraordinary abilities in fields including sciences, arts, and athletics[41].”

Hansel being granted this visa as an international student-athlete was a breakthrough for students to have a chance to be paid NIL money because since players started receiving NIL, the 12 percent of international students were not able to receive the money with fear of being deported because the F-1 visa does not permit athletes to receive money due to the strict regulations of the visa. To qualify for the O-1 visas, the athlete must have “extraordinary ability." In Hansel’s case, he only has one arm, so under the visa, he has an “extraordinary ability." While most international students do not have the opportunity to qualify for this visa due to them not having an ability that the government would view as extraordinary, like Hansel, this gives hope for student athletes that there is a chance that their time will come to receive NIL money just like their American teammates.

### *LAST TEAR POA*

Last Tear Poa, an Australian point guard who played her past three seasons at LSU, filed a lawsuit earlier this year after she was denied a P-1A visa, which is the document many international professional athletes use to make money while competing in the United States. Poa is currently in the country on an F-1 student visa, which prohibits her from working while in the United States.[42]

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[41] Darren Heitner, *Hansel Enmanuel Granted O-1 Visa for NIL*, Sports Agent Blog (Oct. 27, 2022), https://sportsagentblog.com/2022/10/27/hansel-enmanuel-granted-o-1-visa-for-nil/.

[42] *Judge Rules in NIL Visa Lawsuit*, ESPN, https://www.espn.com/womens-college-basketball/story/_/id/46315688/judge-rules-us-government-nil-visa-lawsuit (last visited Oct. 31, 2025).

Poa, like many international student-athletes, is at a disadvantage because they are fighting for the rights that their counterparts already have, but due to visa restrictions and the government's prevention of changing their status, it will make players think twice about playing for American college teams.

While international athletes cannot earn money because it will affect their visa status, there are loopholes that schools can use so the players can receive a passive income, such as a group licensing agreement to profit off their jersey sales. Another example of a workaround to the F-1 visa restriction is for international student-athletes to perform all NIL services outside of the U.S. For example, an NIL deal could be structured so that the student-athlete performs the NIL deal in his/her home country.[43] These alternatives are beneficial, but that is not nearly as much as they deserve. They are receiving an income, but not nearly as much as their teammates who are American. "At least one congressional bill has also attempted to add clarity for international athletes but did not progress past an initial draft. Schools have, in the meantime, been forced to search for creative workarounds to help their international players make money.[44]"

## *ZACH EDEY*

Zach Edey is a Canadian who was an international student-athlete at Purdue University who was affected by the restrictions that the American government imposed on students on the F-1 visa. "I feel like I'm missing out on a lot of money," Edey, the two-time AP Player of the Year, said Friday at the Final Four."[45] Zach's comment is how many of the international student-athletes feel

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[43] *Navigating the House Settlement for International Students*, NIL Revolution, https://www.nilrevolution.com/2025/03/show-me-the-money-navigating-the-house-settlement-for-international-students (last visited Oct. 31, 2025).
[44] *See supra* note 42.
[45] Jeff Borzello, *Purdue's Zach Edey Says He's Missing Profits Due to U.S. NIL Law*, ESPN (Apr. 5, 2024), https://www.espn.com/mens-college-

since they are missing out on opportunities to not only make money but also elevate their image to become more appealing for the draft. Edey's coach at the time commented as well about the restrictions that are imposed on NIL for international student-athletes: "We have to get some parameters around what we're actually doing and what's actually going on and not try to just do something so we can stay out of the courts," Painter said. "That's all things are happening because for a long time, what's the product? The product is the player. They're viewed as amateurs, but they weren't amateurs.[46]" If the NCAA changes the athletes' status from amateur to professional, this will cause a greater issue for Title XI and funding for the schools, as well as the consideration of the students as employees of the school for playing sports at the university or college.

### *Why These Players Matter*

Together, these stories expose a central flaw in the NIL era: international student-athletes must choose between maintaining NCAA eligibility and accessing the same economic rights guaranteed to domestic athletes[47]. The O-1 path that worked for Hansel Enmanuel is extraordinarily rare and not a scalable solution for most athletes;[48] the P-1A category often collides with NCAA eligibility;[49] and the F-1 visa broadly treats NIL activity as unauthorized employment[50]. As a result, international athletes remain trapped in a system where they contribute to university revenue, team success, and NCAA marketing but cannot legally participate in the NIL marketplace that now defines college

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basketball/story/_/id/39882011/purdue-zach-edey-missing-profits-due-us-nil-law.

[46] *Id.*

[47] U.S. Citizenship & Immigr. Servs., *Students and Employment*, *supra* note 34.

[48] Heitner, *supra* note 41.

[49] 8 C.F.R. § 214.2(p)(4)(i)(B) (2025); *see also* U.S. Citizenship & Immigr. Servs., *P-1A: Internationally Recognized Athlete*, *supra* note 39.

[50] 8 C.F.R. § 214.2(f) (2025).

athletics[51][52]. The public statements and litigation by athletes like Last Tear Poa and Zach Edey illustrate both the economic magnitude and human impact of this gap[53][54]. In short, NIL reforms expanded rights in theory. Still, immigration law withholds those rights in practice, echoing the antitrust trajectory from O'Bannon to Alston and underscoring the need for targeted reform by Congress, DHS, or the NCAA.[55] [56] [57]

## Consequences of Visa Violations for International Student-Athletes

Name, Image, and Likeness (NIL) opportunities have introduced new revenue streams for collegiate athletes, but for international students in F-1 status, the legal risks can be severe. Under federal immigration law, F-1 students must strictly maintain status by complying with the terms and conditions of their classification, including limits on employment and compensation. Participating in NIL activities that constitute "employment" or otherwise fall outside Department of Homeland Security (DHS) authorization can be treated as a status violation with cascading consequences[58].

A violation of F-1 rules, such as engaging in unauthorized employment, can result in termination of status and make a student ineligible for key benefits tied to lawful F-1 maintenance. These may include on-campus employment,

[51] *In re* Coll. Athlete NIL Litig., No. 4:20-cv-03919-CW (N.D. Cal. June 6, 2025), *supra* note 28.
[52] College Athlete Compensation Settlement Administration, *supra* note 29.
[53] Borzello, *supra* note 45.
[54] *See supra* note 42.

[55] *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).
[56] *NCAA v. Alston*, 594 U.S. 69, 141 S. Ct. 2141 (2021).
[57] NIL Revolution, *supra* note 43.
[58] 8 C.F.R. § 214.2(f) (2025); 8 C.F.R. § 214.1(e) (2025) (providing that engaging in unauthorized employment constitutes a failure to maintain nonimmigrant status).

Curricular Practical Training (CPT), Optional Practical Training (OPT), transfer to another SEVP-certified school, and changes of status to other visa categories. Because CPT and OPT are often critical bridges to professional opportunities, a single violation can foreclose future career pathways in the United States[59].

For students admitted for "duration of status" (D/S), unlawful presence generally begins to accrue on the earliest of (1) the day after DHS makes a formal finding in an adjudication that the student violated nonimmigrant status, or (2) the day after an immigration judge orders removal. Accrual of more than 180 days of unlawful presence before departure triggers a three-year bar to reentry; one year or more triggers a ten-year bar. Thus, an F-1 athlete who falls out of status because unauthorized NIL activities can unintentionally jeopardize the ability to return for tryouts, professional contracts, or postgraduate opportunities[60].

NIL revenue commonly involves compensated endorsements, appearances, or social media promotion—arrangements that can be construed as "employment" or work for hire under immigration regulations if not specifically authorized. Unlike P-1 athletes (professional competitors) or O-1 beneficiaries (extraordinary ability), who may receive compensation aligned with their classifications, the F-1 category is designed for full-time study with narrow, regimented employment permissions. Absent express DHS authorization,

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[59] 8 C.F.R. § 214.2(f)(9) (2025) (defining the narrow categories of permissible F-1 employment); 8 C.F.R. § 214.1(e) (2025) (treating unauthorized employment as a status violation); 8 C.F.R. § 214.2(f)(9)(i)–(v) (2025) (on-campus and off-campus employment limits); 8 C.F.R. § 214.2(f)(10)–(12) (2025) (CPT, pre- and post-completion OPT, STEM OPT extension); *Id.* § 214.2(f)(8) (2025) (transfer to another SEVP-certified school); 8 C.F.R. § 214.2(f)(8) (2025); 8 C.F.R. § 248.1(b) (2025); U.S. Citizenship & Immigr. Servs., Policy Manual vol. 2, pt. F, chs. 1–2, https://www.uscis.gov/policy-manual (last visited Feb. 11, 2026).

[60] U.S. Citizenship & Immigr. Servs., Policy Manual vol. 3, pt. A, ch. 3(A)(2), https://www.uscis.gov/policy-manual (last visited Feb. 11, 2026); Immigration & Nationality Act § 212(a)(9)(B)(i)(I)–(II), 8 U.S.C. § 1182(a)(9)(B)(i)(I)–(II) (2022).

monetizing NIL can, therefore, conflict with F-1's employment limits even when the NCAA and state law permit NIL compensation[61].

Schools sometimes seek creative compliance models to support international athletes; however, institutional practices cannot override federal immigration law. SEVP-certified schools must ensure students maintain status, and university communications cannot "authorize" employment that DHS has not permitted. For the athlete, the risk calculus is stark: beyond immediate loss of status, a violation can impair eligibility for future nonimmigrant visas (e.g., O-1, P-1) or immigrant processes and may carry reputational and contractual fallout[62].

For international student-athletes, the legal consequences of an F-1 status violation are not speculative; they are codified and potentially career-defining. Until federal regulations expressly accommodate NIL in the student context, the prudent course is strict compliance with F-1 employment limits and advance consultation with designated school officials (DSOs) and qualified immigration counsel before engaging in any compensated NIL activities[63].

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[61] 8 C.F.R. § 274a.1(h)–(i) (2025) (2025) (defining "employment" and "to hire" for unauthorized employment purposes); 8 C.F.R. § 214.2(f)(9) (2025) (limiting permissible F-1 employment); *see generally* U.S. Citizenship & Immigr. Servs., *Employment Authorization* (summarizing when compensation for services requires DHS authorization), https://www.uscis.gov/i-765 (last visited Feb. 11, 2026); INA § 212(a)(9)(B)(i)(I)–(II), 8 U.S.C. § 1182(a)(9)(B)(i)(I)–(II) (2022).

[62] 8 C.F.R. § 214.2(p) (2025) (P-1 classification for internationally recognized athletes and support personnel; authorizing compensated performance consistent with petition terms); 8 C.F.R. § 214.2(o) (2025) (O-1 classification for individuals of extraordinary ability, including compensated services under the petition itinerary); *cf.* 8 C.F.R. § 214.2(f) (2025) (F-1 classification emphasizing education with limited, enumerated employment permissions)..

[63] 8 C.F.R. § 214.3 (2025) (SEVP certification requirements and school obligations); Student & Exch. Visitor Program, *Guidance for Designated School Officials* (clarifying DSOs' role and limits; only DHS/USCIS may authorize certain employment), U.S. Immigr. & Customs Enf't, https://www.ice.gov/sevis/dso (last visited Feb. 11, 2026).

## Legislation on NIL

Lawmakers remain divided on whether international student-athletes should be allowed to receive compensation for their name, image, and likeness (NIL). While some support expanding eligibility, others argue that noncitizens should not have the same NIL rights as U.S. citizens. In 2024, Congresswoman Valerie Foushee and Congressman Mike Flood introduced a bipartisan bill that would modify F-1 visa rules to permit international student-athletes to receive NIL compensation.[64]

Supporters of the proposal frame it as a matter of parity and practicality. They note that international students are already permitted to work part-time while in school and argue that NIL endorsements should be treated similarly. They also contend that equitable NIL access would align international athletes with their U.S. teammates and help alleviate financial strain for students living far from home.[65] Senator Blumenthal has likewise argued that international athletes should be fairly compensated for the value they generate through their athletic performance.[66] "However, broader political resistance complicates the path forward. The President has characterized NIL as detrimental to college sports and

[64] Office of Rep. Valerie Foushee, Press Release, *Foushee, Flood Introduce NIL Reform Bill for International Collegiate Student Athletes* (Jan. 2024), https://foushee.house.gov/posts/rap-foushee-rap-flood-introduce-nil-reform-bill-for-international-collegiate-student-athletes.
[65] *Id.*
[66] Office of Sen. Richard Blumenthal, Press Release, *Ricketts & Blumenthal Introduce Name, Image, and Likeness Legislation for International Collegiate Athletes* (2024), https://www.blumenthal.senate.gov/news/press-releases/ricketts-blumenthal-introduce-name-image-and-likeness-for-international-collegiate-athletes.

the Olympics, a stance that may reduce the likelihood that pro-NIL visa reforms for international athletes become law in the near term."[67]

In addition to executive-level skepticism, some lawmakers have raised concerns about foreign influence in collegiate sports. Representatives Blake Moore and Marc Veasey, for example, introduced legislation to prohibit foreign investment in collegiate NIL agreements, arguing that such funding could threaten the integrity of college athletics or create national security risks.[68] If enacted, these restrictions could further limit NIL opportunities for international athletes; for instance, by creating ambiguity about whether endorsements from companies in their home countries might conflict with visa conditions. While there is yet a bill to be passed to change the visa status for foreign student-athletes, there is hope that in the near future, change will come.

## International Models of Athlete Compensation

The United States NIL model stands alone compared to international approaches, raising the question of whether the U.S. involvement in athlete sponsorship is justified. Every region has different regulations when it comes to collegiate athletes' compensation. While the United States is the first country to have NIL, other countries have different ways of handling student-athletes and their sponsorships. Canada, Europe, and Australia are examples that the United States should follow when it comes to student-athletes and how to handle their sponsorships. A pattern that is shown is that neither the schools nor collegiate sports organizations have a hand in the students' sponsorship since those are

[67] Jack Baer, *President Trump's College Sports Claim Draws Pushback*, Yahoo Sports (Feb. 1, 2024), https://sports.yahoo.com/articles/president-trumps-college-sports-claim-203200723.html.
[68] Office of Rep. Blake Moore, Press Release, *Moore, Veasey Introduce Bill to Prohibit Foreign Investment in Collegiate NIL Agreements* (2024), https://moore.house.gov/posts/moore-veasey-introduce-bill-to-prohibit-foreign-investment-in-collegiate-nil-agreements.

obligations that the students have outside of school. Also, they do not have amateur regulations on the athletes, so they can play professionally while in college. these countries also do not have regulations on foreign students receiving sponsorship deals like the United States.

*Canada's student-athlete compensation rules*

U Sports is the governing body for universities in Canada to regulate sports. The USPORTS brand was unveiled on October 20th, 2016, to recognize the more than 118 years of our history. The brand is one title, instantly recognizable and identical in both French and English, with one goal: to give our student-athletes and national championships the visibility, appreciation, and rewards they deserve[69]. It's a big job in a big country. After all, we represent 58 universities, nearly 15,000 student-athletes, 7,700 games and events per year… and millions of stories. It all comes together under one brand: U SPORTS[70].

Unlike the NCAA model in the United States, the U SPORTS regulatory framework contains no provisions restricting or prohibiting student-athletes from entering commercial endorsement, sponsorship, or name-image-likeness (NIL) arrangements. A review of the governing eligibility and regulations documents reveals detailed academic, recruiting, and anti-doping requirements but no amateurism-based limitations on athlete compensation from third-party commercial entities. This regulatory silence has a significant legal implication: Canadian university athletes, domestic or international, are free to contract independently with sponsors, without institutional involvement or oversight.

[69] U SPORTS, *History*, https://universitysport.prestosports.com/information/about_cis/cishistory (last visited Feb. 19, 2026).
[70] *Id.*

Whereas U.S. universities have developed extensive NIL compliance systems in response to NCAA policy reforms, Canadian universities do not operate NIL departments or NIL marketplaces, because U SPORTS imposes no requirement or framework for institutional participation. As a result, Canadian athletes negotiate their commercial arrangements directly with third-party sponsors[71].

The permissive Canadian model is illustrated most clearly through the conduct of Canadian athletes competing in the United States. Under U.S. immigration law, international student-athletes on F-1 visas are generally barred from engaging in compensated NIL activity while in the United States. Consequently, Canadian NCAA athletes frequently return to Canada to perform NIL deliverables because such activity is lawful in Canada and does not expose them to U.S. immigration penalties[72]. The U.S. could follow Canada's lead when it comes to collegiate athletes having partnership deals that their schools do not have regulation over. The additional supervision that colleges in America place on athletes' finances causes a strain on the athletic departments that is unnecessary since the players' partnerships are outside of their collegiate obligation as athletes to the schools. Canada's approach also does not create a rift between the athletes and the collegiate regulators like the U.S., because the athletes are not attracted to schools based on NIL as in America.

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[71] *Compare* U SPORTS, *Student-Athlete Eligibility*, *supra* note 69, *with* NCAA, *NIL (Name, Image, Likeness)*, https://www.ncaa.org/sports/2021/7/9/name-image-likeness.aspx (last visited Feb. 14, 2026) (setting out NCAA's affirmative NIL policy structure, including business-purpose, fair-market-value guidance, and reporting thresholds).

[72] Oren Weisfeld, *Why Canadians Can't Make as Much Money as Americans in NCAA*, Sportsnet (Mar. 22, 2024), https://www.sportsnet.ca/basketball/article/why-canadians-arent-seeing-fair-share-of-profits-in-wild-west-of-ncaa-athletics/ (reporting that Canadian NCAA athletes often must complete NIL activities on Canadian soil due to F-1 visa constraints).

*European Regulation:*

In Europe, they use the "dual-career" model. This model aims to succeed at the highest level of a sport, which demands intensive training and competitions at home and abroad, which can be difficult to reconcile with the challenges and restrictions in the educational system and the labor market[73]. This is different from the U.S. because instead of going to college and playing for their team, these athletes automatically play professionally. Universities often partner with external clubs or the FA, and students may compete for the university mid-week and for semi-pro/pro clubs on weekends[74].

Unlike the U.S., many European systems emphasize "dual careers," formal mechanisms that let athletes combine higher education with club-based development. The EU Guidelines on Dual Careers and subsequent research promote flexible academic arrangements and institutional partnerships to support elite training alongside studies[75]. Projects like SAMEurope operationalize these policies across universities, while national bodies such as BUCS in the UK regulate campus competitions and, in concert with the FA, build university–community hubs that link students to semi-pro and professional pathways[76].

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[73] European Commission, *EU Guidelines on Dual Careers of Athletes* (Nov. 16, 2012), https://ec.europa.eu/assets/eac/sport/library/documents/dual-career-guidelines-final_en.pdf (last visited Feb. 19, 2026).

[74] European Parliament, *Qualifications/Dual Careers in Sports—Study* (2016), https://www.europarl.europa.eu/RegData/etudes/STUD/2016/573416/IPOL_STU(2016)573416_EN.pdf.

[75] European Commission, *EU Guidelines on Dual Careers of Athletes*, *supra* note 73; European Parliament, *supra* note 74.

[76] SAMEurope Project, *Student Athletes Erasmus+ Mobility in Europe*, https://www.sameuropeproject.eu/ (last visited Feb. 19, 2026); Carlos H. Domingo et al., *Promoting Dual Careers at Higher Education Institutions: 31 Benefits*, Frontiers in Sports & Active Living (June 30, 2024), https://www.frontiersin.org/journals/sports-and-active-living/articles/10.3389/fspor.2024.1407194/full; British Universities & Colleges Sport, *About/News*, https://www.bucs.org.uk/ (last visited Feb. 19, 2026); The FA, *College & University Hubs Programme*, https://www.thefa.com/get-involved/player/youth/fa-college-and-university-hubs-programme (last visited Feb. 19, 2026).

Universities increasingly partner with clubs like Hartpury–Premier League or run academy-style programs such as UCFB that allow students to study while training and competing in BUCS and external leagues, a true club-university hybrid[77].

### *Australia's approach to student-athlete employment*

Australia has adopted a coherent, system-wide "dual-career" framework that enables high-performance athletes to pursue tertiary study and employment alongside elite sport, rather than treating education and work as incompatible with high-performance participation. At the national level, the Australian Institute of Sport (AIS) coordinates the Elite Sport Education Network (ESEN)—a consortium of universities, Technical and Further Education (TAFE) institutions, and other education providers committed to delivering integrated academic, well-being, and career supports that allow athletes, coaches, and officials to "win well" while engaged in study.[78]

AIS supplements this architecture with direct financial and career-planning supports. The AIS Athlete Education Scholarship (AES) provides categorized athletes with up to AUD 5,000 toward tuition, textbooks, travel, and other study-related costs under guidelines that require enrollment in an approved university or TAFE within the Elite Sport Education Network and completion of funded study within the relevant academic year.[79] In parallel, AIS partners with

[77] Hartpury University, *Hartpury University Partners with the Premier League to Provide Football Academy Graduate Scholarships* (Sept. 3, 2024), https://www.hartpury.ac.uk/news/2024/9/hartpury-university-partners-with-the-premier-league-to-provide-football-academy-graduate-scholarships/; UCFB, *Men's Football Academy*, https://www.ucfb.ac.uk/studying-with-us/our-academies/ucfb-mens-football-academy/ (last visited Feb. 19, 2026).
[78] *Elite Sport Education Network*, Austl. Sports Comm'n (AIS), https://www.ausport.gov.au/ais/career-and-education/esen (last visited Feb. 15, 2026).
[79] *AIS Athlete Education Scholarship*, Austl. Sports Comm'n (AIS), https://www.ausport.gov.au/ais/career-and-education/AES (last visited Feb. 15, 2026); *Eligibility Criteria—AIS Athlete Education Scholarship*, Austl. Sports Comm'n (AIS), https://www.ausport.gov.au/ais/career-and-education/AES/eligibility-criteria (last visited Feb. 15, 2026).

industry through initiatives such as Deloitte's Ignite Athlete Employment Program, which offers flexible paid employment, onboarding and mentoring, and access to an athlete liaison officer, explicitly structuring work in a manner that coexists with training and competition demands.[80] National sporting organizations reinforce these pathways by signposting AIS supports, collating dual-career resources, and centralizing guidance on education, career planning, and transitions, as reflected in Athletics Australia's comprehensive "Education and Career" hub[81].

At the institutional level, AIS-endorsed universities operationalize the dual-career mandate through structured, formalized flexibility frameworks. The Australian National University (ANU), for example, offers elite-athlete students' academic planning assistance, cross-institutional study arrangements, extensions or alternative assessment schedules during travel or competition periods, attendance waivers, deferred examinations, tailored study loads, and flexible leave options, all documented in an individualized Elite Athlete Plan.[82] These supports are paired with substantial scholarship opportunities, including the ANU Sport Elite Athlete Scholarship, valued at AUD 25,000 annually for up to six years, alongside event-travel grants and discipline-specific awards.[83]

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[80] *Ignite Athlete Employment Program*, Austl. Sports Comm'n (AIS), https://www.ausport.gov.au/ais/career-and-education/ignite-athlete-employment-program (last visited Feb. 15, 2026).
[81] *Education and Career—Wellbeing Hub*, Athletics Austl., https://www.athletics.com.au/participant-hub/high-performance/wellbeing-hub/education-and-career/ (last visited Feb. 15, 2026).

[82]*ANU Student Elite Athlete Program*, Austl. Nat'l Univ., https://www.anu.edu.au/students/accessibility/anu-student-elite-athlete-program (last visited Feb. 15, 2026).
[83] *ANU Sport Elite Athlete Scholarship*, Austl. Nat'l Univ., https://study.anu.edu.au/scholarships/find-scholarship/anu-sport-elite-athlete-scholarship (last visited Feb. 15, 2026); *Elite Athletes—Grants & Support*, ANU Sport & Recreation Ass'n, https://sportandwellbeing.anu-sport.com.au/student-services/elite-athletes (last visited Feb. 15, 2026).

Similarly, the University of Western Australia (UWA) situates dual-career support within its Student Athlete Development Program, which provides timetable adjustments, exam deferrals, access to world-class training facilities, and a dedicated on-campus Student Athlete Hub equipped for recovery, study, and well-being. UWA complements these services with sport excellence scholarships, bursaries, and specialist workshops aimed at time management, identity formation, and holistic performance.[84] Meanwhile, the University of New South Wales (UNSW) deploys a tiered structure through its Elite Athlete Program and Elite Athletes, Performers, and Leaders (EAPL) scheme, offering flexible entry supported by up to five adjustment factors, ongoing enrollment flexibility, leave of absence for travel, cross-institutional study, and multiple high-performance scholarship streams.[85]

Crucially, athletic competition within higher education is nationally governed by UniSport Australia, which coordinates intervarsity championships and leagues across approximately forty-plus member universities. Its events calendar and representative pathways ensure that high-performance opportunities occur *within* the academic ecosystem—allowing athletes to compete at a national standard without exiting their educational program.[86]

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[84] *Student Athletes—Student Athlete Development Program*, Univ. of W. Austl., https://www.uwa.edu.au/sport/Competitive-Sport/Student-Athletes (last visited Feb. 15, 2026); *UWA Sport—Sports Excellence Scholarship*, Univ. of W. Austl., https://www.uwa.edu.au/study/scholarship-listing/uwa-sport---sports-excellence-scholarship-f1827191 (last visited Feb. 15, 2026).

[85] *UNSW Elite Athlete Program*, UNSW Sydney, https://www.unsw.edu.au/sport/unsw-elite-athlete-program (last visited Feb. 15, 2026); *2026 Elite Athletes, Performers & Leaders Guide (EAPL)*, UNSW Sydney (2026), https://www.unsw.edu.au/content/dam/pdfs/future-students/2026-elite-athletes-performers-and-leaders-guide.pdf (last visited Feb. 15, 2026).

[86] *About/Events*, UniSport Austl., https://www.unisport.com.au/ (last visited Feb. 15, 2026); *Events*, UniSport Austl., https://www.unisport.com.au/events/ (last visited Feb. 15, 2026).

Taken together, the AIS-led governance structure, its aligned scholarship and employment programs, the embedded flexibility and financial supports within universities, and a nationally integrated intervarsity sport system establish a robust dual-career model. This model affirmatively supports student-athlete study, mobility, and employment, offering an alternative to restrictive or protectionist eligibility systems by embedding athletes in structured, rights-protective pathways that recognize education and earning potential as integral components of sporting excellence.

Each of these comparative models reveals a consistent principle: none of these jurisdictions base student-athlete eligibility on an amateurism status like the U.S.; instead, athletes retain ordinary economic rights regardless of nationality or institutional affiliation. Canada treats NIL as a private commercial matter rather than a university-regulated system; Europe separates elite competition from higher education altogether; and Australia embeds athletics within a dual-career support model that assumes athletes will pursue economic opportunities alongside sport. These systems demonstrate that athlete compensation can coexist with academic integrity and competitive fairness without the restrictive legal architecture that currently excludes international athletes in the United States.

## HOW THE U.S. SHOULD FOLLOW SUIT

The comparative models of Canada, Europe, and Australia demonstrate that student-athletes can receive compensation for their commercial value without compromising their academic obligations or destabilizing university governance structures. Although each jurisdiction approaches athlete rights differently, they share a defining feature: none rely on an entrenched amateurism doctrine. Instead, student-athletes are treated as individuals with ordinary commercial rights, free to enter sponsorships and endorsement agreements without being subject to the same

degree of institutional regulation that characterizes the United States. This orientation produces a more coherent and less adversarial framework by recognizing athletes as emerging professionals rather than pseudo-employees bound by restrictive eligibility rules.

Importantly, these international systems avoid the regulatory micromanagement that defines the U.S. NIL landscape. In the U.S., athletes must navigate inconsistent state statutes, NCAA policies, school-specific restrictions, and, in the case of international students, federal immigration barriers. By contrast, Canada, Europe, and Australia do not impose university-centered NIL regimes, nor do they burden athletes with compliance structures that limit their ability to monetize their name, image, and likeness. The result is a more stable environment that allows athletes to plan long-term, negotiate contracts more freely, and pursue endorsements without fear of violating institutional rules. Consequently, international athletes in the U.S. increasingly confront a rational question: if their home countries (or other jurisdictions) offer simpler, more predictable opportunities for compensation, why remain in the United States?

A central area where the U.S. should follow suit is immigration policy. The F1 visa regime, designed for academic study, not economic participation, effectively prohibits most international student-athletes from earning active NIL income. This creates a two-tiered system in which domestic athletes enjoy expansive earning potential while international teammates risk visa violations for the exact same activities. If the United States were to modernize F1 rules to reflect the economic realities of contemporary college sports, it would not only provide parity for international athletes but would likely increase global recruiting by making U.S. universities more attractive destinations for high-performing talent.

Among the three international systems, Canada's model most closely resembles the United States, because Canadian student-athletes still compete on

behalf of their universities and may receive scholarships. However, Canada's U Sports system does not commercialize NIL nor embed it within university governance structures as the NCAA does. Canadian athletes may sign sponsorship agreements, but universities do not interfere, facilitate, or police those deals. This absence of university-driven inducement rules prevents the market distortions seen in the United States, where schools indirectly compete for recruits through elaborate NIL collectives and booster-funded deals. In effect, Canada allows athletes free commercial agency without turning universities into de facto professional sport intermediaries.

Europe departs even more sharply from the U.S. model. European athletes typically train and compete through club systems rather than university teams, meaning higher education institutions have no role in regulating commercial activity. By separating the educational environment from the high-performance sport economy, Europe eliminates many of the conflicts now destabilizing the U.S. system: recruitment inducements, booster-driven marketplaces, institutional compliance burdens, and immigration-related inequities. This separation of sport and education has the benefit of preserving academic integrity while ensuring that commercialization flows through entities designed to manage athlete contracts and professional development.

Australia provides yet another example of how student athletes can balance education and elite sport without adopting a commercialized NIL regime. Although Australian universities offer substantial academic flexibility, athlete-specific support programs, and scholarships, they do not regulate athletes' personal sponsorship agreements nor operate NIL-style institutional marketplaces. Instead, commercialization remains external to the higher education system, allowing athletes to pursue endorsements without university entanglement and without the compliance risks prevalent in the United States. The

Australian model demonstrates that a structured dual-career framework can successfully integrate sport and education without converting universities into economic actors in the athlete marketplace.

Taken together, these comparative systems demonstrate that the United States can protect both athlete earnings and academic integrity without recreating the NCAA's current regulatory restrictions.

## Proposed Legal and Policy Reform

A central shortcoming of the U.S. NIL landscape is its fundamental lack of inclusivity. Although the NCAA now permits student-athletes to monetize their name, image, and likeness, the current framework benefits only a subset of athletes, primarily U.S. citizens. International student-athletes remain effectively excluded because the F-1 student visa treats most NIL activities as prohibited "employment," placing thousands of athletes at risk of status violations for engaging in the same commercial opportunities available to their American teammates. Reform must begin here. The United States should either (1) create a new visa category designed specifically for student-athletes, or (2) amend F-1 regulations to authorize NIL-related commercial activity without jeopardizing a student's lawful status. Either measure would signal a meaningful step toward aligning U.S. policy with modern realities and toward the more equitable approaches observed internationally.

In addition to immigration reform, the United States must reconsider the degree of institutional control it exerts over NIL. The NCAA and individual universities currently dominate NIL governance, generating a fragmented system in which athletes confront inconsistent rules, compliance burdens, and inducement-driven recruiting environments. By contrast, Canada offers a model in which universities remain focused on education and sport participation, while

sponsorships and endorsements occur outside the institutional structure. Under this approach, athletes retain their commercial agency, and universities avoid being drawn into quasi-professional market dynamics. Adopting a similar model in the U.S. would reduce the financial arms race among schools, redirect recruitment incentives toward coaching quality and institutional fit, and restore educational priorities to the collegiate context.

The NCAA's current approach risks destabilizing college sports. Instead of learning from international systems that clearly delineate academic and commercial spheres, the NCAA has taken a reactive posture, issuing piecemeal rule adjustments, litigating its own authority, and attempting to police a rapidly evolving marketplace with outdated tools. What is needed is a clear, nationally uniform NIL framework that prevents schools from exploiting regulatory ambiguity or leveraging NIL collectives to gain competitive advantages in recruitment. A concrete and enforceable governance structure, rather than the existing patchwork of state laws and NCAA guidance, would minimize uncertainty for institutions, athletes, and sponsors alike.

Crucially, any comprehensive solution must include meaningful protections for international athletes. The NCAA cannot claim to champion fairness while maintaining a system that categorically excludes a significant portion of its participants from lawful NIL participation. Federal legislation should expressly authorize international student-athletes to engage in NIL activity without risking visa revocation or removal. Reasonable guardrails could be incorporated—for example, limiting NIL activity to the United States to avoid dual-jurisdiction income advantages or creating tax structures tailored to non-citizen athletes. What matters is that international athletes are no longer asked to choose between maintaining lawful immigration status and accessing the same economic opportunities their teammates enjoy.

By modernizing immigration rules, limiting university overreach, and establishing a uniform, inclusive NIL framework, the United States would not only correct inequities in its current regime but also strengthen the long-term sustainability of college sports. Such reforms would move the U.S. toward a system that prioritizes education, fairness, and athlete autonomy, values already reflected in the more coherent and equitable models embraced abroad.

# Conclusion

The promise of NIL in the United States remains incomplete because it is not equally accessible to all student-athletes. The principal gap is structural: international students, who typically hold F-1 status, are effectively barred from most NIL activity because immigration rules treat such activity as unauthorized employment. The result is a two-tiered marketplace in which similarly situated teammates face starkly different legal risks for identical conduct. A system that purports to value competitive equity and educational opportunity cannot long tolerate that disparity.

Reform should proceed on two coordinated tracks. First, immigration policy must be modernized. Congress and the executive branch should either create a narrowly tailored visa classification for student-athletes or amend the F-1 framework to authorize defined NIL activities (e.g., endorsements, appearances, and licensing) without jeopardizing lawful status. Guardrails, such as contract disclosure, fair-market-value requirements, and tax compliance, can preserve the integrity of the visa program while eliminating categorical exclusion.

Second, NIL governance should be re-centered on uniformity, transparency, and academic primacy. The NCAA and universities should support a national, clearly articulated baseline that (1) removes institutions from day-to-day deal-making and recruiting inducements; (2) preserves athletes'

freedom to enter lawful commercial agreements; and (3) sets bright-line rules against pay-for-play disguised as marketing. A stable federal standard would reduce forum shopping and compliance gamesmanship while allowing schools to focus on education and athlete welfare.

Comparative experience abroad underscores that these aims are attainable. In Canada, Europe, and Australia, universities prioritize education and athlete support, while commercial activity is handled outside the university governance apparatus. Although the U.S. model will remain distinct because college sports here are uniquely commercialized, the core lesson travels: student-athletes can exercise ordinary commercial rights without compromising academic missions when the legal architecture is coherent and the institutional role is properly limited.

Adopting immigration reforms that include international athletes and implementing a uniform, education-first NIL framework would align policy with principle. It would make NIL genuinely inclusive, reduce inequities that threaten the legitimacy of college sports, and ensure that the collegiate enterprise continues to serve its dual purpose: developing both scholars and athletes. If the United States is serious about fairness and educational opportunity, this is the path forward. The fight for equality has started, and it's time for the NCAA and the government to join so that international student-athletes are able to receive NIL like their counterparts.