

5-15-2023

Navigating Name, Image, and Likeness Policy in College Athletics – Issues and Solutions

Daniel Erber

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjcfcl>



Part of the [Antitrust and Trade Regulation Commons](#), [Education Law Commons](#), and the [Entertainment, Arts, and Sports Law Commons](#)

Recommended Citation

Daniel Erber, *Navigating Name, Image, and Likeness Policy in College Athletics – Issues and Solutions*, 17 *Brook. J. Corp. Fin. & Com. L.* 105 (2023).

Available at: <https://brooklynworks.brooklaw.edu/bjcfcl/vol17/iss2/7>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of Corporate, Financial & Commercial Law by an authorized editor of BrooklynWorks.

NAVIGATING NAME, IMAGE, AND LIKENESS POLICY IN COLLEGE ATHLETICS – ISSUES AND SOLUTIONS

ABSTRACT

College athletics, specifically the NCAA, has faced legal challenges throughout its history. In the wake of Alston and other Supreme Court decisions regarding antitrust violations tied to student-athlete benefits, many states proposed and passed laws explicitly allowing student-athletes at NCAA institutions to utilize their names, images, and likenesses for commercial purposes. With the state laws in direct conflict with NCAA rules, college sports entered an era of extreme uncertainty. While the NCAA attempts to maintain its grip on the commercial endeavors of student-athletes and member institutions, states and society are pushing a free market agenda geared towards liberalizing the economic opportunities granted. However, operating as a free market while also subject to NCAA rules results in an environment of confusion, risk, and detrimental consequences. Student-athletes and schools must be cognizant of conflicting laws and rules, the NCAA must learn from past antitrust violations, and college athletics must adjust to a new normal. Although many benefits arise from the new opportunities granted to student-athletes, there is a necessity for a clear understanding and uniformity of laws and rules to fully seize the benefits. Therefore, this Note analyzes the history of college athletics, the common law rules produced by past litigation, and proposes uniform legislative action to combat future harm.

INTRODUCTION

“The NCAA is not above the law,”¹ stated Supreme Court Justice Brett Kavanaugh in his concurring opinion in *NCAA v. Alston*. In the majority opinion, Justice Gorsuch, affirming the ruling of the district court, held that the National Collegiate Athletic Association’s (NCAA) “rules limiting education-related benefits were subject to rule of reason analysis,”² and that under such analysis, the NCAA must “show that its rules constituted least restrictive means of preserving consumer demand.”³ The NCAA lost its appeal, ultimately being unable to show that its limitations imposed on member schools regarding the awards of education-related benefits to student-athletes were the least restrictive way of preserving the product that is college athletics.⁴ In the case, the Supreme Court expressed concerns about antitrust violations, fairness, and the dangers resulting from the NCAA’s grip

1. Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141, 2169 (2021).

2. *Id.* at 2141.

3. *Id.*

4. *Id.*

on student-athlete rights.⁵ Supplementing the *Alston* decision, the state of California proposed for its own educational institutions Senate Bill 206 (2019),⁶ which “. . . prevents universities from punishing athletes for being paid for the use of their name, image, and likeness (NIL) . . .”⁷ The bill went into effect on January 1, 2023.⁸ After the enactment of Senate Bill 206 in 2019, the NCAA responded with a letter to California Governor Gavin Newsom urging him to reconsider the bill and for California to be “a constructive partner in our efforts to develop a fair name, image, and likeness approach for all 50 states.”⁹ Not only did the NCAA’s threatening letter not work, but 206 is still set to go into effect, and other states also passed laws that put even more pressure to form a uniform nationwide structure.¹⁰ Given pending state legislation, threatened boycotts, school/conference action, and unsuccessful Senate hearings, the NCAA’s Board of Directors was forced to adopt a temporary change to its rules that would allow NIL activity.¹¹ Now, while athletes have begun signing endorsement deals, the college sports world is left without a uniform framework.¹²

Although the *Alston* Supreme Court decision and the NCAA’s interim NIL rule change solved past problems regarding antitrust and fairness, there is apparent concern and frustration over the lack of uniformity in the laws.¹³ For example, “if a student athlete transfers to a new school in a different state, while already engaged in a contract set out under the state laws and the policies in place at the student athlete’s current school, it is unclear whether such a contract will be legal, permissible and/or enforceable under the laws and policies applicable to the student athlete at its new school.”¹⁴ To combat the likely attacks on the integrity of college sports, federal lawmakers must

5. Dennis Dodd, *NCAA amateurism is effectively dead, and the association itself may not be far behind*, CBS SPORTS (June 21, 2021, 5:20 PM), <https://www.cbssports.com/college-football/news/ncaa-amateurism-is-effectively-dead-and-the-association-itself-may-not-be-far-behind/>.

6. Cal. S. B. 206 (Cal. 2019).

7. Tyler Tynes, *The Ripple Effects of California’s ‘Fair Pay to Play’ Act*, THE RINGER (Oct. 11, 2019, 6:55 AM), <https://www.theringer.com/2019/10/11/20909171/california-sb-206-ncaa-pay-college-players>.

8. *Gov. Newsom Signs SB 206, The ‘Fair Pay to Play Act’*, SENATOR NANCY SKINNER (Sept. 30, 2019), <https://sd09.senate.ca.gov/news/20190930-gov-newsom-signs-sb-206-%E2%80%98fair-pay-play-act%E2%80%99>.

9. *NCAA responds to California Senate Bill 206*, NCAA (Sept. 11, 2019), <https://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206>.

10. See Dan Murphy, *Everything you need to know about the NCAA’s NIL debate*, ESPN (Sept. 1, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate.

11. *Id.*

12. Darren Heitner, *Congress Is Embarrassed for not Passing An NIL Law, as It Continues to do Nothing*, ABOVE THE LAW (June 10, 2021, 3:15 PM), <https://abovethelaw.com/2021/06/congress-is-embarrassed-for-not-passing-an-nil-law-as-it-continues-to-do-nothing/>.

13. *Id.*

14. Morgan Lewis, *Think Before you Ink: Key Considerations in Contracting with Student Athletes for NIL Rights*, JD SUPRA (Aug. 18, 2021), <https://www.jdsupra.com/legalnews/think-before-you-ink-key-considerations-8896193/>.

step in to preempt both competing state laws as well as rules implemented by the NCAA and their member institutions.

This Note will explore the lead-up to this dilemma in American amateur sports, how it can be combatted, and the effects that have already taken place. First, Part I will provide a detailed analysis of the history of the NCAA and amateurism in college sports. Next, Part II will discuss the current landscape regarding college athlete compensation. Part III will evaluate possible actions, such as state law, NCAA and institution rules, litigation, and penalties, that could arise before uniformity is established. Lastly, Part IV will introduce proposals with the aim of respecting the constitutional rights of college athletes, maintaining the integrity of amateur athletics, and producing benefits for all parties involved. Overall, the NCAA's long and controversial history has come to a point where changes are needed sooner than they could possibly be enacted, and the goal of this Note is to provide a forward-thinking analysis of how to protect and prepare for the future of college sports.

PART I: HISTORY OF THE NCAA AND AMATEURISM IN COLLEGE SPORTS

The NCAA requires that “prospective student-athletes enrolling for the first time at a Division I or II school must receive a final amateurism certification before being eligible to compete.”¹⁵ Many argue that the NCAA's firm defense of “amateurism” principles is to promote unfairness, and it is difficult to ignore the limitations placed on student-athlete payments while the schools, coaches, and other administrators bring in millions.¹⁶

Founded in 1906, the NCAA was formed to regulate rules and protect athletes.¹⁷ While the first few decades of NCAA governance focused on player protection and regulation, it was not until the adoption of the “Sanity Code” after World War II that amateurism and compensation became subject to NCAA regulation and enforcement. In 1948, the NCAA passed the Sanity Code, “. . . permitting the awarding of scholarships and jobs, but with the important caveat that the recipients had to demonstrate financial neediness.”¹⁸ Then, in 1956, the NCAA finally allowed scholarships to be rewarded regardless of economic hardships.¹⁹ In the decades that followed, the NCAA has become a massive revenue-generating entity, and the athlete's

15. *Amateurism*, NCAA, <https://www.ncaa.org/student-athletes/future/amateurism> (last visited Feb. 7, 2023).

16. Robert Litan, *The NCAA's "Amateurism" Rules: What's in a Name?*, MILKEN INST. REV. (Oct. 28, 2019), <https://www.milkenreview.org/articles/the-ncaas-amateurism-rules>.

17. *Origins*, NCAA, <https://www.ncaa.org/history> (last visited Feb. 7, 2023).

18. *The Sanity Code*, SPORTS CONFLICT INSTITUTE, <https://sportsconflict.org/the-sanity-code/> (last visited Feb. 7, 2023).

19. *Id.*

role (and financial cut) has become a heated topic of debate.²⁰ While the NCAA generated \$165.23 million in revenue from television and marketing rights fees in 2020,²¹ student-athletes are still not compensated under the NCAA's revenue generating model.

In the 2014 ruling in the *O'Bannon v. NCAA*, regarding the commercial use of athlete NIL, Northern District of California Judge Claudia Wilken stated, "[t]he association's current rules demonstrate that, even today, the NCAA does not consistently adhere to a single definition of amateurism."²² The malleable definition of amateurism and the term student-athlete has been used to repress college-athlete rights. Pulitzer Prize-winning author Taylor Branch wrote in *The Atlantic* in 2011:²³

College players were not students at play (which might understate their athletic obligations), nor were they just athletes in college (which might imply they were professionals). That they were high-performance athletes meant they could be forgiven for not meeting the academic standards of their peers; that they were students meant they did not have to be compensated, ever, for anything more than the cost of their studies.²⁴

Simply put, the profitability of college athletics has shifted the emphasis towards "athlete" rather than "student," and amateurism requirements have prevented these athletes from sharing the profits their time and effort generate. So, the NCAA's strategic definitions of amateurism and student-athlete have helped prevent college athletes from taking a piece of the college sports profit pie while maintaining a monopoly on talent and opportunity.²⁵ But is this now changing?

Recent developments have put immense pressure on the NCAA to loosen its grip on college athletes' financial opportunities. First, in 2018, the National Basketball Association (NBA) G League, the NBA's development league, introduced a "Select Contract" available beginning in the 2019-2020

20. *AP Survey: ADs fear sharing revenue with college athletes*, ESPN (Apr. 1, 2021), https://www.espn.com/college-sports/story/_/id/31177331/ap-survey-ads-fear-sharing-revenue-college-athletes.

21. Christine Gough, *National Collegiate Athletic Association (NCAA) revenue by segment 2012-2020*, STATISTA (Mar. 1, 2021), <https://www.statista.com/statistics/219605/ncaa-revenue-breakdown/>.

22. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

23. Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018) <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/>.

24. Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

25. *NCAA approves Name, Image and Likeness (NIL) Policy*, NEXT COLLEGE STUDENT ATHLETE (last visited Feb. 7, 2023), <https://www.ncsasports.org/name-image-likeness>.

season.²⁶ The contracts, made available to elite prospects not yet eligible to play in the NBA, include vast athletic and educational development opportunities and will pay \$125,000 over a five-month season.²⁷ Now, elite college basketball prospects have a choice—earn a salary while competing against top talent in the NBA’s pipeline program, or take the traditional college route while forfeiting pay—and the benefits of the former are clear.

The expansion of the NBA G League to 18-year-old prospects is bound to hurt the NCAA and has indirectly forced its hand. Losing elite talent translates to dips in popularity and, in turn, losses in revenue.²⁸ Further, the G League is also offering college scholarships, which eliminates the advantage of a college degree that the NCAA provides.²⁹ By partnering with Arizona State University (ASU) and Game Plan, a student-athlete development platform, NBA G League players can take classes and earn a degree,³⁰ a benefit that the NCAA harped on and held solely for the benefit of student-athletes competing at their member institutions. Not only does the G League now offer equivalent educational opportunities to that of the NCAA, but “[p]layers may also take courses through ASU’s Global Freshman Academy, which allows students to earn ASU academic credit that can be used once they are enrolled in a degree program or transfer to another university.”³¹ The professional atmosphere, high level coaching and competition, and the expansive and flexible educational benefits offered by the new G League program have provided potential NCAA student-athletes with legitimate options out of high school.

A financial opportunity once restricted to playing professionally overseas is now obtainable in the United States. “Making overseas-level money while maintaining a domestic presence is something the NCAA, as one college assistant coach put it, ‘can’t compete with.’”³² In fact, top basketball prospects Jalen Green and Isaiah Todd have already opted to compete in the G League for a six-figure salary instead of following the traditional college route.³³ Like all profit-hungry organizations, the NCAA, when faced with

26. *NBA G League Introduces Professional Path For Elite Basketball Prospects*, NBA G LEAGUE (Oct. 18, 2018), <https://gleague.nba.com/news/nba-g-league-introduces-professional-path-select-contracts-elite-basketball-prospects/>.

27. *Id.*

28. Aaron Kraus, *Is NCAA basketball in trouble with high schoolers going to the G-League?*, THE SPECTATOR (Oct. 2, 2020), <https://spec.hamilton.edu/is-ncaa-basketball-in-trouble-with-high-schoolers-going-to-the-g-league-6518a6f0efd8>.

29. *Id.*

30. Brian Kotloff, *NBA G League Partners With Game Plan, Arizona State for NBA G League Education Program*, NBA G LEAGUE (Nov. 13, 2017), <https://gleague.nba.com/news/nba-g-league-education-program-game-plan-arizona-state/>.

31. *Id.*

32. Paolo Uggetti, *Jalen Green’s G League Decision Could Be a Critical Blow Against the NCAA*, THE RINGER (Apr. 16, 2020), <https://www.theringer.com/nba/2020/4/16/21224465/jalen-green-nba-g-league-ncaa>.

33. *Id.*

threats to its revenue stream, will ultimately make combative changes, and that's precisely what we are beginning to see.³⁴

To go along with changes and opportunities in the professional sports landscape, individual states have also played a considerable role in bringing the NCAA to the negotiating table. For example, the California "Fair Pay to Play Act," passed in 2019 and set to take effect in 2023, allows student-athletes to profit off their NIL from endorsements without losing them their athletic scholarship or eligibility.³⁵ This law, while presenting a clear conflict, will preclude any rule set by the NCAA.³⁶ And not only has the NCAA worried about the California legislation, but since the passage of 206, nineteen states have passed their own NIL laws.³⁷ Fearing the inevitable state-by-state patchwork that would arise in the absence of a nationwide NIL law, the NCAA had been lobbying Congress.³⁸ In fact, the NCAA spent over \$750,000 "lobbying lawmakers to shape any reforms to the organization's liking."³⁹ But, the lobbying efforts did not result in any legislation by the July 1 artificial deadline, when state laws were set to go into effect.⁴⁰ Therefore, the NCAA was forced to amend its rules, and that is precisely what it did through the interim NIL policy.⁴¹

In response to the pressures of evolving state laws, such as Senate Bill 206 in California, the NCAA Division 1 Board of Directors implemented an interim NIL policy that allows student-athletes across all NCAA divisions to earn compensation for their NIL as of July 1, 2021.⁴² The interim NCAA NIL policy is applicable to all student-athletes competing at NCAA member schools regardless of if their state has already implemented its own NIL law or not.⁴³ If the NCAA declined to change its rules, schools in states with new laws would gain a substantial advantage in regard to recruiting.⁴⁴

While athlete recruiting inequality occurs naturally—some institutions are more attractive due to their resources, history, and potential career opportunities—inequality in terms of financial opportunities for student-athletes presents an immense danger to the integrity of college athletics. For

34. *NCAA approves Name, Image and Likeness (NIL) Policy*, NEXT COLLEGE STUDENT ATHLETE (last visited Feb. 7, 2023), <https://www.ncsasports.org/name-image-likeness>.

35. Cal. S. B. 206 (Cal. 2019).

36. Katie McNerney, *What is NIL? NCAA rules are changing regarding athlete pay. Here's what it means*, THE BOSTON GLOBE, <https://www.bostonglobe.com/2021/06/30/sports/ncaa-nil-rules-change/> (last updated July 2, 2021, 10:57 AM).

37. *Id.*

38. *Id.*

39. *NCAA spent \$750,000 lobbying Congress to curb potential earnings for college athletes*, ASSOCIATED PRESS (Feb. 11, 2020, 2:54 PM), <https://www.marketwatch.com/story/ncaa-spent-750000-lobbying-congress-to-curb-potential-earnings-for-college-athletes-2020-02-11>.

40. McNerney, *supra* note 36.

41. *NCAA approves Name, Image and Likeness (NIL) Policy*, NEXT COLL. STUDENT ATHLETE (last visited Feb. 7, 2023), <https://www.ncsasports.org/name-image-likeness>.

42. *Id.*

43. *Id.*

44. McNerney, *supra* note 36.

example, if some states allow institutions to conduct marketing for their athletes, those schools will attract and obtain most of the top talent in the country. Although the NCAA's policy states that "NIL opportunities may not be used as a recruiting inducement,"⁴⁵ the *New York Times* recently reported⁴⁶ "that the Minnesota's men's basketball coach told an in-state recruit he could make more money as a hometown hero than if he went out of state and that Texas' coach 'played up the presence of the computer manufacturer Dell and the social media company TikTok in or around Austin.'"⁴⁷ The benefits of attending schools with vast marketing potential are clear; student-athlete brand partnerships are likely to be more lucrative in large cities rather than rural communities. Schools that cannot offer their student-athletes options to profit off their NIL will be at a recruiting disadvantage, regardless of whether the NCAA's policy restricts NIL as a recruiting inducement or not. Once talent becomes concentrated in certain geographical regions, the quality of competition amongst schools competing across state lines will become diminished. For example, a state-by-state structure of NIL laws and regulations has the potential to create extremely influential recruiting advantages where athletes will choose schools to attend based on the state allowing NIL payments.⁴⁸ Liberal NIL laws are most attractive to elite athletes who are set to profit the most off of their NIL, and therefore the state-by-state patchwork can create a damaging competitive imbalance.⁴⁹ Lack of quality leads to decreasing viewership; fewer viewers mean decreasing revenue, and schools nor the NCAA will be able to support large athletic programs without the necessary monetary funds. Overall, there is a major concern that new and evolving NIL policies will harm the already hampered competitive balance in college athletics.⁵⁰ "Until reform is enacted, the history of corruption in and prioritization of commercialization of athletics will serve as a foreshadowing of its future."⁵¹

45. *NCAA Name, Image and Likeness Policy: Question and Answer*, NCAA (July 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf.

46. Billy Witz, *The Dynamics of College Sports Are Changing. So Are the Business Prospects.*, THE N.Y. TIMES (June 25, 2021), <https://www.nytimes.com/2021/06/25/sports/ncaabasketball/ncaanil-athletes-endorsements.html>.

47. Andrew Kahn, *More money, more problems: As college athletes cash in on NIL, pitfalls arise*, M LIVE (July 16, 2021, 10:21 AM), <https://www.mlive.com/wolverines/2021/07/more-money-more-problems-as-college-athletes-cash-in-on-nil-pitfalls-arise.html>.

48. Tom Goldman, *A New Era Dawns In College Sports, As The NCAA Scrambles To Keep Up*, NPR (June 28, 2021, 5:01 AM), <https://www.npr.org/2021/06/28/1010129443/a-new-era-dawns-in-college-sports-as-the-ncaa-scrambles-to-keep-up>.

49. *Id.*

50. *AP Survey: Ads concerned NIL will skew competitive balance*, ESPN (Apr. 4, 2021), https://www.espn.com/college-sports/story/_/id/31193360/ap-survey-ads-concerned-nil-skew-competitive-balance.

51. Teresa Parrot, *Profit motives make fixing college sports nearly impossible*, THE WASHINGTON POST (Apr. 5, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/04/05/profit-motives-make-fixing-college-sports-nearly-impossible/>.

PART II: CURRENT LANDSCAPE OF THE NCAA

“The NCAA has been vigorously criticized from the outside forever,”⁵² and the recent developments have only contributed to such criticism. The *NCAA v. Alston* majority held that the rules imposed by the NCAA limiting education related benefits (laptops, study abroad, post-grad scholarship, etc.) were an unreasonable restraint on trade under federal antitrust law.⁵³ The *Alston* holding spotlighted the fact that NCAA amateurism rules cannot be used as a weapon to reallocate monetary benefits from the athletes who are core to the revenue generation in the first place.⁵⁴ But, the Court allowed some questions to remain.⁵⁵ Notably, NCAA member institutions are still left uninformed as to the amount of permissible “educational-related benefits” they could provide their student-athletes without violating amateur status, and in turn, destroying their eligibility.⁵⁶ So, while the Court issued a big blow to the NCAA’s anti-competitive practices, citing federal antitrust violations,⁵⁷ there are still various key issues that colleges, universities, and their athletic departments must consider and act upon.⁵⁸

“The *Alston* plaintiffs alleged that the NCAA’s eligibility rules, which limit the types and amounts of compensation to which student-athletes are entitled, violate Section 1 of the Sherman Antitrust Act.”⁵⁹ Put generally, the Sherman Act combats restrictions on interstate competition that is deemed to be unreasonable.⁶⁰ The Court recognized the market for “athletic services in men’s and women’s Division I basketball and FBS football,”⁶¹ and held that while some restrictions on compensation were permissible under an amateurism versus professional defense, limiting education-related benefits such as “paid internships, tutors, computers, science equipment, musical instruments . . .” was an unreasonable antitrust violation.⁶² Justice Kavanaugh, in his concurring opinion, “. . . noted that the NCAA’s broader rules against pay-for-play likely implicate the same antitrust issues that were discussed in the narrower *Alston* holding, and that just as the NCAA’s

52. Pat Forde, *Explosive Weekend Raises Doubts About Whether the NCAA Can (and Should) Survive*, SPORTS ILLUSTRATED (Aug. 2, 2020), <https://www.si.com/college/2020/08/02/ncaa-doubts-survive-explosive-weekend-power-5-breakaway>.

53. Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141 (2021).

54. Sarah Eberspacher, Martin D. Edel, *Supreme Court Sides with Student-Athletes in NCAA v. Alston, Expands Permissible Types of Compensation*, THE NATIONAL L. REV. (June 21, 2021), <https://www.natlawreview.com/article/national-collegiate-athletic-association-v-alston>.

55. *Id.*

56. *Id.*

57. *Alston*, 141 S. Ct. 2141 (2021).

58. Eberspacher, *supra* note 54.

59. *Id.*

60. *Id.*

61. Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141 (2021).

62. Eberspacher, *supra* note 54.

defense in *Alston* came up short, so too might it be insufficient in defending broader prohibitions on compensation for student athletes.”⁶³

So, what now? First, the NCAA has urged Congress to implement federal NIL law.⁶⁴ Second, the NCAA hopes that federal NIL law would preempt state law and provide a uniform standard that schools follow.⁶⁵ But, this has not happened, and in fact, “[t]here are 28 states with NIL laws already in place and multiple others that are actively pursuing legislation.”⁶⁶ This is a damaging revelation for the NCAA and clearly implicates the competition and integrity issues referenced above. Therefore, the NCAA, in an attempt to stall the imminent harm to its product, college sports, adopted an interim NIL policy.⁶⁷ The new interim policy set out four major points. First, student-athletes can now be compensated for their NIL as long as the NIL activity abides by the law of the state in which the school is located.⁶⁸ Next, student-athletes at schools in states without NIL law can still be compensated for their NIL without violating NCAA rules.⁶⁹ Further, student-athletes can use professional service providers, such as management agencies, lawyers, and marketing agencies, to assist with their NIL activities.⁷⁰ Lastly, the NCAA recommends that student-athletes should report their NIL activities to their school to ensure that they are still abiding by state law as well as school and conference regulations.⁷¹ While the new NIL rule helped curb the immediate competitive shifts that would likely have occurred in its absence, it is not a long-term solution. Without a uniform federal law, states, and the large public universities that they support, will likely continue updating and advancing student-athlete compensation laws to gain competitive advantages.⁷²

PART III: AWAITING UNIFORMITY - ACTION, INACTION, UNCERTAINTY

Currently, NCAA student-athletes can profit from their NIL without losing eligibility to participate in college athletics (amateur) competitions.⁷³

63. *Id.*

64. Ralph D. Russo, *Conferences urge stopgap for NCAA on NIL until federal law*, AP NEWS (June 21, 2021), <https://apnews.com/article/college-sports-business-sports-f39a8ae059041c954bed3708a441b890>.

65. *Id.*

66. Murphy, *supra* note 10.

67. Michelle Brutlag Hosick, *NCAA adopts interim name, image and likeness policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *NCAA's NIL rule change isn't a long-term solution for student-athlete compensation*, U.S. S. FOR KAN. (July 11, 2021), <https://www.moran.senate.gov/public/index.cfm/2021/7/ncaa-s-nil-rule-change-isn-t-a-long-term-solution-for-student-athlete-compensation>.

73. Lauren Withrow, *Money Moves: NCAA NIL Laws Take Effect*, FAN NATION (July 1, 2021), <https://www.si.com/college/northwestern/ncaa/money-moves-ncaa-nil-laws-take-effect>.

“College athletes can now accept money from companies and businesses to execute sponsorships, endorsements, advertisements, product deals, and more. Athletes may also now be acting on sites such as Cameo, where they can sell personalized video messages to fans.”⁷⁴ But, there are still some restrictions.⁷⁵ Further, allowing student-athletes to profit off their NIL does not mean they are sharing in the NCAA’s revenue; they are simply given the intellectual property rights already granted to non-athlete students. College athletes do not earn a salary, but instead, they only have the opportunity to create their own revenue streams through their personal brands as NCAA rules and most state legislation prevent direct payments from schools to athletes and recruits for their NIL rights.⁷⁶ Further, there are state and school prohibitions on gambling, alcohol, or tobacco endorsements, and limitations on competition with and usage of the school’s already existing sponsorships, branding, and logos.⁷⁷ Therefore, given the sudden allowance combined with the restrictions stemming from overlapping NCAA rules and state law, student-athletes must exercise caution when exploiting new financial opportunities.

For athletes hoping to profit off of their NIL, they should gain an understanding of the interim NCAA policy, discover whether their state has a NIL law, inquire into their institution’s NIL policy, employ legal intellectual property protections, acknowledge potential tax implications of any earned income, and consider working with professional representation.⁷⁸ For young adults, some just recent high school graduates, this is a daunting task when expected to balance school, their athletic careers, and new financial opportunities. Overall, student-athletes cannot become blinded by the newfound opportunity, as slip-ups can result in NCAA, school, or state law violations that threaten eligibility and potentially their careers.

To avoid confusion and potential harm to student-athlete careers as a result of ineligibility rulings, federal NIL legislation is needed to combat the imminent uncertainty and risk, but it has not yet come.⁷⁹ According to Mark Emmert, the President of the NCAA, “[the NCAA] need[s] a federal solution that sets the baseline protections for college athletes The patchwork of state laws has left college athletes subject to different sets of standards than

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. W. Drew Kastner, Jordan Kelso, Theresa Loscalzo, Matthew Tamasco, Stephenie Wingyuen Yeung, *Navigating the New NIL Landscape: A Checklist for Athletes Looking to Profit*, JD SUPRA (Sept. 27, 2021), <https://www.jdsupra.com/legalnews/navigating-the-new-nil-landscape-a-5935657/>.

79. Emily Caron, Michael McCann, *NCAA Returns to Swamped Congress Seeking NIL, Antitrust Help*, SPORTICO (Oct. 1, 2021, 10:00 AM), <https://www.sportico.com/leagues/college-sports/2021/ncaa-still-waiting-congress-federal-nil-bill-1234642992/>.

their peers in neighboring states.”⁸⁰ Because the NCAA lacks the power to preclude state law, has not yet challenged state NIL legislation in court, and has been unable to force Congress’s hand, the NIL era begins under murky standards.⁸¹

A. ACTION IN THE FACE OF UNCERTAINTY

However, just because there is uncertainty does not mean there has not been action. A new line of business has quickly emerged—athlete management agencies and consulting firms have begun to grow practices in NIL strategies.⁸² “One sports business expert predicted the NIL space will become a \$100 million industry in the first year alone, with some athletes commanding \$1 million a year or more by the end of 2021. Places like Opendorse and MatchPoint, marketplaces for NIL opportunities, receive a percentage of the deal money when they match a company with a college athlete.”⁸³ But the theme of uncertainty persists. Tim Derdenger, a sports marketing and branding expert and professor at Carnegie Mellon University, said, “[p]eople are trying to figure out what they can and can’t do.”⁸⁴ Given the significant monetary goals of agencies and consultants, athletes must look after themselves in regard to NCAA, conference, and school rules, as well as current and future state and federal legislation.

Acknowledging the eligibility risks that may arise as a result of student-athletes working with third-party marketing agencies, schools have stepped in to provide guidance.⁸⁵ Unlike other states, North Carolina has not introduced NIL law, but Governor Roy Cooper issued Executive Order No. 223, “Postsecondary Educational Institutions’ Responsibilities Regarding Name, Image, and Likeness Compensation of Student-Athletes.”⁸⁶ In response, the University of North Carolina-Chapel Hill created the LAUNCH program to assist in building a personal brand, hired Altius Sports Partners for strategic guidance, is using COMPASS for compliance management help, and will expand the use of INFLCR, a software used to prepare social media channels for marketing opportunities.⁸⁷ North Carolina State University has taken similar action, and Duke created a comprehensive NIL policy with rules and guidelines beyond that required by the NCAA and North Carolina

80. *Id.*

81. *Id.*

82. Christopher J. Brooks, *It’s the “Wild, Wild West” for companies hoping to monetize college athletes*, CBS NEWS (July 30, 2021, 12:21 PM), <https://www.cbsnews.com/news/nil-college-athletes-collegiate-sports-ncaa/>.

83. *Id.*

84. *Id.*

85. James O’Brien III & Francis Pray III, *Navigating the New World of Name-Image-Likeness for Student-Athletes*, JD SUPRA (July 28, 2021), <https://www.jdsupra.com/legalnews/navigating-the-new-world-of-name-image-9939837/>.

86. *Id.*

87. *Id.*

law.⁸⁸ While such policies and rules assist student-athletes in avoiding eligibility violations, an inconsistent nationwide framework poses competitive balance issues. “In an Associate Press survey of 357 Division I athletic directors with 99 participating, nearly 73% said allowing athletes to be compensated for NIL use will decrease the number of schools that have a chance to be competitive in college sports.”⁸⁹

Competitive balance is core to the NCAA’s business model. “According to the NCAA, its rules about the amateur status of the athletes increase the number of college sports and sports teams, help to maintain a competitive balance between teams, and offer consumers an attractive ‘amateur’ alternative to professional sports.”⁹⁰ With the *Alston* Supreme Court holding that limiting educational related benefits was not the least restrictive means to preserving consumer demand for the NCAA amateur sports product, and a violation of the Sherman Antitrust Act,⁹¹ the NCAA now has to strategize to maintain the quality, integrity, and profitability of college athletics. According to Tom McMillen, former Congressman and head of an organization representing athletic directors, “[t]he NCAA is imploding in retreat . . . because of actual and potential litigation, Congressional and state intervention and public antipathy.”⁹²

B. WHAT LED US HERE? AND WHAT NOW?

The NCAA had opportunities to avoid the current situation.⁹³ When Ed O’Bannon filed suit in 2009,⁹⁴ the NCAA could have allowed NIL compensation.⁹⁵ The NCAA did not present legal challenges to NIL laws in California in Florida—a challenge that could have helped retain power over college-athlete compensation.⁹⁶ Further, the NCAA could have lobbied Congress earlier, rather than after state action, in order to get overarching federal legislation.⁹⁷ “But the NCAA did not do those things, and Emmert boldly performed one of the biggest handoffs in college athletics’ history”

88. *Id.*

89. *AP Survey: Ads concerned NIL will skew competitive balance*, ESPN (Apr. 4, 2021), https://www.espn.com/college-sports/story/_/id/31193360/ap-survey-ads-concerned-nil-skew-competitive-balance.

90. Scott Lemieux, *The NCAA Supreme Court ruling heralds the end of the era of unpaid student athletes*, NBC NEWS (June 21, 2021, 7:39 PM), <https://www.nbcnews.com/think/opinion/ncaa-supreme-court-ruling-heralds-end-era-unpaid-student-athletes-nca-1271721>.

91. *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141 (2021).

92. Dennis Dodd, *With the NCAA’s authority quickly eroding, significant change is ahead for major college sports*, CBS SPORTS (July 18, 2021, 1:11 PM), <https://www.cbssports.com/college-football/news/with-the-ncaas-authority-quickly-eroding-significant-change-is-ahead-for-major-college-sports/>.

93. *Id.*

94. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1055 (9th Cir. 2015).

95. Dodd, *supra* note 92.

96. *Id.*

97. *Id.*

when he gave control to schools, conferences, and states.⁹⁸ And now, “Regulation could become a competition.”⁹⁹

According to Southeastern Conference Commissioner Greg Sankey, “Knowing the competition within my 11 states, I can foresee quickly the other 10 one-upping each other. And I think that’s a problem for fair and equitable competition.”¹⁰⁰ So, how can this problem be avoided? The authorities are split. The Mississippi Vice Chancellor for Intercollegiate Athletics, Kevin Carter, “. . . wrote that Ole Miss supported having an independent organization provide national oversight of NIL issues”¹⁰¹ The Chairwoman of the Consumer Protection and Commerce Subcommittee, Jan Schakowsky, during a recent hearing on NIL with testimony from the NCAA, Players Association, and others, stated that “[f]or years, Congress was told by the NCAA and others to let them govern themselves However, in the wake of the proliferation of NIL laws in states around the country, and not to mention also Supreme Court cases, today they are coming asking us to intervene.”¹⁰² Further, Ramogi Huma, the National College Players Association executive director and former UCLA football player, noted that while there may not be a “need” for congressional action on NIL since students have already been granted their sought after rights, federal legislation should still be implemented to provide oversight.¹⁰³ Baylor University president Linda Livingstone testified that the state law structure is confusing and expressed similar notions to that of Ramogi Huma, suggesting that a uniform national standard would be helpful in addressing any arising challenges posed by a state-by-state framework.¹⁰⁴ And from an athlete’s perspective, Cameron March, a member of the Washington State University women’s golf team, expressed concerns about the focus on male football and basketball players.¹⁰⁵ She insisted that “Congress should focus on how NIL might impact less visible players.”¹⁰⁶

As legislation has yet to come from Congress, states are passing their own laws.¹⁰⁷ “Who is to blame? The states that have done nothing deserve

98. *Id.*

99. *Id.*

100. Aaron Beard, *SEC’s Sankey: Federal NIL Law needed for fair competition*, ASSOCIATED PRESS (July 2, 2020, 6:53 AM), <https://www.tennessean.com/story/sports/college/2020/07/02/greg-sankey-federal-nil-law-needed-fair-competition/5362645002/>.

101. *Id.*

102. Maria Carrasco, *Congress Weighs In on College Athletes Leveraging Their Brand*, INSIDE HIGHER ED (Oct. 1, 2021), <https://www.insidehighered.com/news/2021/10/01/congress-holds-hearing-creating-federal-nil-law>.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Darren Heitner, *Congress Is Embarrassed For Not Passing An NIL Law, As It Continues To Do Nothing*, ABOVE THE LAW (June 10, 2021, 3:15 PM), <https://abovethelaw.com/2021/06/congress-is-embarrassed-for-not-passing-an-nil-law-as-it-continues-to-do-nothing/>.

some blame. Congress deserves some blame. The NCAA deserves the most blame. It has proposed NIL legislation for many months and has done absolutely nothing with it.”¹⁰⁸ While there are differing opinions, it is clear that one authority has the power to preempt all others, and that is Congress. Therefore, Congress must adopt considerations from the NCAA, schools, conferences, athletes, and others in order to present a uniform framework that can make college-athlete compensation a universal benefit, rather than a never-ending problem.

PART IV: PROPOSALS – RESPECTING RIGHTS, MAINTAINING INTEGRITY, PRODUCING BENEFITS.

A. RESPECTING AND RECOGNIZING THE RIGHTS OF STUDENT-ATHLETES

In June of 2021, Maria Cantwell, the Chair of the Senate Committee on Commerce, Science, and Transportation, held a hearing for student-athlete voices.¹⁰⁹ At that hearing, Christina Chenault, a former UCLA track and field athlete, emphasized the importance of having universally applicable federal law.¹¹⁰ Chenault explained that the institutions cannot be trusted to consider student-athlete interests if they are given autonomy, and “[w]hen that happens, especially in a system where athletes do not have the power within this system, the athletes are always going to be put on the backburner, or put at a state of disadvantage.”¹¹¹ Further, an ACC softball player writing for Sports Illustrated urged Congress to heavily consider nonrevenue sports when drafting its federal NIL bill.¹¹² While student-athletes competing in nonrevenue sports such as softball, soccer, golf, track, and swim makeup approximately 80% of the NCAA student-athlete population, the revenue to fund those sports comes from the two most popular and profitable, football and basketball.¹¹³ “[Nonrevenue sport student-athletes] need NIL legislation that will preserve the revenue-sharing model that uses the popularity of football and basketball to fund broad athletic programs on campuses of all sizes.”¹¹⁴ And lastly, addressing the question of a need for a uniform national

108. *Id.*

109. Press Release, U.S. Senate Committee on Commerce, Science, & Transportation, Chair Cantwell, Congress Cannot Pass an NIL Law That Just Ignores the Rights of Students, (June 17, 2021), *available at* <https://www.commerce.senate.gov/2021/6/chair-cantwell-congress-cannot-pass-an-nil-law-that-just-ignores-the-rights-of-students>.

110. *Id.*

111. *Id.*

112. Celene Funke, *To Get NIL Right, Congress Must Protect Nonrevenue Sports*, SPORTS ILLUSTRATED (Mar. 11, 2021), <https://www.si.com/college/2021/03/11/ncaa-name-image-likeness-athletes-acc>.

113. *Id.*

114. *Id.*

standard, Ramogi Huma took a somewhat different approach.¹¹⁵ Huma explained that while there is room for uniform federal legislation, it is not as much of a need as some experts argue.¹¹⁶ “The need was the fact that the NCAA was illegally prohibiting college athletes from these opportunities. That need has now been met through the Supreme Court and various state laws.”¹¹⁷

Although uniformity may not be a need, as Huma explains, it can certainly provide benefits.¹¹⁸ While the effects are yet to be seen, it is plausible that a lack of federal uniformity can harm the competitive balance across institutions, damage the revenue-sharing model between highly profitable sports and those in need of funding, and subject some student-athletes to restrictions that they would not be hampered by in other states and at other institutions. But overall, college athletes are not as much concerned with uniformity as they are with their individual rights; the athletes will choose to attend a school that provides them with the greatest educational, athletic, and financial opportunities, with or without a universally applicable federal NIL law. And as the core component of the NCAA’s business model, athlete priorities should be respected, or at least given a voice. But that is not what has happened.

When the Senate Committee on Commerce, Science, and Transportation met in June 2021, the athletes were not invited.¹¹⁹ Instead, while many senators care genuinely about NCAA reform and have been working to achieve bipartisan legislation, the questions and concerns are focused on the longevity of the NCAA as an institution.¹²⁰ The focus has always been on the NCAA, rather than the athletes governed by the institution.¹²¹ NIL legislation is about an athlete’s property right in their NIL. When the debate is diverted to the subject of maintaining the prosperity of the institutions governing college sports, there is a clear neglect of who and what really contributes to the product. Put simply: the NCAA is nothing without its athletes. Therefore, Congress should pass a NIL law that allows for broad exploitation of an athlete’s NIL. In other words, there should be no restrictions on an athlete’s ability to profit off the intellectual property that everyone else in society is granted freely. While the NCAA argued in *Alston* that “because amateurism is the characteristic that sets the NCAA apart from others in the marketplace

115. Liz Clarke, *Q & A with Ramogi Huma: Why Congress should be addressing way more than NIL*, THE WASH. POST, (Oct. 6, 2021), <https://www.washingtonpost.com/sports/2021/10/06/name-image-likeness-ramogi-huma-college-athletes/>.

116. *Id.*

117. *Id.*

118. Funke, *supra* note 112.

119. Sally Jenkins, *The college sports debate comes to Capitol Hill, athletes not invited*, THE WASH. POST (June 8, 2021, 1:12 PM), <https://www.washingtonpost.com/sports/2021/06/08/congress-ncaa-nil-senate-commerce-hearing/>.

120. *Id.*

121. *Id.*

of sports entertainment, the organization should get to decide how to define the line between amateurs and professionals.”¹²² Plaintiff’s attorney Jeffrey Kessler argued convincingly that “[j]ust like nothing bad happened after the O’Bannon case they lost. Nothing bad happened after the Board of Regents case they lost. Nothing bad happened after the *NCAA v. Law* case that they lost. They always warn, the NCAA, that this will be the thing that ruins college sports. And what we find instead is that when they’re forced to comply with the law it actually helps college sports.”¹²³ Overall, protecting and enforcing the rights of college athletes has only helped the NCAA in the past; therefore, Congress should continue that trend in federal legislation.

Between state law pushes and the *Alston* Supreme Court decision, the NCAA has been presented with the task of managing the new structure of college-athlete compensation. Not only is the NCAA pressured to share its profits with those who contribute to the product, but they are also putting those profits towards damage control.¹²⁴ In fact, just this year, the NCAA has spent \$180,000 on lobbying.¹²⁵ This is \$60,000 more than the same period last year.¹²⁶ Further, the Power Five conferences, which include the Big Ten, Big 12, PAC-12, SEC, and ACC, have also spent big sums in lobbying efforts.¹²⁷ Specifically, the Power Five conferences have spent \$900,000 lobbying for new legislation relating to the “modernizing” of college athletics, according to federal findings.¹²⁸ Clearly, the NCAA is fearful that broad rights allowing college-athlete NIL compensation can lead to a decline in the integrity of college sports and, in turn, their product.

But that is not the only concern. “Among the industry’s top priorities: a legal shield from retroactive lawsuits filed as a result of actions that violated whatever legislation Congress might pass before it is enacted.”¹²⁹ Not only is the NCAA fearful about its loosening grip in the future, but it is also forced to reflect on potential law violations committed in the past.¹³⁰ While the core holding of *Alston* was that the NCAA could not place restrictions on in kind education-related benefits for its athletes,¹³¹ “. . . the case also created ‘an

122. Dan Murphy, *Supreme Court questions validity of amateurism in NCAA’s business model*, ESPN (Mar. 31, 2021), https://www.espn.com/college-sports/story/_/id/31172473/supreme-court-questions-validity-amateurism-ncaa-business-model.

123. *Id.*

124. Hailey Fuchs, *Major college sports are under siege and they want K Street to save them*, POLITICO (Sept. 14, 2021, 4:30 AM), <https://www.politico.com/news/2021/09/14/ncaa-college-sports-athletes-511700>.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Hailey Fuchs, *Major college sports are under siege and they want K Street to save them*, POLITICO, (Sept. 14, 2021, 4:30am), <https://www.politico.com/news/2021/09/14/ncaa-college-sports-athletes-511700>.

131. Nat’l Collegiate Athletic Ass’n v. *Alston*, 141 S. Ct. 2141 (2021).

open invitation and in some ways a roadmap to future plaintiffs to bring antitrust suits against the NCAA,' said Gabe Feldman, an expert in sports law at Tulane University."¹³² That is why the NCAA adopted the interim NIL policy,¹³³ but that does not mean they are in the clear.

While the NCAA has somewhat alleviated its restrictions on domestic student-athletes, international students are noticeably left out of the liberalized policy.¹³⁴ International student-athletes, those who are not U.S. citizens nor lawful permanent residents, are posed with different considerations than those of their American peers.¹³⁵ To avoid violations of their visa status, international students must be mindful of the distinction between passive income and work for pay.¹³⁶ "For example, appearing in a scripted advertisement probably is work for pay, whereas the use of competition film or photos in subsequent advertising probably is passive income."¹³⁷ The distinction is important, and the consequences for violations are drastic.¹³⁸ "If an F-1 student violates status by engaging in any amount of unlawful employment, the DSO is required by law to terminate the student's SEVIS record with the Student and Exchange Visitor Program, U.S. Immigration and Customs Enforcement (SEVP, ICE, and DHS, respectively), which terminates the student's F-1 visa status."¹³⁹ Clearly, immigration status violations by international student-athletes can potentially have life-altering effects, and schools should certainly step in to help avoid such violations.¹⁴⁰

Although employing the assistance of educational institutions can help avoid problems, some experts view the issue through the lens of unfairness rather than a need to exercise caution. Darren Heitner, a lawyer, professor, and NIL expert, according to *USA Today*,¹⁴¹ recently touched upon the unfairness in a recent Twitter post.¹⁴² According to Heitner, "[one] big reason why Congress should get involved in #NIL: International students' rights.

132. Fuchs, *supra* note 124.

133. *Id.*

134. Leigh Cole, Adam Maldonado, *International Student-Athlete Visas Potentially At Risk Due To New NCAA NIL Rules*, JD SUPRA (Sept. 2, 2021), <https://www.jdsupra.com/legalnews/international-student-athlete-visas-4199988/>.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Leigh Cole & Adam Maldonado, *International Student-Athlete Visas Potentially At Risk Due To New NCAA NIL Rules*, JD SUPRA (Sept. 2, 2021), <https://www.jdsupra.com/legalnews/international-student-athlete-visas-4199988/>.

140. *Id.*

141. Dan Wolken, *Opinion: By paying players to sell tickets, college hoops tournament is expanding NIL possibilities*, USA TODAY (Oct. 7, 2021), <https://www.usatoday.com/story/sports/college/columnist/dan-wolken/2021/10/07/how-one-college-basketball-tournament-expanding-nil-possibilities/6037233001/>.

142. Darren Heitner (@DarrenHeitner), TWITTER (Nov. 15, 2021, 11:44 AM), <https://twitter.com/darrenheitner/status/1460287695486439436?s=21>.

It's unfair that thousands of college athletes on F-1 visas are prevented from earning money, fearing that they will be deported based on a violation of federal law. This needs to be changed."¹⁴³ Recognizing the rights of student-athletes means *all* student-athletes. Therefore, in the interest of complete fairness and uniformity, Congress's future NIL legislation must also touch upon federal immigration law.

B. AVOIDING FUTURE CHALLENGES

First reported in November 2021, the NCAA has made itself responsible for all legal fees stemming from the *Alston* litigation after significant pushback from the conferences that were originally supposed to pay 90%.¹⁴⁴ And the fees aren't small; according to sources, the full tab run up by the NCAA was \$37.9 million.¹⁴⁵ Responding to the report, Darren Heitner said passionately: "[y]ou know what would have been cool? For the NCAA to have given all of that money to college athletes instead of paying lawyers to fight college athletes."¹⁴⁶ To avoid such criticism and monetary waste, the NCAA must expand its own NIL rules beyond an interim policy, as well as continue to lobby Congress on unselfish terms.

The voice and power of the student-athlete have been amplified in the development and wake of the Supreme Court *Alston* case. During the 2021 NCAA Men's College Basketball Tournament, better known as "March Madness," numerous players tweeted and wore t-shirts with the hashtag "#NotNCAAProperty."¹⁴⁷ "Athletes and their advocates argue that they risk injury to help generate huge sums for their universities, all while under stricter limits than other college students."¹⁴⁸ Not only do student-athletes feel the power shifting in their favor, but public opinion has also contributed to the momentum.¹⁴⁹ "Between 2013 and 2017 the share of Americans who said scholarships were sufficient compensation for college athletes dropped from 71% to 60%."¹⁵⁰ Further, two years later, in 2019, 60% said student-athletes should have the right to profit from their NIL.¹⁵¹ And in 2020, only 25% were in opposition to the topic of student-athlete NIL rights.¹⁵²

143. *Id.*

144. Bryan Fischer, (@BryanDFischer), TWITTER (Nov. 15, 2021, 2:43 PM), <https://twitter.com/bryandfischer/status/1460332578276216832?s=10>.

145. *Id.*

146. Darren Heitner, (@DarrenHeitner), TWITTER (Nov. 15, 2021, 4:02 PM), <https://twitter.com/DarrenHeitner/status/1460352410111680521>.

147. Rachel Bachman, Laine Higgins, *NCAA Faces Showdown Over Player Compensation—and Future of College Sports*, THE WALL ST. J. (Mar. 29, 2021), <https://www.wsj.com/articles/ncaa-faces-showdown-over-player-compensationand-future-of-college-sports-11617032979>.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

While there is a clear argument founded simply on a student-athletes right to profit off their NIL just like any other student at the school, other forces have also driven the change in public opinion.¹⁵³ College-athletic revenues have skyrocketed as a result of the increasing value of live sports broadcasts, the risk of long-term damage stemming from concussions is extremely apparent, and “[i]ncreased attention on racial-justice issues emphasized the poor optics of restricting the earnings of largely Black football and men’s basketball players while mostly white head coaches take home, in many cases, their respective state’s highest public salary.”¹⁵⁴

Reacting to increased scrutiny, and therefore increased risk of future litigation regarding its rules, the NCAA Constitution Committee met in early November 2021 to discuss a draft for a new constitution.¹⁵⁵ While the NCAA claims the convention is an effort to “rethink” college athletics in a modern world, it can also be viewed as an attempt to shield itself from future and further legal trouble in the wake of *Alston*.¹⁵⁶ But, after reading the text of the new draft, it doesn’t seem like the NCAA is trying to avoid further legal scrutiny, according to some experts.¹⁵⁷ The concept of amateurism, which prohibits pay for play, was mentioned second in the draft’s principles, right behind “the primacy of the academic experience.”¹⁵⁸ “It’s a bold move for the NCAA to put amateurism in writing because of the *Alston* decision, which found not only that education-related restrictions violated antitrust law, but also that other compensation limits could be illegal, too. ‘It’s like playing chicken with the courts,’” said Boise State law professor Sam Ehrlich.¹⁵⁹ While *Alston* only held that restricting education-related benefits was an illegal restraint of trade under federal antitrust law,¹⁶⁰ future challenges can certainly go beyond just education-related benefits, such as the “pay for play” mentioned in the new draft constitution.

Not only is the “pay for play,” amateurism business model ripe for challenges, but the National Labor Relations Board recently added to the list of NCAA language and policy that can soon be challenged.¹⁶¹ Specifically, the “National Labor Relations Board (NLRB) General Counsel Jennifer

153. Rachel Bachman, Laine Higgins, *NCAA Faces Showdown Over Player Compensation—and Future of College Sports*, THE WALL ST. J. (Mar. 29, 2021), <https://www.wsj.com/articles/ncaa-faces-showdown-over-player-compensationand-future-of-college-sports-11617032979>.

154. *Id.*

155. Amanda Christovich, *NCAA Constitutional Convention: Real Reform of Legal Cover*, FRONT OFFICE SPORTS (Nov. 15, 2021), <https://frontofficesports.com/ncaa-constitutional-convention-real-reform-or-legal-cover/>.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. Nat’l Collegiate Athletic Ass’n v. *Alston*, 141 S. Ct. 2165 (2021).

161. *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, NLRB (Sept. 29, 2021), <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of>.

Abruzzo issued a memorandum to all Field offices providing updated guidance regarding her position that certain Players at Academic Institutions (sometimes referred to as student athletes), are employees under the National Labor Relations Act, and, as such, are afforded all statutory protections.¹⁶² The term student-athlete was created by the NCAA as a way to avoid providing athletes with compensation benefits, effectively classifying them as amateur athletes rather than employees.¹⁶³ But now, the NLRB memo is a clear attack on that classification. Therefore, classifying the athletes as student-athletes rather than employees can open yet another door for plaintiffs to challenge the NCAA's model, and that's exactly what's happening. "The NCAA is currently a defendant in *Johnson v. NCAA*, which centers on whether the players contend they are employees under both state law and the Fair Labor Standards Act, a federal law that guarantees minimum wage and overtime pay."¹⁶⁴ The constitution clearly ignores the NLRB position by consistently referring to student-athletes and emphasizing the long standing point made by the NCAA that they cannot be compensated by their school in connection with participation in their respective sport.¹⁶⁵

While the NCAA appeared to stay strong on amateurism, pay for play, and the student-athlete classification, it seems as if they conceded control over NIL.¹⁶⁶ "The draft asks that every division, conference, and school write and publish their own regulations."¹⁶⁷ While it is unclear what this means exactly, divisions, conferences, schools, and even the NCAA can still see lawsuits regarding their NIL policy—this looks like a hands-off way to legislate NIL with the hope of preventing further lawsuits.¹⁶⁸ But overall, this NIL policy in the draft constitution shows that maybe the NCAA is acknowledging warnings set forth in *Alston*, specifically that schools—competitors for college athletes—should have more flexibility in how they decide to reward the athletes.¹⁶⁹

Further, the decentralized NCAA governance model advocated for in the draft constitution, set to be ratified in January 2022, is consistent with one of Justice Gorsuch's assertions in *Alston*.¹⁷⁰ Gorsuch stated that individual conferences "remain free to impose whatever rules they choose."¹⁷¹ While the Sherman Antitrust Act states that competing businesses are prohibited from conspiring in unreasonable ways, allowing individual conferences to

162. *Id.*

163. Christovich, *supra* note 155.

164. Michael McCann, *NCAA Draft Constitution Heeds Alston's Antitrust Warnings*, SPORTICO (Nov. 9, 2021), <https://www.sportico.com/law/analysis/2021/ncaa-constitution-1234646189/>.

165. *Id.*

166. Christovich, *supra* note 155.

167. *Id.*

168. *Id.*

169. McCann, *supra* note 164.

170. *Id.*

171. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2144 (2021).

choose their own rules is permissible because “[a]n individual conference that sets its own rules is not conspiring—it is acting by itself.”¹⁷² Although the decentralized governance model may help the NCAA convince the courts that it doesn’t coerce member institutions into limiting the opportunities it provides for its athletes, potential legal concerns still exist.¹⁷³ For example, the recent development by the ACC, Big Ten, and Pac-12 to align their schedules and restrict other scheduling could bring antitrust challenges because of the competition limitations it could place among media and broadcast companies seeking to sponsor games in the conferences.¹⁷⁴

Overall, the hands-off approach to NIL can certainly alleviate some of the NCAA’s legal concerns, but the persistent “amateur” classification of its athletes can be detrimental in a climate of progressive labor laws and regulations. As we saw in *Alston*, all it takes is one case, one ruling, to change the structure of college sports. Therefore, while the NCAA must pay for its oppressive past, it also must allow for a future of liberalized student-athlete empowerment.

CONCLUSION

It is undeniable – the NCAA and college sports landscape is changing. “I don’t know about the word ‘transformational,’ but I think it represents pretty dramatic change in a number of different areas,”¹⁷⁵ said Robert Gates, former defense secretary, and former Texas A&M president, who presented the proposal prepared by a committee of conference commissioners, athletic directors, university presidents, and athletes. While the NCAA has opened the door for NIL opportunities since last July, they are still looking to forbid schools from making direct payments to players.¹⁷⁶ Because of this, Jordan Bohannon, a men’s basketball player at the University of Iowa, said the limits on direct payments made the new proposal inadequate.¹⁷⁷ Further, Ramogi Huma said that the new proposal “amounted to ‘more of the same from the N.C.A.A.’ and that it would spark ‘more of the same from us – pursuing governmental action to fight for justice.’”¹⁷⁸ This enthusiasm for justice, combined with the recent NLRB memo expressing the belief that some student-athletes are “employees,”¹⁷⁹ will force the NCAA to give up its

172. McCann, *supra* note 164.

173. *Id.*

174. *Id.*

175. Alan Blinder, *How College Sports May Change Under Proposed N.C.A.A. Rule Revisions*, THE N. Y. TIMES (Nov. 15, 2021), <https://www.nytimes.com/2021/11/15/sports/ncaafball/ncaa-constitution.html>.

176. *Id.*

177. *Id.*

178. *Id.*

179. *NLRB General Counsel Memo Announces Initiative to Treat College Athletes as Employees*, MCGUIRE WOODS (Oct. 7, 2021), <https://www.mcguirewoods.com/client-resources/Alerts/2021/10/nlrb-general-counsel-memo-college-athletes-employees>.

stronghold. Growing classes of plaintiffs, changing public opinion, NLRB support, and the new media spotlight simply gives the NCAA no choice.

While unfair labor practice lawsuits to enhance athlete rights may extend years into the future,¹⁸⁰ giving student-athletes “employee” classification in the present may have other impactful consequences.¹⁸¹ Specifically, this classification can affect federal financial aid eligibility, international immigration law and employment regulations, and Title IX obligations.¹⁸² Given the potential harms to the NCAA’s business model, an influx of federal labor law complaints, and uncertainty faced by student-athletes, Congress is the only entity that has the ability to effectively lead college sports into this new era.

With athletes calling the new NCAA constitution proposal “inadequate,”¹⁸³ the NCAA refusing to amend its limitations on pay-for-play, and schools left in limbo on how to legally craft their policies in order to most effectively attract top educational and athletic talent, there are simply too many opposing sides to come up with a unified solution. However, Congress has the power to implement federal law by which the players and governing bodies must abide. Therefore, a decades-long, complex problem may, in fact, have a simple, un-creative solution: federal legislation.

*Daniel Erber**

180. *Id.*

181. *Id.*

182. *Id.*

183. Blinder, *supra* note 175.

* J.D. Candidate 2023, Brooklyn Law School; B.A. 2020, University of Michigan. Thank you to all members of the Brooklyn Journal of Corporate, Financial & Commercial Law for your support and assistance throughout the writing and publication process. Thank you to my family and friends for your support during my law school journey. Lastly, thank you to my peers at Brooklyn Law School, and I wish you all great success in your future endeavors.