THE PATCHWORK PROBLEM: A NEED FOR NATIONAL UNIFORMITY TO ENSURE AN EQUITABLE PLAYING FIELD FOR STUDENT-ATHLETES' NAME, IMAGE, AND LIKENESS COMPENSATION

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"*The arms race in intercollegiate athletics must stop*."[1]

I. INTRODUCTION

Student-athlete[2] compensation in the National Collegiate Athletic Association (NCAA) has historically been limited to awarding academic scholarships.[3] Recently, many states have passed laws giving student-athletes the ability to monetize their name, image, and likeness ("NIL").[4]

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[1] *Supporting Our Intercollegiate Student-Athletes: Proposed NCAA Reform: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. 10 (2004) (statement of Hon. C. Thomas McMillen).

[2] Although the National Labor Relations Board seeks to classify "student-athletes" as "employees," this Comment will use the term "student-athletes" for consistency purposes. *See* Gregg E. Clifton & Bernard G. Dennis III, *NLRB's General Counsel Uses Prosecutorial Authority to Assert Student-Athletes Are Employees*, NAT'L L. REV. (Oct. 1, 2021), https://www.natlawreview.com/article/nlrb-s-general-counsel-uses-prosecutorial-authority-to-assert-student-athletes-are (arguing that "the term 'student-athlete' has a chilling effect that misleads student-athletes to believe [that] they are not entitled to the [National Labor Relations Act's] protection").

[3] *See Scholarships*, NAT'L COLLEGIATE ATHLETIC ASS'N, https://www.ncaa.org/student-athletes/future/scholarships (last visited Dec. 28, 2021) (noting that "[o]nly about [two percent] of high school athletes are awarded athletics scholarships to compete in college").

[4] An individual's NIL makes up the legal concept known as the "right of publicity," or the right of the individual to control the commercial use of one's identity. *See Name, Image and Likeness: What Student-Athletes Should Know*, NAT'L COLLEGIATE ATHLETIC ASS'N, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/2020_NILresource_SA.pdf (last visited Dec. 28, 2021). Examples of NIL-related activities include autographs, personal appearances, business promotions, merchandise sales, video game representation, and social media endorsements. *Id*.

The growing patchwork of state legislation, however, invites inconsistent application and interpretation of NIL laws. This gives rise to an important question: is uniform federal legislative intervention the answer?[5] This Comment argues that it is.

First, without some form of national uniform NIL rights, student-athletes will likely only apply for admission at schools where NIL rights are afforded. This consequence discourages a meaningful and educational choice. National uniformity ensures that student-athletes will enjoy more than simply the right to compete economically; it will allow them to receive an education at the institution of their choice. In uniformly promoting a meaningful and educational choice, federal legislation will help student-athletes enjoy better opportunities, both socially and financially, within the athletic industry as a whole.

Second, this state-by-state approach will—at a minimum—severely impact the competitive balance within college sports. Because student-athletes will be incentivized to attend schools in states with the best regulatory environment for the player, power schools in states with NIL laws will enjoy massive and unfair recruiting and transfer advantages, thereby increasing the imbalances between the larger and smaller markets. Already successful athletic programs will gain even more advantages, as non-NIL states (or states with less desirable NIL rules) may suffer due to less working capital to finance their educational opportunities and to gain advantages for their students. The hodgepodge of state laws will effectively steer the greatest future talent toward a handful schools.

Third, although no court has explicitly addressed this issue, the fractured state-by-state approach to NIL compensation may be unconstitutional. In arguing against a state-by-state approach, the NCAA could potentially rely on the Dormant Commerce Clause ("DCC") of the U.S. Constitution.[6] The DCC is an implied restriction as interpreted by the United States Supreme Court that effectively prevents states from passing laws that burden or discriminate against interstate commerce.[7] In relying on prior case law, the NCAA could contend that the sheer number of intercollegiate schools subjected to

[5] This is as opposed to judicial intervention. *See infra* notes 173-180 and accompanying text (discussing why judges should refrain from interfering with sports associations' internal affairs, absent exceptional circumstances).

[6] *See infra* notes 86–96 and accompanying text (exploring this argument in detail).

[7] *See, e.g.*, Dep't of Revenue v. Davis, 553 U.S. 328, 337–38 (2008) (stating that the "the [D]ormant Commerce Clause is driven by concern about 'economic protectionism'—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors").

inconsistent state laws could potentially interfere with a national uniform governance structure, thereby unduly impacting or discriminating against interstate commerce. In other words, this state-by-state approach could be placing certain states' economic interests (those that have NIL legislation) above out-of-states' economic interests (those that do not have NIL legislation), thus creating a competitive and commercial advantage for certain student-athletes (i.e., is discriminatory in purpose or effect). It remains to be seen whether the conflicting state laws violate the DCC.

Fourth, despite their asserted aims, multiple state laws governing NIL compensation are ambiguous and alarming. Based on the differences in payment structures, effective dates, legal rights, requirements regarding financial literacy, and ill-defined provisions within each passed and proposed state bill, the welfare of student-athletes will not be uniformly protected. Navigating competing and inconsistent state regulations will create confusion amongst athletes, agents, and athletic departments nationwide.[8]

This Comment illustrates that the current athletic landscape and patchwork of state laws governing NIL compensation requires federal legislative intervention. Specifically, Part II addresses the history of the NCAA, analyzes the NCAA's slippery principle of amateurism, and discusses how the NCAA has slowly begun to consider allowing student-athletes to benefit from their NIL. Part III considers the current patchwork of state laws governing NIL compensation, studies how their inconsistencies necessitate federal legislation, and examines the NCAA's reaction to a fractured state-by-state approach.

Part IV analyzes the currently proposed federal legislation regarding NIL compensation. Finally, Part V concludes by arguing that, although the attempt by some legislators to pass federal legislation is headed in the right direction, more can—and must—be done. To mitigate mass confusion, promote educational opportunities, and pursue economic equity for student-athletes nationwide, Congress should pass federal legislation, preempt competing state laws and regulations, and restore uniformity throughout intercollegiate athletics. Until then, states with NIL laws will compete vigorously for top talent, and national uniformity in college sports and educational opportunities will be severely undermined.

[8] This Comment will not dissect each NIL state law that has been passed (or is in the process of being passed); rather, it will analyze the representative components of NIL state laws to demonstrate the inconsistencies which require federal legislation to alleviate.

II. NCAA BACKGROUND, AMATEURISM, AND MOMENTUM TOWARDS NIL RIGHTS

This Part will (1) consider the NCAA's background and show how the NCAA has historically prevented student-athletes from earning income on their NIL; (2) analyze the elusive principle of amateurism and note how the NCAA's primary argument revolves around giving student-athletes NIL rights to protect their amateur status; and (3) explore the NCAA's current stance regarding NIL and explain how and why the NCAA was forced to act.

A. *NCAA Background*

The NCAA is a private, nonprofit association of approximately 1,098 members and 102 athletic conferences.[9] This member-led organization consists of colleges, universities, conferences, and associations.[10] It is "the largest and most prestigious association of colleges and athletic conferences in the United States," and holds a "dominant position in intercollegiate athletics."[11] To retain membership, NCAA members must abide by the NCAA's "Constitution,"[12] of which its internal bylaws are voted upon by its members.[13] These bylaws, however, do not carry the force of law.[14] Accordingly, the NCAA cannot prevent further state legislation regarding NIL compensation, as its nationwide rulemaking authority continues to be chipped away by the growing amount of state NIL laws.

Historically, the NCAA has prevented student-athletes from earning income on their NIL.[15] The reasoning, according to the NCAA, is to protect student-athletes from "exploitation by professional and

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[9] *What is the NCAA?* NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa (last visited Dec. 28, 2021).

[10] *Id*.

[11] Coll. Athletic Placement Serv., Inc. v. Nat'l Collegiate Athletic Ass'n, No. 74-1144, 1974 WL 998, at *2 (D.N.J. Aug. 22, 1974); *see also* Banks v. Nat'l Collegiate Athletic Ass'n, 746 F. Supp. 850, 852 (N.D. Ind. 1990), *aff'd*, 977 F.2d 1081 (7th Cir. 1992).

[12] Bd. of Regents v. Nat'l Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1282 (W.D. Okla. 1982).

[13] Worldwide Basketball & Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n, 388 F.3d 955, 957 (6th Cir. 2004) (noting that the NCAA "adopts bylaws formulated by a legislative body drawn from the Association's membership").

[14] *See* Justin W. Aimonetti & Christian Talley, *Game Changer: Why and How Congress Should Preempt State Student-Athlete Compensation Regimes*, 72 STAN. L. REV. ONLINE 28, 34 (2019) (["The NCAA's] bylaws do not carry the force of law.").

[15] *See, e.g.*, NAT'L COLLEGIATE ATHLETIC ASS'N, 2020–21 NCAA DIVISION I MANUAL §§ 12.4.2.3, 12.5.1.3, and 12.5.2.1, at 74, 75–76, 77 (2020), https://web3.ncaa.org/lsdbi/reports/getReport/90008 [hereinafter 2020–2021 DIVISION I MANUAL].

commercial enterprises."[16] The NCAA has justified its opposition to NIL rights and supported the concept of amateurism by (1) encouraging competitiveness in college sports; (2) promoting education by integrating academic and athletic goals; (3) incentivizing Division I schools to remain a part of the NCAA; and (4) increasing consumer demand.[17]

But many athlete advocates have vehemently opposed the NCAA's anti-NIL business model. Romogi Huma, the Executive Director of the National College Players Association, stated that the NCAA has treated its student-athletes like "disposable university property."[18] Senator Steven Bradford, who co-sponsored the California NIL bill, likened the situation to "institutionalized slavery."[19] And others have argued that "absolute power tends to corrupt absolutely, and the NCAA's [power] has been absolute for half a century."[20] Many student-athletes agree. For instance, a day before the 2021 NCAA March Madness Basketball Tournament began, many college athletes took to social media and pushed for NCAA reform using the hashtag "NotNCAAProperty."[21]

B. *The Principle of Amateurism*

The NCAA has primarily opposed giving student-athletes NIL rights to protect their amateur status. Allowing student-athletes to profit from their NIL, the argument goes, would repel fans.[22] Often referred to as

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[16] 2020–2021 DIVISION I MANUAL, *supra* note 15, § 2.9, at 3.

[17] *See* Michael McCann, *Name Image and Likeness: A Guide on College Athlete Compensation*, SPORTICO (Nov. 11, 2020), https://www.sportico.com/feature/college-athletes-paid-name-image-likeness-deals-nils-1234616329/.

[18] *NCAA Refusal to Vote on NIL Pay is 'Slap in the Face' to Athletes*, NAT'L COLLEGE PLAYERS ASS'N (Jan. 11, 2021), https://www.ncpanow.org/news/releases-advisories/ncaa-refusal-to-vote-on-nil-pay-is-slap-in-the-face-to-athletes.

[19] *See* Gregg E. Clifton, *California Senators to Introduce Supplement to SB 206 in Advance of NCAA's January Name, Image, and Likeness Vote*, NAT'L L. REV. (Dec. 8, 2020), https://www.natlawreview.com/article/california-senators-to-introduce-supplement-to-sb-206-advance-ncaa-s-january-name.

[20] Ivan Solotaroff, *The Athlete Advocate*, SB NATION (Apr. 23, 2014), https://www.sbnation.com/longform/2014/4/23/5640402/the-athlete-advocate-ramogi-huma.

[21] *See, e.g.*, Geo Baker (@Geo_Baker_1), TWITTER (Mar. 17, 2021, 1:42 PM), https://twitter.com/Geo_Baker_1/status/1372241981150220290?s=20; McKenzie Milton (@McKenzieMil10), TWITTER (Apr. 29, 2021, 12:59 AM), https://twitter.com/McKenzieMil10/status/1387632668146163715.

[22] Michael McCann, *Name, Image and Likeness: A Guide on College Athlete Compensation*, SPORTICO (Nov. 11, 2020), https://www.sportico.com/feature/college-athletes-paid-name-image-likeness-deals-nils-1234616329/.

the "principle of amateurism," this slippery principle[23] states that "[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation in sports should be motivated primarily by education and by the physical, mental and social benefits to be derived."[24] Thus, the NCAA's amateurism principle has attempted to "retain a clear line of demarcation between intercollegiate athletics and professional sports" in order for college athletics to remain "an integral part of the educational program."[25]

Initially, courts endorsed the NCAA's definition of amateurism. In *Jones v. NCAA*, for example, the court held that the NCAA was allowed to declare an ice hockey player ineligible to play intercollegiate ice hockey due to his violation of amateurism rules.[26] Fifteen years later, in *Gaines v. NCAA*, the court held that the "public interest is promoted by preserving amateurism."[27] And in *McCormack v. NCAA*, the Fifth Circuit held that the NCAA's amateurism requirements "reasonably further[ed]" the NCAA's goals of integrating athletics with academics.[28]

Recent litigation, however, has challenged this nebulous concept.[29] After seeing an avatar of himself in an officially licensed NCAA video game, Ed O'Bannon—a former All-American UCLA basketball player and retired National Basketball Association player—sued the NCAA,[30] arguing that the NCAA's rules violated the Sherman Antitrust Act.[31]

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[23] *See* Ivan Maisel, *The NCAA Must Again Put Athletes First, This Time Around the NIL Debate*, ESPN (Apr. 23, 2020), https://www.espn.com/college-sports/story/_/id/29083196/the-ncaa-again-put-athletes-first-nil-debate (describing the amateurism principle as, "at best, a beau ideal," and recognizing that, "[w]hen convenient, amateurism has been held as the standard. And when the sham has become too obvious to ignore, the NCAA simply has changed its definition of amateurism to bring it closer to the actual behavior of its coaches and players."); *see also* Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ (criticizing the "noble principles [of amateurism and the student-athlete] on which the NCAA justifies its existence," classifying them as "cynical hoaxes" and "legalistic conductions").

[24] 2020–2021 DIVISION I MANUAL, *supra* note 15, § 2.9, at 3.

[25] *Id.* § 1.3.1, at 1.

[26] 392 F. Supp. 295, 304 (D. Mass. 1975).

[27] 746 F. Supp. 738, 747 (M.D. Tenn. 1990).

[28] 845 F.2d 1338, 1345 (5th Cir. 1988).

[29] *See* Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 70 (2013) (arguing that the principle of amateurism violates the Sherman Antitrust Act).

[30] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1055 (9th Cir. 2015).

[31] Sherman Antitrust Act, 15 U.S.C. § 1 (2018) (outlawing "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . .").

O'Bannon neither consented to nor received compensation for the use of his NIL.[32] Under a three-step framework of the antitrust "rule of reason" test,[33] Judge Bybee found that the NCAA's prevention of NIL compensation in various markets[34] constituted a commercial restraint on trade, thus violating the Sherman Antitrust Act.[35]

On appeal, the Ninth Circuit noted that "the NCAA's rules [had] been more restrictive than necessary [in this case] to maintain its tradition of amateurism," but it nevertheless held that preserving amateurism had procompetitive benefits, and distinguished between payments tied to educationally-related activities and those unrelated.[36] Thus, *O'Bannon* established that future student-athletes "can use federal antitrust law to attempt to 'prove' that there are better ways of preserving amateurism than current NCAA rules."[37] In the wake of *O'Bannon*, however, one thing remains certain: as more states continue to pass laws governing student-athletes' NIL compensation, the NCAA's ability to uphold its amateurism principle erodes in tandem.[38]

C. *A Plea to Congress: The NCAA's Shift in Position*

In light of recent and robust legal and legislative activity, coupled with its associated and mounting pressures to afford student-athletes

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[32] *O'Bannon*, 802 F.3d at 1055.

[33] Under this test, "[t]he plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market," and if the plaintiff demonstrates this, the burden shifts to the defendant to "come forward with evidence of the restraint's procompetitive effects." If the defendant meets this burden, the plaintiff "must then show that any legitimate objectives can be achieved in a substantially less restrictive manner." *O'Bannon*, 802 F.3d at 1070 (citing Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th. Cir. 2001)).

[34] These markets include live game telecasts, sports video games, and game rebroadcasts, advertisements, and other archival footage. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 968 (N.D. Cal. 2014).

[35] *O'Bannon*, 802 F.3d at 1053.

[36] *Id.* at 1079.

[37] FED. AND STATE LEGIS. WORKING GRP., NCAA BD. OF GOVERNORS, FINAL REPORT AND RECOMMENDATIONS 29 (2020), https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf [hereinafter WORKING GROUP RECOMMENDATIONS].

[38] In February 2021, EA Sports (a division of Electronic Arts Inc.) announced that it will revive its college football video games series—a series that was stopped because of *O'Bannon*'s NIL controversy. *See* Mike Hume & Rick Maese, *EA Sports Revives College Football Franchise as Courts Mull NCAA's Stance on Amateurism*, WASH. POST (Feb. 2, 2021, 12:00 PM), https://www.washingtonpost.com/video-games/2021/02/02/ea-sports-college-football/.

NIL rights, the NCAA was forced to act.[39] The NCAA tasked the Federal and State Legislation Working Group ("Working Group") with exploring solutions for NIL compensation issues.[40] Nearly a year after its inception, the Working Group proposed to the NCAA Board of Governors certain changes to the NCAA bylaws, which would allow student-athletes to profit from use of their NIL in ways both related and unrelated to athletics.[41]

Although this seemed promising for student-athletes, the Working Group's recommendations were more restrictive in relation to state NIL laws.[42] For example, the Working Group recommended that the NCAA should stress that "any modernization of [the NCAA's] NIL bylaws must be accompanied by guardrails."[43] Unfortunately, these guardrails were vague, did not adequately address NIL compensation issues, and continued to severely restrict opportunities for student-athletes to earn income on their NIL.

The NCAA has historically placed a shadow of uncertainty over any negotiation for compensation that might benefit student-athletes.[44] While this might stifle students' attempts to gain compensation, it could also place the student-athlete in financial peril because it is equally possible that it will lead to unfair deals. The possibility that a university could exercise its discretion to force a student out of a deal could not only make it more difficult for students to retain agents, but it would also weaken students' leverage in setting favorable contractual terms. This, in turn, could place students at risk of exploitation or downstream breach claims.

On November 13, 2020, the NCAA Division I Council submitted proposed amendments regarding student-athletes' NIL rights. According to one proposed NCAA bylaw, "[a]n institution, *at its*

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[39] *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, NAT'L COLLEGIATE ATHLETIC ASS'N (Oct. 29, 2019), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities.

[40] WORKING GROUP RECOMMENDATIONS, *supra* note 37, at 1.

[41] *Id.* at 21–25.

[42] *See* Dan Murphy, *NCAA Group Supports Player Endorsement Plan*, ESPN (Apr. 29, 2020), https://www.espn.com/college-sports/story/_/id/29112263/ncaa-group-oks-conditional-player-endorsements (noting that the "NCAA's proposal remains more restrictive than the state laws and proposed laws," as "[t]hose differences could lead to a legal conflict . . . .").

[43] WORKING GROUP RECOMMENDATIONS, *supra* note 37, at 1–2.

[44] *See generally* Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/.

discretion, [would be able to] prohibit a student-athlete's involvement in name, image, and likeness activities [while they are actively participating in collegiate sports] based on other considerations, such as conflict with institutional values, as defined by the institution."[45] But "institutional values" is an inherently subjective concept defined by the particular school. Darren Heitner, a sports lawyer and NIL advocate, noted that if this were to occur, the NCAA would effectively be creating the opposite of a free market.[46] "[W]ithout a uniform set of objective values," Heitner argued, "there should be fear of the values changing whenever it suits the university."[47]

The NCAA acknowledges this unfortunate reality. Mark Emmert, President of the NCAA, stressed the need for federal legislation to achieve uniformity in athletic compensation.[48] To achieve consistency, the NCAA presented Congress with a summary of proposed NIL legislation. The bill—The Intercollegiate Amateur Sports Act of 2020—has not, and should not, become law for three reasons: (1) it is utterly brazen, overly restrictive, and one-sided; (2) it imposes a blanket antitrust exemption from lawsuits; and (3) it provides the NCAA with full control to craft all rules on student-athlete compensation and NIL legislation.[49] To be sure, the NCAA's interests are important; but federal lawmakers should nevertheless enact legislation that also protects NCAA student-athletes—political accountability and unbiased treatment of all interests is required.

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[45] *Amateurism—Use of Name, Image and Likeness—Student-Athletes*, NAT'L COLLEGIATE ATHLETIC ASS'N (2020), https://web3.ncaa.org/lsdbi/search/proposalView?id=105566 (emphasis added).

[46] Darren Heitner, *The NCAA's Proposed Name, Image, And Likeness (NIL) Legislation Fails College Athletes*, ABOVE THE LAW (Nov. 16, 2020, 11:17 AM), https://abovethelaw.com/2020/11/the-ncaas-proposed-name-image-and-likeness-nil-legislation-fails-college-athletes.

[47] *Id*.

[48] *Name, Image, and Likeness: The State of Intercollegiate Athletic Compensation: Hearing Before the S. Subcomm. on Mfg., Trade, and Consumer Prot.*, 116th Cong. 6 (2020) (statement of Dr. Mark Emmert, President, National Collegiate Athletic Association), https://www.commerce.senate.gov/services/files/A3E515B6-A2A3-4453-BB32-DE37F4D72FB5; *see also Questions and Answers on Name, Image, and Likeness*, NAT'L COLLEGIATE ATHLETIC ASS'N (Apr. 28, 2020), http://www.ncaa.org/questions-and-answers-name-image-and-likeness (The NCAA considers it "critical that college sports are regulated at a national level" in order to ensure "the uniformity of rules and a level playing field for student-athletes.").

[49] *See* Ross Dellenger, *NCAA Presents Congress with Bold Proposal for NIL Legislation*, SPORTS ILLUSTRATED (July 31, 2020), https://www.si.com/college/2020/07/31/ncaa-sends-congress-nil-legislation-proposal#&gid=ci026b661b40002686&pid=ncaa-nil-draft-language.

On June 30, 2021, all three NCAA divisions adopted a uniform, interim policy that suspended the NCAA's NIL rules prohibiting athletes from monetizing their NIL.[50] Although facially promising, this interim policy is yet another example of why uniform federal legislation is needed. Under the interim policy, some opportunities will be restricted, but the types of restrictions will vary based on state laws and policies created by individual schools. Schools in states that have NIL laws, for example, are instructed to follow that state's NIL law when determining what their student-athletes can do. But the NCAA instructed schools in states without NIL laws to "create and publish their own policies to provide clarity to the gray area and come up with a plan to resolve any disputes that arise."[51]

The interim policy, therefore, is simply a stopgap measure which will remain in effect until federal legislation is passed or new NCAA rules are adopted.[52] The ramifications stemming from this policy will likely increase the patchwork of state NIL laws by forcing states without NIL laws to catch up so as to not be left behind. This exerts an additional burden on athletic departments within each state to ensure that student-athletes are fully informed about the complex and different policies that must be complied with in terms of exploiting their NIL.

III. THE PASSAGE OF STATE LAWS, THEIR INCOMPATIBILITY, AND POTENTIAL INVALIDATION

This Part will (1) introduce why a patchwork of state laws governing NIL compensation is problematic; (2) examine the current balkanization of NIL state laws; and (3) analyze whether these varying NIL state laws pass muster under the DCC. As of September 20, 2021, twenty-two states passed NIL laws, while seven other states enacted NIL laws that go into effect between 2022 and 2025.[53] It is possible, if not probable, that many more states will continue to draft and propose NIL

[50] *Taking Action: Name, Image and Likeness*, NAT'L COLLEGIATE ATHLETIC ASS'N (June 30, 2021), https://www.ncaa.org/about/taking-action; *see also* Dan Murphy, *NCAA Clears Student-Athletes to Pursue Name, Image and Likeness Deals*, ESPN (June 30, 2021), https://www.espn.com/college-sports/story/_/id/31737039/ncaa-clears-student-athletes-pursue-name-image-likeness-deals ("The NCAA's board of directors decided . . . to officially suspend the organization's rules prohibiting athletes from selling the rights to their names, images and likenesses.").

[51] Murphy, *supra* note 50.

[52] *See id*.

[53] *See* Thomas Di Biasio, *Most States Pass "Name, Image, and Likeness" Laws for Student Athletes*, MULTISTATE (Sept. 21, 2021), https://www.multistate.us/insider/2021/9/21/most-states-pass-name-image-and-likeness-laws-for-student-athletes.

bills unless Congress solidifies a uniform plan.[54] While the general structure of the passed and proposed bills are similar, some of the provisions are ill-defined and could confuse athletic departments.

A. *Passage of State Laws: The Patchwork Problem*

Advocating for evenness nationally, the NCAA contends that if schools are governed by different NIL laws, this would "gravely undermine the ability of the NCAA's members to achieve their shared goal of fair competition within their divisions."[55] But this NIL conundrum is not solely about economic competitiveness within a capitalistic society. If this were only about money—and particularly if it were only about providing student-athletes with the ability to profit financially—the NCAA would not support it as strongly as it has been. Without some form of national uniform NIL rights, student-athletes will likely only apply for admission in schools where NIL rights are afforded. This consequence discourages athletes from making a meaningful choice when selecting their school.

But if student-athletes are given the ability to apply to schools in *any* state (because federal NIL rights would exist), then such uniformity promotes educational opportunities. Thus, the NCAA—and this Comment—supports national uniformity to ensure that students can not only enjoy more than simply the right to compete economically but also to receive an education at the institution of their choice. In allowing them to monetize their NIL through federal legislation, student-athletes will enjoy better opportunities within the athletic industry as a whole, compete on an equal playing field, and grow educationally, socially, and financially.

States are passing NIL laws for three primary reasons: (1) student-athletes in non-NIL states (or states with less desirable NIL rules) are deprived of money, opportunities, and advantage; (2) there is bipartisan support for the idea that student-athletes are being commercially exploited through their inability to capitalize on their NIL;[56] and (3) lawmakers do not want other states to enjoy recruiting advantages,

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[54] *See, e.g.*, Ross Dellenger, *Iowa Becomes Latest State to Introduce Athlete NIL Bill; Targeting July 1 Effective Date*, SPORTS ILLUSTRATED (Feb. 3, 2021), https://www.si.com/college/2021/02/03/iowa-name-image-likeness-bill-ncaa (noting how Senator Nate Boulton introduced the Iowa NIL bill because he "want[ed] to make sure [that] no Iowa athlete [was] left behind").

[55] WORKING GROUP RECOMMENDATIONS, *supra* note 37, at 28.

[56] *See, e.g.*, Patrick Hruby, *How Fighting the NCAA Became a Bipartisan Sport*, WASH. POST MAG. (Mar. 17, 2020), https://www.washingtonpost.com/magazine/2020/03/17/how-fighting-ncaa-became-bipartisan-sport/?arc404=true.

thereby losing potential recruits to states where student-athletes have the right to profit on their NIL.

Because student-athletes will be incentivized to attend schools in states with the best regulatory environment for the player, power schools[57] in states with NIL laws could enjoy massive and unfair recruiting advantages.[58] Not only would this increase the imbalances between the larger and smaller markets, but it may inevitably create confusion amongst athletes and agents navigating the competing and inconsistent state regulations. Therefore, already successful athletic programs could gain even more advantages, as non-NIL states, or states with less desirable NIL rules, may suffer due to less working capital to finance educational opportunities and advantages for their students. Until federal legislation is enacted, this state-by-state approach will—at a minimum—severely impact the competitive balance within college sports.

B. *Unfair Competition: The Current Balkanization of NIL State Laws*

This Section will not dissect each NIL state law that has been enacted (or is in the process of being passed); rather, it will analyze the representative components of certain NIL state laws to demonstrate the inconsistencies which require federal legislation to alleviate. Based on the differences in payment structures, effective dates, legal rights, and requirements of financial literacy,[59] the welfare of student-athletes will not be uniformly protected without federal intervention. Navigating ill-defined and inconsistent state regulations will create confusion among athletes, agents, and athletic departments nationwide.

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[57] *See American Football: Sarah Fuller Makes History as First Woman in a Power 5 Game*, BBC NEWS (Nov. 28, 2020), https://www.bbc.com/news/world-us-canada-55115661 (noting that the Power Five refers to five athletic conferences which are considered to be the elite in collegiate football. The Power Five conferences are the Atlantic Coast Conference, Big Ten Conference, Big 12 Conference, Pac-12 Conference, and Southeastern Conference.).

[58] *See* Andrew Weiss, *The California Fair Pay to Play Act: A Survey of the Regulatory and Business Impacts of a State-Based Approach to Compensating College Athletes and the Challenges Ahead*, 16 RUTGERS BUS. L.J. 259, 289 (2020) (addressing the potential recruiting problems associated with schools in states with NIL laws, as compared to states without NIL laws).

[59] *See* Zachary Zagger, *4 Key Issues as States Tackle College Athlete Pay*, LAW360 (Oct. 9, 2020, 4:47 PM), https://www.law360.com/california/articles/1318247?copied=1 (describing four key issues that states must confront in tackling student-athlete NIL compensation issues).

California Senate Bill 206, commonly referred to as the Fair Pay to Play Act[60] ("California Bill"), prohibits any postsecondary educational institution from hindering student-athletes from capitalizing on their NIL.[61] Although the California Bill is advancing NIL rights, it is not perfect. The California Bill, which took effect on September 1, 2021, prevents the NCAA from precluding universities, or any organization with authority over intercollegiate athletics, from participating in intercollegiate athletics as a result of a student-athlete's use of their NIL.[62] The California Bill allows a student-athlete to earn compensation from their NIL, but it does not define compensation or provide further context for the term.[63]

In addition, the California Bill allows student-athletes to hire agents to represent them in negotiation matters and business opportunities, so long as those endorsement deals are not in conflict with the athlete's team contract.[64] This is a seismic change from the current landscape. Because competing for high-profile players is a difficult task—especially in California's competitive sports market—it is plausible that agents will begin recruiting elite players during the early stages of their career, such as high school. Agents in California, therefore, will likely feel pressure to intervene early in a student-athlete's career, because if they fail to do so, they might miss the opportunity of representing the same player at the professional level. And athletes under eighteen are continuously and increasingly the targets of solicitation; subjecting fifteen-year-old student-athletes to agents might do more harm than good.[65]

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[60] S.B. 206, Collegiate Athletics: Student Athlete Compensation and Representation, 383 Reg. Sess. (Cal. 2019).

[61] S.B. 206 § 2(a)(2).

[62] S.B. 206 § 2(a)(3).

[63] *Compare* S.B. 206 (not defining compensation), *with* S.B. 20-123, 72nd Gen. Assemb., Reg. Sess. § 2 (Colo. 2020) (defining compensation as "money or other remuneration or thing of value given to a student athlete in exchange for the use of the student athlete's name, image, or likeness" and "[d]oes not include a scholarship from the institution at which a student athlete is enrolled that provides the student athlete all or a portion of the cost of attendance at that institution"), *and* L.B. 962, 106th Leg., 2d Sess. § 1 (Neb. 2020) (defining compensation as "consideration received pursuant to an endorsement contract").

[64] *See* S.B. 206, § 2(c)(1), (e)(1) (describing the terms of the California Bill).

[65] *See generally* Lee Green, *Impact of California's 'Fair Pay to Play Act' On High School Athletes*, NAT'L FED'N OF STATE HIGH SCHOOL ASS'N (Nov. 13, 2019), https://www.nfhs.org/articles/impact-of-california-s-fair-pay-to-play-act-on-high-school-athletes/ (discussing the ramifications of the California Bill on high school athletes).

Florida Senate Bill 646, known as the Intercollegiate Athlete Compensation and Rights Bill[66] ("Florida Bill"), took effect on July 1, 2021. The Florida Bill currently allows student-athletes to enter into contracts to license their NIL while participating in intercollegiate athletics.[67] The Florida Bill permits sixty-four postsecondary educational institutions[68] in Florida to be subjected to different rules than states throughout the entire country, further dividing the gap among rights afforded to amateur athletes nationwide. It is also the only state bill thus far that includes an educational component, requiring schools to "conduct a financial literacy and life skills workshop for a minimum of [five] hours at the beginning of the intercollegiate athlete's first and third academic years."[69] The Florida Bill, unlike the California Bill, applies to community colleges.[70]

The Florida Bill also provides that an intercollegiate athlete may not enter into a contract for compensation for the use of the student-athlete's NIL if a term of the contract conflicts with a term of the intercollegiate athlete's "team contract." But the term "team contract" is not defined in the bill.[71] It also states that compensation "may only be provided by a third-party unaffiliated with" the athlete's school and that the compensation be "commensurate with the market value of the authorized use of the athlete's name, image, or likeness."[72] Again, the terms "unaffiliated" or "commensurate with the market value" are not defined in the Florida Bill. Therefore, although compensation usually means monetary compensation, it is plausible to interpret the term compensation in this context to "allow non-monetary compensation to be deemed compensation so long as it is commensurate with market value."[73]

New Jersey Senate Bill 971, known as the New Jersey Fair Play Act ("New Jersey Bill"), will not take effect until 2025.[74] Notably, the New

66 S.B. 646, 2020 Leg., Reg. Sess. (Fla. 2020).

67 § 1006.74(2)(a).

68 *See* § 1006.74(1)(c). Florida defines a postsecondary educational institution as "a state university, a Florida College System institution, or a private college or university receiving aid under chapter 1009."

69 § 1006.74(2)(k).

70 § 1006.74(1)(c).

71 § 1006.74(1).

72 § 1006.74(2)(a).

73 Bob Wallace, Jr. & Matthew Misichko, *A Look at Recent Student Athlete Name, Image and Likeness Legislation*, THOMPSON COBURN LLP (July 7, 2020), https://www.thompsoncoburn.com/insights/publications/item/2020-07-07/a-look-at-recent-student-athlete-name-image-and-likeness-legislation.

74 N.J. STAT. ANN. § 18A:3B-86–89 (West 2020).

Jersey Bill prohibits student-athletes from earning NIL compensation in connection with "adult entertainment products and services; alcohol products; casinos and gambling, including sports betting, the lottery, and betting in connection with video games, on-line games, and mobile devices; tobacco and electronic smoking products and devices; pharmaceuticals; a controlled dangerous substance; and weapons, including firearms and ammunition."[75] The New Jersey Bill prohibits postsecondary institutions from "upholding any rule, requirement, standard, or other limitation that prevents college athletes from monetizing their [NIL]."[76]

Nebraska Legislative Bill 962, known as the Nebraska Fair Pay to Play Act ("Nebraska Bill"), does not take effect until July 1, 2023, but it states that "each postsecondary institution shall determine a date on or before" that date to start implementing the new law.[77] Although it has yet to happen, schools in Nebraska[78] could allow student-athletes to receive NIL compensation as of the date this Comment was written. The Nebraska Bill is silent as to whether schools can pay student-athletes (unlike the other state laws that explicitly state that schools cannot do so), leaving open the possibility that Nebraska schools themselves could potentially pay the student-athletes through endorsement deals.

Colorado Senate Bill 20-123[79] ("Colorado Bill") takes effect January 1, 2023.[80] Both the Colorado Bill and the Nebraska Bill—unlike the California Bill, the New Jersey Bill, and the Florida Bill—allow "athletes to sue schools, conferences, or the NCAA if their new rights under the law are violated."[81] The Colorado Bill allows a student-athlete "aggrieved by an action taken by an institution or an athletic association in violation of this part [to] bring an action for injunctive relief."[82] In contrast, Nebraska's bill allows student-athletes "aggrieved by a violation" to "bring a civil action against the postsecondary institution

[75] § 18A:3B-87(2)(b).

[76] Gregg E. Clifton & Nicholas A. Plinio, *New Jersey Grants Name, Image, Likeness Rights to Collegiate Student-Athletes*, NAT'L L. REV. (Sept. 15, 2020), https://www.natlawreview.com/article/new-jersey-grants-name-image-likeness-rights-to-collegiate-student-athletes.

[77] NEB. REV. STAT. § 48:3609 (2020).

[78] This includes the Big Ten Conference, which is the oldest Division I collegiate conference in the NCAA.

[79] COLO. REV. STAT. § 23-16-301 (2020).

[80] S.B. 20-123, 72nd Gen. Assemb., Reg. Sess. § 2.

[81] Zagger, *supra* note 59.

[82] § 23-16-301(6)(b).

or collegiate athletic association committing such violation."[83] That is, Colorado's private right of action is reduced to seeking "injunctive relief,"[84] while Nebraska's bill allows student-athletes to seek "actual damages," "preliminary and other equitable or declaratory relief," and "[r]easonable attorney's fees and other litigation costs."[85]

Ultimately, the growing number of state laws governing NIL compensation, despite their asserted aims, is ambiguous and alarming. Based on the differences in payment structures, effective dates, legal rights, and requirements of financial literacy, the welfare of student-athletes will not be uniformly protected without congressional intervention.

C. *Worthy of Constitutional Protection? Potential Invalidation of State Laws Under the DCC*

The U.S. Constitution expressly permits the federal government to regulate commerce among the states.[86] The DCC, by contrast, is an implied restriction in the U.S. Constitution that effectively prevents states from passing laws that burden or discriminate against interstate commerce.[87] Relying on favorable case precedent and the DCC, the NCAA could argue that the sheer number of intercollegiate schools subjected to inconsistent state laws interferes with a national uniform governance structure and thus unduly impacts or discriminates against interstate commerce (i.e., violates the DCC).[88]

The Supreme Court has adopted a two-tier approach in analyzing a DCC challenge.[89] First, if the statute "*directly* regulates or discriminates against interstate commerce, or when its *effect* is to favor in-state economic interests over out-of-state interests," federal courts will strike

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83 NEB. REV. STAT. § 48:3608(1) (2020).

84 § 23-16-301(6)(b).

85 § 48:3608(2).

86 *See* U.S. CONST. art. I, § 8, cl. 3.

87 *See* Dep't of Revenue v. Davis, 553 U.S. 328, 337–38 (2008) (stating that the "the [D]ormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors'").

88 *See also* Michael Fasciale, *Is a Patchwork of State NIL Laws Unconstitutional?*, CONDUCT DETRIMENTAL (Oct. 5, 2021), https://www.conductdetrimental.com/post/is-a-patchwork-of-state-nil-laws-unconstitutional.

89 *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986); *see also* Bowers v. Nat'l Collegiate Athletic Ass'n, 151 F. Supp. 2d 526, 537 (D.N.J. 2001).

down the law without further inquiry.[90] Second, where the statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[91]

As to the first prong, the NCAA could argue that the state-by-state approach to NIL compensation puts certain states' economic interests (those which have NIL legislation) above out-of-states' economic interests (those which do not have NIL legislation), thus creating a competitive and commercial advantage for certain student-athletes (i.e., is discriminatory in purpose or effect). In response, one could argue that each state NIL law does not discriminate against interstate commerce because each state's NIL law does not inject its regulatory scheme into the jurisdiction of other states. For example, as written, California's NIL statute—like many other state NIL laws—is directed only towards conduct within California and applies to in-state and out-of-state entities alike.

In arguing that a patchwork of state NIL laws directly regulates or discriminates against interstate commerce, the NCAA could potentially rely on favorable case precedent like *NCAA v. Miller*. There, the Nevada state legislature enacted a statute that required the NCAA to provide student-athletes "accused of a rules infraction with certain procedural due process protections during an enforcement proceeding."[92] The Ninth Circuit held that Nevada's statute violated the DCC because it impermissibly regulated interstate commerce.[93]

However, the NCAA might have difficulty relying on *Miller*. The "critical inquiry," the Ninth Circuit explained, is whether "the practical effect of the regulation is to control conduct beyond the boundaries of the State."[94] That is precisely what the Nevada law did in *Miller*—Nevada was telling the NCAA how to conduct a hearing and, in doing so,

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[90] *Distillers Corp*, 476 U.S. at 579 (emphasis added). This, of course, is subject to the Virtual Per Se Rule of Invalidity, which leaves open the possibility that some such laws might still pass constitutional muster. *See, e.g.*, Maine v. Taylor, 477 U.S. 131, 148–52 (1986) (validating a law that banned the importation of out of state fish because the state had a legitimate purpose of protecting its waters from invasive/non-native species of fish and the court found no other non-discriminatory means for achieving that interest).

[91] *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[92] Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 637 (9th. Cir. 1993).

[93] *Id*. at 640.

[94] *Id*. at 639 (quoting Healy v. Beer Inst., 491 U.S. 324, 336 (1989)).

intruded on an interstate organization.[95] But here, the states with NIL laws are telling the universities *within their states* how to treat their student-athletes. Hence, they do not require the NCAA to do anything, and each state law is directed towards conduct within each individual state (and treats in-state and out-of-state entities alike).

As to the second prong, the NCAA could argue that student-athletes will be incentivized to attend schools in states with NIL laws, effectively steering the greatest future talent toward a handful of schools. This competitive advantage, the argument goes, harms the overall intercollegiate athletic landscape because the NCAA's NIL business model requires uniformity. In response, one could argue that the burdens associated with the patchwork of state NIL laws (i.e., potential recruiting advantages) are small in connection with the purported benefits (i.e., the protection of student-athletes). Importantly, the majority of student-athletes who attend schools in states with NIL statutes will not profit extensively by marketing their NIL; rather, the minority of student-athletes will negotiate meaningful and money-making endorsement deals. Thus, the burdens associated with the patchwork of state NIL laws would not be "clearly excessive" in relation to the state's legitimate interest in protecting student-athletes.

It also could be argued that NIL compensation effectively means extraterritorial regulation.[96] Under this theory, once one state allows NIL compensation, all other schools in other states would likely feel obligated to follow suit. In other words, if State A allows its student-athletes to be paid, then other schools in State B will likely have to start offering payments as well in order to compete with State A when it comes to recruiting. Nevertheless, the mounting uncertainty as to whether a hodgepodge of state laws is unconstitutional further demonstrates the need for federal intervention.

In sum, the NCAA will face an uphill battle in court if it pursues the "state NIL laws violate the DCC" argument. Note that the DCC only applies where Congress has not explicitly authorized the states to pass laws of this type—in other words, Congress can override the DCC's limits. Until Congress acts, however, it remains to be seen whether conflicting state laws violate the DCC.

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[95] *Id.* at 641 ("[w]e appreciate Nevada's interest in assuring that its citizens and institutions will be treated fairly. However, the authority it seeks here goes to the heart of the NCAA and threatens to tear that heart out.").

[96] *See* Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause is Not Dead*, 100 MARQ. L. REV. 497, 501 (2016) (noting that the extraterritorial doctrine "applies when a state regulates conduct that is wholly outside its own borders and . . . unconstitutionality does not depend on the regulation's discriminating against out-of-staters"); *see also Healy*, 491 U.S. at 336 (defining extraterritoriality).

IV. PENDING FEDERAL LEGISLATION REGARDING NIL COMPENSATION

In its plea to Congress to enact federal legislation, the NCAA contended that the patchwork of state laws "would adversely impact the competitive balance that currently exists in college sports."[97] A federal law, however, would resolve this concern by eliminating any competitive and commercial advantages over schools in non-NIL states.[98] In addition to legislation proposed by the NCAA, which fails to account fairly for student-athlete's interests, there have been seven separate federal bill proposals (with additional ones expected in the foreseeable future).[99] Like the preceding Section, this Part will only analyze the ramifications of the most recent NIL federal bills.[100]

A. *Positive Progress: Student-Athlete Equity Act*

Congressman Mark Walker's bill, known as the Student-Athlete Equity Act ("Equity Act"), was the first federal bill proposed.[101] The Equity Act primarily aims to "amend the Internal Revenue Code of 1986 to prohibit qualified amateur sports organizations from prohibiting or substantially restricting the use of an athlete's name, image, or likeness."[102] To date, § 501(j)(2) of the Internal Revenue Code exempts from federal taxation "any organization organized and operated exclusively to foster national or international amateur sports competition if such organization is also organized and operated primarily to conduct national or international competition in sports or

97 *See* Dellenger, *supra* note 49.

98 *See* Michael McCann, *California's New Law Worries the NCAA, But a Federal Law is What They Should Fear*, SPORTS ILLUSTRATED (Oct. 4, 2019), https://www.si.com/college/2019/10/04/ncaa-fair-pay-to-play-act-name-likeness-image-laws (noting that, if a federal law is passed, the "NCAA could not credibly argue that multiple states are forcing it into a confused and conflicting set of rules," and no state "would . . . gain[] a competitive advantage in recruiting").

99 *NIL Legislation Tracker*, SAUL, EWING, ARNSTEIN, & LEHR, LLP, https://www.saul.com/nil-legislation-tracker#3.

100 This Part will not address Senator Roger Wicker's federal proposal (The College Athlete and Compensatory Rights Act); Senator Christopher Murphy's federal proposal (The College Athlete Economic Freedom Act); Senator Jerry Moran's federal proposal (The Amateur Athletes Protection and Compensation Act of 2021); Senators Christopher Murphy's and Bernie Sanders' federal proposal (The College Athlete Right to Organize Act); and any other bills that were proposed after September 22, 2021.

101 Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019).

102 *Id*.

to support and develop amateur athletes for national or international competition in sports."[103]

The Equity Act, therefore, would make § 501(j)(2)'s tax exemption unavailable to "[any] organization that substantially restricts a [student-athlete] from using, or being reasonably compensated for the third-party use of, [their] name, image, or likeness."[104] In effect, it would "strip the NCAA of its nonprofit tax status if the association [did not] allow its athletes to have the full use of their NIL rights."[105] In other words, it forces the NCAA to choose between "pay[ing] significantly more in taxes or allow[ing] student-athletes to earn NIL compensation."[106]

B. *(No) Power to the Players: Fairness in Collegiate Athletics Act*

A second federal proposal, U.S. Senator Marco Rubio's Fairness in Collegiate Athletics Act (the "Rubio Bill"), aims to "ensure that college athletes, and not institutions of higher education, are able to profit on their name, image, and likeness."[107] Senator Rubio believes the NCAA must write national standards—not Congress.[108] Accordingly, under the Rubio Bill, if the NCAA failed to develop a design by June 30, 2021,[109] the Federal Trade Commission would have enforcement powers.[110] Because all three NCAA divisions adopted an interim policy on June 30, 2021 that suspended the NCAA's NIL rules prohibiting athletes from

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[103] I.R.C. § 501(j)(2); *see also* NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND SUBSIDIARIES: CONSOLIDATED FINANCIAL STATEMENTS AS OF AND FOR THE YEARS ENDED AUGUST 31, 2018 AND 2017, SUPPLEMENTARY INFORMATION FOR THE YEAR ENDED AUGUST 31, 2018, AND INDEPENDENT AUDITORS' REPORT 4 (2018), https://ncaaorg.s3.amazonaws.com/ncaa/finance/2017-18NCAAFin_NCAAFinancialStatement.pdf (stating that the NCAA's annual revenue from 2017-2018 topped one billion dollars in revenue, most of which came from television and marketing rights fees, and championships and NIT tournaments). Per § 501(j)(2), however, the NCAA was not obligated to pay federal taxes in any amount.

[104] Student-Athlete Equity Act, H.R. 1804, 116th Cong. § 2(a) (2019).

[105] Dan Murphy, *Can Congress Help the NCAA Find NIL Consistency?*, ESPN (July 1, 2020), https://www.espn.com/college-sports/story/_/id/29392144/congress-working-multiple-legislative-options-solve-ncaa-nil-issue.

[106] Brandon Beyer, *Federal Legislation Still Has a Role to Play in the Fight for Student-Athlete Compensation*, 46 J. LEGIS. 303, 312 (2019).

[107] Fairness in Collegiate Athletics Act of 2020, S. 4004, 116th Cong. (2020) (flush language).

[108] OutKick, *Marco Rubio Joined Clay to Discuss Sport and His Name, Image, and Likeness Bill*, YOUTUBE (June 18, 2020), https://www.youtube.com/watch?v=hH1eXhcA9Rc.

[109] S. 4004, § 3.

[110] *Id.* § 4(a)(2).

monetizing their NIL, this provision is likely moot.[111] The Rubio Bill also contains an express preemption provision that is critical to achieve economic equity and uniformity for student-athletes nationwide.[112]

But the Rubio Bill is problematic. First, it is extremely NCAA-friendly and fails to put the student-athlete first. It reads as if it was created to solve the problem for the NCAA—not for student-athletes[113]—thus allowing the NCAA to further "enshrine its own definition of amateurism"[114] while providing "considerable leeway to determine what types of opportunities would be available to its athletes."[115] Second, it does not protect all student-athletes' employment rights—only those that participate in NCAA programs.[116] Commenters argue that the bill "undermines economic freedom, states' rights, and gives the NCAA immunity for illegal activities."[117] Third, the bill (rather paradoxically) would "open the door for NIL pay, but it would also give the NCAA, conferences and schools protection from all causes of action 'in any court' regarding the adoption of rules around such a system."[118] In effect, the bill insulates the NCAA from both ongoing and future litigation, and it gives the NCAA immunity from

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111 *See Taking Action, supra* note 50.

112 For further discussion on this, see *infra* Part V.

113 Unsurprisingly, the NCAA supports the Rubio bill, stating: "[the NCAA] looks forward to working with Senator Rubio . . . to establish a legislative and legal framework at the federal level." *See NCAA Statement on Sen. Marco Rubio Bill*, NAT'L COLLEGIATE ATHLETIC ASS'N (June 18, 2020), http://www.ncaa.org/about/resources/media-center/news/ncaa-statement-sen-marco-rubio-bill.

114 Julie Sommer, *A Comparative Analysis of U.S. Senator Rubio's Proposed Federal Name/Image/Likeness (NIL) Bill and the New Florida NIL Statute*, THE DRAKE GROUP 2 (2020), https://www.thedrakegroup.org/wp-content/uploads/2020/06/A-Comparative-Analysis-of-Florida-and-Rubio-Bill.pdf.

115 Justin Sievert, *The Name, Image, and Likeness Legal and NCAA Regulatory Landscape*, VELAWOOD LAW, https://velawoodlaw.com/the-ncaa-name-image-and-likeness-legal-landscape/ (last visited Dec. 28, 2021) (noting that the NCAA would control "any legislation needed to preserve the amateur status of the athletes, ensure appropriate recruitment, and prevent deals with a third party offered to recruit or retain an athlete at a particular institution").

116 *See* S. 4004, § 2(4)(A)-(B); *see also College Athletes Should Give U.S. Senate NIL Bill a Failing Grade: Criticism of the Fairness in Collegiate Athletics Act*, THE DRAKE GROUP (June 24, 2020), https://www.thedrakegroup.org/wp-content/uploads/2020/06/Drake-Position-on-Rubio-NIL-Bill-FINAL.pdf [hereinafter *Drake's Failing Grade*].

117 *See* Gregg E. Clifton, *Florida Senator Rubio Introduces Federal Name, Image, and Likeness Legislation*, NAT'L L. REV. (June 19, 2020), https://www.natlawreview.com/article/florida-senator-rubio-introduces-federal-name-image-and-likeness-legislation.

118 Zachary Zagger, *Ball in Congress' Court as States Tackle NCAA Athlete Pay*, LAW360 (Aug. 26, 2020), https://www.law360.com/articles/1304852/ball-in-congress-court-as-states-tackle-ncaa-athlete-pay (referencing § 4(b)).

litigation covering rights of publicity. The model federal bill should not provide the NCAA (or any other school or conference) with immunity from any causes of action. Thus, if the Rubio Bill is passed, the exploitation of student-athletes will persist, as the NCAA would continue to "earn billions in gate receipts, sponsorships and television revenues from college athletic events."[119]

C. *A (Potential) Reasonable Resolution: Student Athlete Level Playing Field Act*

A third federal proposal, Congressman Anthony Gonzalez's Student Athlete Level Playing Field Act ("Gonzalez Bill"), primarily aims to prevent "a covered athletic association and institution of higher education from prohibiting a [student-athlete] from participating in intercollegiate athletics because such [student-athlete] enters into an endorsement contract."[120] The Gonzalez Bill seeks to maintain the NCAA's principle of amateurism,[121] prevent schools from paying student-athletes for use of their NIL,[122] and allow student-athletes to sign contracts with companies that are competitor companies of, or have business relationships with, their respective schools.[123] The Gonzalez Bill, like the Rubio Bill, also contains an express preemption clause.[124]

Importantly, the Gonzalez Bill would create a thirteen-member commission comprised of current and former athletes, coaches, directors, and administrators, "whose role would be to recommend ways for legislators to change the law as the nascent marketplace for college athletes becomes [clearer] and any unintended consequences

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119 *Drake's Failing Grade*, *supra* note 116.

120 Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. (2020).

121 Zachary Zagger, *House Bill Would Allow NCAA Sponsorship Pay, Empower FTC,* LAW360 (Sep. 24, 2020), https://www.law360.com/sports-and-betting/articles/1313480/house-bill-would-allow-ncaa-sponsorship-pay-empower-ftc-; *see also* H.R. 8382, § 5 (a)(2) (stating that it is "unlawful for a booster to directly or indirectly provide or offer to provide any funds or thing of value as an inducement for a student athlete to enroll or remain at a specific institution or group of institutions").

122 *See* Dan Murphy, *Bipartisan Federal NIL Bill Introduced for College Sports*, ESPN (Sept. 24, 2020), https://www.espn.com/college-sports/story/_/id/29961059/bipartisan-federal-nil-bill-introduced-college-sports.

123 *Id.* ("That means, for example, an athlete who attends a school with a Nike contract would be allowed to sign an endorsement deal with Under Armour, but he or she wouldn't have the right to wear Under Armour apparel during games or other school-sponsored events.").

124 H.R. 8382, § 6.

emerge."[125] This oversight committee would provide a powerful voice for current and former student-athletes and imbue balance into the NIL quandary. Moreover, the Gonzalez Bill "shall [not] provide a cause of action pursuant to the Sherman Act."[126] Unlike the Rubio Bill, therefore, the Gonzalez Bill does not prohibit student-athletes from filing antitrust lawsuits against the NCAA. Whether or not to provide antitrust protection continues to be a key distinction between the currently proposed federal NIL bills.[127]

D. *Beyond NIL Compensation: The College Athlete Bill of Rights*

Shortly after the Supreme Court granted certiorari to consider the Ninth Circuit's ruling in *NCAA v. Alston*, Senator Booker and Senator Blumenthal introduced The College Athlete Bill of Rights[128] ("Bill of Rights Act") to "drastically limit the NCAA's current authoritative stronghold on student-athletes."[129] The Bill of Rights Act, however, goes well beyond NIL rights—it addresses not only student-athletes' economic rights but also focuses on their health, safety, and educational opportunities.[130]

At least two provisions in the Bill of Rights Act warrant attention. The first is the unregulated transfer provision.[131] If an athlete enters into a professional sports draft—thus prohibiting college sports from preventing athletic participation—this could lead to an eruption of litigation and other serious ramifications.[132] The second provision requires athletic departments to share the profit from revenue generating sports with college athletes who play those sports (after

125 *See* Murphy, *supra* note 122.

126 H.R. 8382, § 7(c).

127 *Compare* The Collegiate Athlete Compensation Rights Act, H.R. 5003, 116th Cong. (2020), *and* Fairness in Collegiate Athletics Act, H.R. 4004, 116th Cong. §4(b) (2020) (providing antitrust protection to the NCAA), *with* The College Athlete Economic Freedom Act, H.R. 850, 117th Cong. (2021), *and* Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. (2020) (not providing antitrust protection to the NCAA).

128 College Athletes Bill of Rights of 2020, S.5062, 116th Cong. (2020).

129 Gregg E. Clifton, *The Proposed "College Athletes Bill of Rights" Joins Growing Number of Federal Bills on Student-Athlete Rights*, NAT'L L. REV. (Dec. 20, 2020), https://www.natlawreview.com/article/proposed-college-athletes-bill-rights-joins-growing-number-federal-bills-student.

130 College Athletes Bill of Rights, H.R. 116th Cong. § 11 (2020).

131 H.R. 116th Cong. § 3(d).

132 *Details & Ramifications of the "College Athletes Bill of Rights*," LEAD1 ASS'N (Feb. 2, 2021), https://lead1association.com/details-ramifications-of-the-college-athletes-bill-of-rights/.

subtracting scholarship costs).[133] But the Bill of Rights Act is vague regarding its definition of "revenue." This invites other fundamental concerns, such as the growing disparities among institutional revenues and the uncertainty of whether revenue sharing will result in workers' compensation or unionization.

V. THE TIME IS NOW: A FAIR FEDERAL FRAMEWORK

Although the attempts by some legislators to pass federal legislation has been well-intentioned and promising, more can and should be done to protect student-athletes. Specifically, to avoid mass confusion and to achieve economic equity and educational opportunities for student-athletes nationwide, Congress must preempt competing state laws and regulations to create national uniformity. An independent entity established by Congress—not the NCAA or the courts—should take charge and pass a law that includes an express preemption clause and, if narrowly tailored, an antitrust exemption.

A. *Express Preemption Clause*

Preemption is based on the Supremacy Clause, which specifies that federal law is supreme over state law when each comes into conflict.[134] The Supreme Court recognizes three types of preemption: (i) express preemption,[135] (ii) field preemption,[136] and (iii) conflict preemption.[137] The only effective and reasonable means to trump the patchwork of state laws, however, is an express (i.e., outright) preemption clause, where the federal statute contains a preemption clause that explicitly preempts all state laws (both existing and prospective).

We need not look far and wide for an example of preemption language. The ideal federal bill's preemption clause should mirror the language in the Employment Retirement Income Security Act of 1974 (ERISA).[138] ERISA's express preemption clause preempts state law claims that "relate to" ERISA plans under either of the two definitions posited by the Supreme Court of the United States.[139] There, Justice Harry Blackmun "craft[ed] a functioned test for express preemption,

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133 Zachary Zagger, *Athlete-Focused Bill Calls for Fed Oversight of NCAA Sports*, LAW360 (Dec. 17, 2020), https://www.law360.com/articles/1338547/athlete-focused-bill-calls-for-fed-oversight-of-ncaa-sports.

134 U.S. CONST. art. VI, cl. 2.

135 *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1480 (2018).

136 *Id*.

137 *Id*.

138 Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a).

139 Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 (1983).

instructing that a state law 'relates to' an employee benefit plan if it has either (1) a 'reference to' or (2) a 'connection with' that plan."[140] Congress enacted § 514(a) of ERISA to limit plan liability by preempting claims under state law (including state statutes and common law causes of action) in order to supplant the "patchwork of state law previously in place."[141]

In this respect, the express preemption clause in the Rubio Bill is strikingly similar in that it utilizes the language of "relate[s] to."[142] The Gonzalez's Bill, however, uses the language "with respect to."[143] As written, each preemption clause can be improved. Thus, the express preemption clause in the ideal federal bill should model that of ERISA's clause, preempting state laws that "relate to student-athlete compensation with third parties," or the like. In other words, any state law that has a "reference to" or a "connection with" student-athlete compensation regarding NIL should be expressly preempted to achieve uniformity throughout the country.

B. *Is a Narrowly Tailored Antitrust Exemption Feasible?*

The NCAA has been faced with several antitrust challenges in the past, some of which the NCAA has been successful in defending. In *Deppe v. NCAA*, for instance, a punter for Northern Illinois University's football team argued that the NCAA's rule requiring transfer students to wait one year after transferring to play for their new school was intended for the NCAA's economic benefit.[144] The Seventh Circuit held that Division I transfer rules do not violate antitrust laws because they are "clearly meant to help maintain the 'revered tradition of amateurism in college sports.'"[145] In *Worldwide Basketball & Sports Tours, Inc. v. NCAA*, the NCAA changed its rules regarding participation in certified outside basketball tournaments.[146] There, the Sixth Circuit held that the lower court erred in using the wrong antitrust analysis, and dismissed the case because the plaintiff sports promoters failed to define a relevant market.[147]

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[140] Plastic Surgery Ctr., P.A. v. Aetna Life Ins. Co, 967 F.3d 218, 226 (3d Cir. 2020) (citing *Shaw*, 463 U.S. at 96–97).

[141] *Id*.

[142] Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019).

[143] Student-Athlete Level Playing Field Act, H.R. 8382, 116th Cong. (2020).

[144] 893 F.3d 498, 500 (7th Cir. 2018).

[145] *Id*. at 498, 501 (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 120 (1984)).

[146] *Worldwide Basketball*, 388 F.3d at 961, 957.

[147] *Id*. at 963.

But the NCAA's attempts to defend itself from antitrust attack have not always been successful.[148] In *NCAA v. Board of Regents*,[149] for example, the Supreme Court held that the NCAA's conduct violated the Sherman Antitrust Act because the NCAA's actions constituted a horizontal restraint in trade.[150] In *Law v. NCAA*, college basketball coaches filed a class action suit claiming the NCAA violated federal antitrust laws.[151] There, the Tenth Circuit held that a restricted earnings cap for college coaches violated antitrust law.[152] And in *O'Bannon*, as noted in Part II above, the Ninth Circuit established that future student-athletes "can use federal antitrust law to attempt to 'prove' that there are better ways of preserving amateurism than current NCAA rules."[153]

On January 8, 2021, Assistant Attorney General Makan Delrahim wrote a letter to NCAA President Emmert cautioning him that the NCAA's planned approach to regulate NIL "may raise concerns under the antitrust laws."[154] In response, NCAA President Emmert claimed that "[the NCAA's] current amateurism and other rules [were] . . . fully compliant" with federal antitrust law.[155] Many athlete advocates believe, however, that the NCAA's current business model surrounding NIL compensation violates antitrust laws.

Any antitrust exemption shielding the NCAA from liability could halt student-athletes' progress and give the NCAA unbounded power to restrain athletes' fair market rights. Recently, in *NCAA v. Alston*, the

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148 *See* Zagger, *supra* note 118 (noting that, if student-athletes are allowed to monetize their NIL, this could undermine the NCAA's main defense in antitrust suits—that not paying college athletes increases consumer demand due to the concept of amateurism).

149 *Bd. of Regents*, 468 U.S. at 120.

150 The Supreme Court defined a horizontal restraint on trade as an "agreement among competitors on the way in which they will compete with one another," and noted that this type of agreement is often "held to be unreasonable as a matter of law." *Id*. at 99.

151 134 F.3d 1010, 1015 (10th Cir. 1998).

152 *Id*. at 1020, 1024; *see also In re* Nat'l Collegiate Athletic Ass'n I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1149 (W.D. Wash. 2005) (holding that the NCAA is not exempt from antitrust scrutiny under the Sherman Act for its financial aid to college students).

153 WORKING GROUP RECOMMENDATIONS, *supra* note 37, at 29.

154 Steve Berkowitz and Christine Brennan, *Justice Department Warns NCAA Over Transfer and Name, Image, Likeness Rules*, USA TODAY (Jan. 8, 2021, 4:00 PM), https://www.usatoday.com/story/sports/ncaaf/2021/01/08/justice-department-warns-ncaa-over-transfer-and-money-making-rules/6599747002/.

155 Alan Blinder, *N.C.A.A. President Seeks Delay on Vote to Let Students Profit from Fame*, N.Y. TIMES (Jan. 9, 2021), https://www.nytimes.com/2021/01/09/sports/ncaabasketball/ncaa-delays-vote-athlete-endorsements.html.

Supreme Court affirmed a 2020 ruling by the Ninth Circuit, wherein Chief Judge Thomas held that "courts must continue to subject NCAA rules, including those governing compensation, to antitrust scrutiny."[156] The antitrust law violation arose from "NCAA members agreeing to limit how much each school [could] compensate athletes for academic-related costs."[157] Thus, the question before the court was whether student-athletes were allowed to receive payments and other benefits related to education.

The Supreme Court unanimously held that (1) the district court did not err in finding that the NCAA violated the Sherman Act by limiting the education-related benefits schools could offer student-athletes; and (2) the district court properly applied a rule of reason analysis and found that the restraints were stricter than necessary to achieve demonstrated procompetitive benefits.[158] In other words, all nine justices of the Supreme Court agreed that the NCAA's restrictions on non-cash payments to college athletes related to education were anti-competitive under federal antitrust law.[159]

Although it did not directly address the issue of whether student-athletes can monetize their NIL, the *Alston* decision—and specifically Justice Kavanaugh's concurring opinion—illustrated that the Supreme Court is willing to further erode the NCAA's framework in future antitrust challenges.[160] As Justice Kavanaugh stated bluntly, "[t]he NCAA is not above the law."[161] Going forward, if the NCAA attempted to sanction a college that was complying with that state's NIL law, that conduct would almost certainly be seen as a violation of antitrust law under *Alston*.

The NCAA has publicly stated that, given the threat of future state and federal antitrust lawsuits, "the membership's ability to investigate and adopt common and adequate solutions to pressing issues facing

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156 *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig., 958 F.3d 1239, 1254 (9th Cir. 2020).

157 Gregg E. Clifton, *NCAA v. Alston—The Wait is Over . . . What's Next for the NCAA*, NAT'L L. REV. (June 22, 2021), https://www.natlawreview.com/article/ncaa-v-alston-wait-overwhat-s-next-ncaa.

158 Nat'l Collegiate Athletic Ass'n v. Alston, No. 20-512, slip op. at 2–3 (U.S. June 21, 2021).

159 *Id*.

160 *Id*. slip op. at 5 (Kavanaugh, J., concurring) (stating that "[n]owhere else in America [could] businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different").

161 *Id*. (Kavanaugh, J., concurring).

college athletics" will be impinged.[162] In essence, the NCAA is seeking the same antitrust exemption protections that Major League Baseball has enjoyed since 1922.[163] But without the looming threat of future antitrust challenges, it is plausible—even foreseeable—that the NCAA will remain stagnant and be less likely to voluntarily address this issue.

Furthermore, the aforementioned NCAA antitrust cases demonstrate that many college athletes would not have received the benefits and rights they did thus far without holding NCAA bylaws accountable to federal antitrust laws. An antitrust exemption shielding the NCAA from liability could halt the student-athlete's progress and give the NCAA unbounded power to restrain athletes' fair market rights.[164] Judicial checks on NCAA overreach in the antitrust realm, therefore, adequately maintain and enhance the legitimacy of the NCAA.

Additional support for not granting the NCAA an antitrust exemption can be found in the 2007 Antitrust Modernization Commission Report[165] addressed to the President and Congress. The Commission asserted that "[i]mmunities should rarely (if ever) be granted and then only on the basis of compelling evidence that either (1) competition cannot achieve important societal goals that trump consumer welfare, or (2) a market failure clearly requires government regulation in place of competition."[166]

A blanket antitrust exemption would fail to meet these standards. Instead of proving that an antitrust exemption would "achieve important societal goals that trump consumer welfare," the NCAA contends that antitrust scrutiny requires it to unnecessarily devote time and resources to defend against antitrust lawsuits.[167] In almost all of the NCAA antitrust cases, the NCAA has justified the restraint by arguing that amateurism is an important value. But a blanket antitrust exemption is an overly broad way of protecting amateurism. If the NCAA's bylaws were not subject to antitrust scrutiny, consumer

162 WORKING GROUP RECOMMENDATIONS, *supra* note 37, at 30.

163 *See* Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208–09 (1922) (holding that, because baseball competitions are not "commerce," and thus baseball is purely a state affair, the professional baseball business is not subject to federal antitrust law).

164 *Exploring a Compensation Framework for Intercollegiate College Athletics, Hearing Before the S. Comm. On Com., Sci., & Transp.*, 116th Cong. 11 (2020) (statement of Dionne Koller, Professor of Law, University of Baltimore), ("An antitrust exemption would give the NCAA unchecked power to restrict athletes' free market rights . . . .").

165 ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS (2007).

166 *Id*. at viii.

167 WORKING GROUP RECOMMENDATIONS, *supra* note 37, at 29; see also ANTITRUST MODERNIZATION COMM'N, *supra* note 165, at viii.

welfarism would be compromised. A blanket antitrust exemption, like the NCAA proposes,[168] would likely continue to "undermine the sanctity of America's entire free market system and lead to substantial unfairness to college athletes."[169]

Although it is understandable why the NCAA seeks an antitrust exemption for college sports, a blanket antitrust exemption would do more harm than good. Specifically, it would (1) cripple the development of a NIL market that took athlete advocates years to build; (2) leave student-athletes without recourse moving forward; (3) allow the NCAA to further reap financial rewards; (4) make it less likely that the NCAA will voluntarily act; and (5) bypass well-established legal precedent. Thus, the NCAA could either rewrite its rules to comply with U.S. antitrust law or wait for courts to mandate such changes.[170] Another option, as sports law scholar Richard Karcher suggests, is that the ideal federal legislation would include a mandatory arbitration provision, as well as the right of student-athletes (and the state) to enjoin through civil action.[171] Either way, any viable federal legislation must address the antitrust issue.[172]

C. *An Independent Entity Established by Congress—Not the NCAA or the Courts—Should Write the Rules*

Another reason why a federal statute should govern NIL compensation issues is because "judges generally should . . . refrain from interfering with the internal matters of sports associations unless exceptional circumstances justify that interference."[173] For example, in

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168 WORKING GROUP RECOMMENDATIONS, *supra* note 37, at 27.

169 Marc Edelman, *Why Congress Would Be Crazy to Grant the NCAA An Antitrust Exemption*, FORBES (May 6, 2020, 9:50 AM), https://www.forbes.com/sites/marcedelman/2020/05/06/why-congress-would-be-crazy-to-grant-the-ncaa-an-antitrust-exemption/?sh=2a4f4fff70a9.

170 Edelman, *supra* note 29, at 99.

171 Richard T. Karcher, *A Model Federal College Athletes Right of Publicity Statute*, BLOGGER (Dec. 10, 2019), https://collegeathletesrightofpublicity.blogspot.com/2019/12/drafted-by-richard-t.html.

172 Aimonetti & Talley, *supra* note 14, at 35 (noting that a benefit of federal legislation "is its ability to sidestep the purview of federal antitrust law").

173 Davidovich v. Israel Ice Skating Fed'n, 140 A.3d 616, 632 (N.J. Super Ct. App. Div. 2016); *see also* Ruiz v. Sauerland Event GMBH, 801 F. Supp. 2d 118, 125 (S.D.N.Y. 2010) (stating that "[c]ourts generally defer to a private organization's interpretation of its rules in the absence of bad faith or illegality"); M'Baye v. World Boxing Ass'n, 429 F. Supp. 2d 660, 667 (S.D.N.Y. 2006) (noting that "[c]ourts generally are reluctant to interfere with the internal decisions of organizations such as the WBA, deferring to the principle that courts are ill-equipped to resolve conflicts involving the interpretation of the organization's own rules").

a 2016 case, Tom Brady was involved in a scheme to deflate footballs below the permissible range during the American Football Conference Championship Game.[174] There, the Second Circuit noted that courts "do not sit as referees of football any more than [courts] sit as the 'umpires' of baseball or the 'super-scorer' for stock car racing. Otherwise, [courts] would become mired down in the areas of a [sporting] group's activity concerning which only the group can speak competently."[175] Judge Barrington reasoned[176] that the National Football League Commissioner "properly exercised his broad discretion to resolve an intramural controversy between the League and a player" in his role as an arbitrator under the collective bargaining agreement.[177]

Because courts are hesitant to regulate, or interfere with, the interplay between athletes and the operation of private sports associations, it is likely that state courts will be reluctant to get involved in the NCAA's internal sporting affairs. This reaffirms the need for a federal statute to create an independent oversight committee to write the rules—but it should not be the NCAA.[178] The NCAA is too restrictive, too ambitious with its requests, and clearly partial.[179] A practical solution, however, would be for the NCAA to revise its amateurism rules and allow NIL compensation prior to each state law taking effect.[180] But this is unlikely to happen.

An independent entity, therefore, could provide objectivity when neither side's agenda will dominate.[181] This entity could (1) provide bi-monthly reports to Congress and explain how the NIL issue is playing out; (2) set standards and adjudicate challenges; (3) establish caps on

174 NFL Mgmt. Council v. NFL Players Ass'n, 820 F.3d 527, 531 (2d. Cir. 2016).

175 *Id*. at n.5 (citing Crouch v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 845 F.2d 397, 403 (2d. Cir. 1988) and Charles O. Finley & Co., Inc. v. Kuhn, 569 F.2d 527, 536–38 (7th Cir. 1978)).

176 Patriots fans do not read the rest of this sentence.

177 *NFL Mgmt. Council*, 820 F.3d at 532.

178 *See* Maisel, *supra* note 23 ("[T]he NCAA is run by a board of governors made up largely of university presidents, a class whose lack of knowledge of athletic administration is matched only by their reticence to act.").

179 *See id*. (explaining how the NCAA has historically been unaccountable as an organization).

180 *See, e.g*., Ross Dellenger, *Congress Says NCAA Needs Change, But Mark Emmert Does Not Have the Answers*, SPORTS ILLUSTRATED (Feb. 11, 2020), https://www.si.com/college/2020/02/12/ncaa-mark-emmert-senate-name-image-likeness.

181 *See* Jay Bilas, *NCAA Stance on Name, Image, and Likeness Amounts to Lip Service, Half-Measure*, ESPN (Apr. 30, 2020), https://www.espn.com/mens-college-basketball/story/_/id/29113994/ncaa-stance-name-image-likeness-amounts-lip-service-half-measure (noting how the NCAA currently has an extremely low reputation regarding NIL compensation).

employment and NIL compensation; and (4) oversee sports agents' requests and appeal disapprovals.[182] It ideally would consist of approximately ten to fifteen members, including former collegiate athletes, economists, and lawyers. Each member could be elected for a term of two or three years,[183] and the number of members could be increased or decreased from time to time through amendment of the entity's bylaws.[184] This organizational structure would ensure that the commission would remain impartial and diverse.

The formation of an independent committee, however, might raise overreaching concerns. The Commission, similar to the proposed Bill of Rights Act, would likely have the right to investigate, subpoena, audit, and impose substantial penalties. But the advantages may outweigh the disadvantages: an independent oversight committee would (1) provide student-athletes with a meaningful voice; (2) facilitate representation of student-athletes, colleges and universities, conferences and associations, and other educational establishments throughout the NCAA; (3) likely be more transparent than the NCAA; (4) deter unwanted conduct; and (5) afford a more reliable and authoritative voice.

Another solution would be for Congress to mandate a federally chartered, independent non-profit entity ("501(c)(3)") to set standards and adjudicate challenges and conflicts. For guidance, Congress could look to the U.S. Olympic Committee, a federally chartered, independent 501(c)(3) organization, which was successful in its operation when it passed the Ted Stevens Olympic and Amateur Sports Act to oversee U.S. Olympic, Paralympic, and open amateur sport systems. An independent NIL Commission would be better than the NCAA because "rights of college athletes to outside employment are not within the purview of a collegiate athletics governance organization."[185]

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182 *See Compensation of College Athletes Including Revenues Earned from Commercial Use of Their Names, Images and Likenesses and Outside Employment*, THE DRAKE GROUP (Aug. 8, 2020), https://www.thedrakegroup.org/wp-content/uploads/2020/08/8-3-20-FINAL-Drake-NIL-Position-Paper.pdf [hereinafter *The Drake Group Recommendations*].

183 *See, e.g.*, MODEL BUS. CORP. ACT § 8.06 (2020) (describing how, in a jurisdiction that follows the Model Business Corporation Act (MBCA), a corporation's board of directors must serve staggered terms).

184 *See, e.g.*, *id*. § 8.03 (describing how many directors a corporation should have and how the election process works in a jurisdiction that follows the MBCA).

185 *The Drake Group Recommendations*, *supra* note 182, at 14.

VI. CONCLUSION

The current athletic landscape and patchwork of state laws governing NIL compensation require federal legislative intervention. While the attempts by some legislators to pass federal legislation is heading in the right direction, the efforts can go further. Specifically, to avoid confusion and achieve economic equity for student-athletes nationwide, Congress must preempt competing state regulations and restore national uniformity through a reasonable federal law. This uniform federal law should be made by Congress—not the NCAA—and should include an express preemption clause and, if narrowly tailored, an antitrust exemption. Until then, states with NIL laws will compete vigorously for top talent, and national uniformity in college sports and educational opportunities will be severely undermined.