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## Put Your Mouth where the Money is: The Need for Federal Regulation of NIL rights in College Athletics

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# Put your Mouth where the Money is: The Need for Federal Regulation of NIL rights in College Athletics

*Michael Thompson\**

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## INTRODUCTION

The National Collegiate Athletic Association (NCAA), a \$1 billion a year industry, has hidden behind the guise of “amateurism” for over 100 years to prevent student-athletes from monetizing their own names,

images, likenesses and performance. Historically, compensation to student-athletes was limited to academic scholarships.<sup>1</sup> On June 30, 2021, the landscape of college athletics was forever changed. Governance bodies for Divisions I, II, and III adopted a uniform interim policy which suspended the NCAA name, image, and likeness (NIL) rules for all current and incoming student-athletes.<sup>2</sup> Now, student-athletes across the country can monetize their own name, image, and likeness while retaining their athletic eligibility.<sup>3</sup> Seventeen states<sup>4</sup> have NIL laws that went into effect immediately following the removal of NIL restrictions, and eleven states passed legislation that will go into effect over the next four years.<sup>5</sup> With multiple states passing their own versions of these NIL laws, there is inconsistency among the States. . This inconsistency creates a lack of equal economic opportunity for student athletes. This comment will argue that federal regulation of NIL rights is the best way to create a uniform system that will provide transparency and consistency to student-athletes traversing this new landscape of college athletics.

Part I of this comment will examine the history of the NCAA and the history of NIL rights. Part II of this comment will discuss the NCAA's interim policy on NIL rights and legislation passed by various states. Part III of this comment will address proposed federal legislation. Part IV of this comment will address the ramifications and benefits of regulating NIL rights on a national level. Finally, Part V of this comment will address the best approach moving forward with a federal statute.

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1. *See Scholarships*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/sports/2014/10/6/scholarships.aspx> [<https://perma.cc/R5MK-WJ4S>].

2. *NCAA adopts interim name, image, and likeness policy*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [<https://perma.cc/W8NG-FHUR>] (June 30, 2021).

3. *Id.*

4. *Name, Image, and Likeness: Five Months into the NCAA's New Frontier*, BLANK ROME LLP. (Dec. 2, 2021), <https://www.jdsupra.com/legalnews/name-image-and-likeness-five-months-1219411/> [<https://perma.cc/8WND-PEHY>].

5. *Id.*

## I. THE HISTORY OF NIL RIGHTS IN COLLEGE ATHLETICS

### A. *History of the National Collegiate Athletic Association*

The NCAA is a private, nonprofit association of approximately 1,098 members (colleges and universities) and 102 athletic conferences.<sup>6</sup> It is a member-led organization dedicated to the well-being and lifelong success of college athletes.<sup>7</sup> 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.”<sup>8</sup> To remain a member of the NCAA, the members must follow the NCAA Constitution<sup>9</sup> which has bylaws that are voted on by the members.<sup>10</sup> While members must abide by these rules, they do not carry the force of law.<sup>11</sup> Because of this, the NCAA cannot prevent or preempt the laws passed by the states regarding the regulation of NIL rights.<sup>12</sup>

The NCAA has historically prevented student-athletes from monetizing their name, image, and likeness in an effort to “protect student-athletes from exploitation by professional and commercial enterprises.”<sup>13</sup> The NCAA justified this stance by claiming to support the concept of amateurism by (1) encouraging competitiveness in college sports; (2) promoting education by integrating academic and athletic goals; (3)

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6. *What is the NCAA?*, NAT’L COLLEGIATE ATHLETIC ASS’N (Feb. 10, 2021), <https://www.ncaa.org/sports/2021/2/10/about-resources-media-center-ncaa-101-what-ncaa.aspx> [<https://perma.cc/2GK2-H4HD>].

7. *Id.*

8. *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).

9. *Bd. of Regents v. Nat’l Collegiate Athletic Ass’n*, 546 F. Supp. 1276, 1282 (W.D. Okla. 1982).

10. *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”).

11. *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.”).

12. Michael D. Fasciale., *The Patchwork Problem: A Need for National Uniformity to Ensure an Equitable Playing Field for Student-Athletes’ Name, Image, and Likeness Compensation* (Jan. 21, 2022), <https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1821&context=shlr> [<https://perma.cc/S5JQ-YU7L>].

13. *Id.*

incentivizing Division I schools to remain a part of the NCAA; and (4) increasing consumer demand.<sup>14</sup> Many advocates for student-athletes have opposed this justification by stating that “absolute power tends to corrupt absolutely, and the NCAA’s [power] has been absolute for half a century.”<sup>15</sup>

There have been multiple examples of student-athletes showing their disapproval of NCAA policy. For example, in 1987, Oklahoma linebacker Brian Bosworth wore a shirt with the acronym “NCAA” across the top. The shirt read, “National Communists Against Athletes”.<sup>16</sup> Additionally, several players participating in the 2021 NCAA basketball tournament wore shirts that read “#NotNCAAProperty” to “underscore their concern that the NCAA too often treats college athletes like dollar signs rather than people”.<sup>17</sup>

### B. History of NIL rights

In the United States, name, image, and likeness (NIL) rights are grouped under the right of publicity which serves to “prevent the unauthorized commercial use of an individual’s name, likeness, or other recognizable aspects of one’s persona. It gives an individual the exclusive right to license the use of their identity for commercial promotion.”<sup>18</sup> In the United States, the right of publicity is largely protected by state common or statutory law.<sup>19</sup>

Before the recent change to NCAA bylaws regarding NIL, the NCAA had a policy<sup>20</sup> which prevented student-athletes from accepting

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14. See Michael McCann, *Name Image and Likeness: A Guide on College Athlete Compensation*, SPORTICO (Nov. 11, 2020), <https://www.sportico.com/feature/collegethletes-paid-name-image-likeness-deals-nils-1234616329/> [<https://perma.cc/9WUM-ZF23>].

15. Ivan Solotaroff, *The Athlete Advocate*, SB NATION (Apr. 23, 2014), <https://www.sbnation.com/longform/2014/4/23/5640402/the-athlete-advocate-ramogihuma> [<https://perma.cc/U2RR-MPDB>].

16. L.A. TIMES ARCHIVE., <https://www.latimes.com/archives/la-xpm-1987-01-06-sp-2558-story.html> [<https://perma.cc/2BST-23ZW>].

17. Cindy Boren, *Prominent NCAA Tournament Players Launch ‘#NotNCAAProperty’ Protest as March Madness Begins*, THE WASHINGTON POST, <https://www.washingtonpost.com/sports/2021/03/18/not-ncaa-property/> [<https://perma.cc/Z9LE-96CK>].

18. *Publicity*, CORNELL LAW SCH. (Feb. 22, 2022) <https://www.law.cornell.edu/wex/publicity> [<https://perma.cc/DS5K-WVB2>].

19. *Id.*

20. Kevin Skiver, *NIL New Guidelines, Explained: NCAA Walks Back Regulations to Protect Incoming College Athletes from Boosters*, THE SPORTING

compensation for their performance in any manner. The primary reason for this was to protect the amateur status of the student-athlete. The NCAA argued that allowing student-athletes to profit from their name, image, and likeness would repel fans.<sup>21</sup> The “principle of amateurism” and “the slippery slope principle”<sup>22</sup> of the NCAA state that “student-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.”<sup>23</sup> The NCAA has attempted to use this amateurism principle to “retain a clear line of demarcation between intercollegiate athletics and professional sports” for college athletics to remain “an integral part of the educational program.”<sup>24</sup>

The courts initially went along with the NCAA’s definition of amateurism. For example, in *Jones v. NCAA* 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.<sup>25</sup> Fifteen years later, in *Gaines v. NCAA*, the court held that the “public interest is promoted by preserving amateurism.”<sup>26</sup> Also, 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

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NEWS (May 9, 2022), <https://www.sportingnews.com/us/ncaa-division-i-fbs/news/ncaa-nil-new-guidelines-college-athletes-boosters/trkqvs5a9nwsdv1bf12lef8w> [<https://perma.cc/4C58-Y3CM>].

21. McCann, *supra* note 14.

22. 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](https://www.espn.com/college-sports/story/_/id/29083196/the-ncaa-again-put-athletes-first-nil-debate) [<https://perma.cc/MAJ9-8C6C>] (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/> [<https://perma.cc/XBE7-F7KB>] (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”).

23. 2020–2021 DIVISION I MANUAL, *supra* note 15, at 3.

24. *Id.* § 1.3.1, at 1.

25. 392 F. Supp. 295, 304 (D. Mass. 1975).

26. 746 F. Supp. 738, 747 (M.D. Tenn. 1990).

academics.<sup>27</sup> However, recent litigation has challenged this vague concept of amateurism.<sup>28</sup>

In 2008, Ed O'Bannon, a former All-American basketball player at UCLA, sued the NCAA for the use of his likeness in a videogame. O'Bannon was depicted in a college basketball video game produced by Electronic Arts (EA).<sup>29</sup> O'Bannon never consented to the use of his likeness in the video game, and he had not been compensated for it. O'Bannon sued the NCAA and the Collegiate Licensing Company (CLC) claiming that the NCAA's amateurism rules, insofar as they prevented student-athletes from being compensated for the use of their name, image, and likeness, were an illegal restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1.<sup>30</sup>

At the same time, Sam Keller, a former quarterback for the Arizona State University and University of Nebraska football teams, filed a separate suit against the NCAA and the CLC. Keller also alleged that EA had impermissibly used student-athletes' names, images, and likenesses in video games and that that the NCAA as well as the CLC had wrongfully turned a blind eye to EA's misappropriation.<sup>31</sup> The Court held that the NCAA rules barring compensation to student-athletes for the use of their names, images, and likenesses were subject to antitrust laws since the amateurism rules were not categorically valid, involved commercial activity in which the student-athletes and the users anticipated economic gain, and had a significant anticompetitive effect on the college education market.<sup>32</sup>

According to the Court, while the compensation rules had pro-competitive effects in integrating academics with athletics and promoting amateurism, and raising the cap on compensation to the full amount of the costs of attending college was a substantially less restrictive alternative means of accomplishing the pro-competitive purposes, allowing the student-athletes to receive deferred compensation untethered to educational expenses was not an appropriate alternative since it would defeat the student-athletes' status as amateurs.<sup>33</sup> The O'Bannon decision

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27. 845 F.2d 1338, 1345 (5th Cir. 1988).

28. 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).

29. *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

established that future student-athletes “can use federal antitrust law to attempt to prove that there are better ways of preserving amateurism than the current NCAA rules”.<sup>34</sup>

On June 21, 2021, the Supreme Court decided in *NCAA v. Alston*<sup>35</sup> that the NCAA cannot limit the educational-related benefits that colleges can offer student-athletes because the current limits violate antitrust laws.<sup>36</sup> Current and former student-athletes who played men’s and women’s Division I football and basketball filed an antitrust class action against the NCAA and eleven different Division I conferences alleging that the NCAA implemented anticompetitive bylaws that unreasonably limited the compensation and benefits that student-athletes might receive in exchange for their athletic participation.<sup>37</sup> A unanimous decision by the Supreme Court found that the NCAA’s compensation rules violated the Sherman Act when they restricted non-cash education-related benefits such as post-eligibility undergraduate or graduate scholarships or tutoring, study-abroad expenses, and paid post-eligibility internships.<sup>38</sup> While *NCAA v. Alston* did not directly address the NCAA’s remaining compensation rules, Justice Kavanaugh stated that there were serious problems with the validity of the remaining rules.<sup>39</sup>

*NCAA v. Alston* has perhaps left the door open for potential changes regarding student-athletes’ financial rights in the future. *Alston* paved the way for re-establishment of the delicate relationship between universities and student-athletes from a business perspective.<sup>40</sup> It helped to shed a light on the developing landscape of college athletics when it comes to fair compensation and just treatment of student-athletes.<sup>41</sup> Another major

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34. FED. AND STATE LEGIS. WORKING GRP., *Final Report and Recommendations*, NCAA BD. OF GOVERNORS 29 (2020), [https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG\\_Report.pdf](https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf) [<https://perma.cc/YNS4-DAKC>].

35. In its unanimous 9-0 decision in *NCAA v. Alston*, the Supreme Court upheld a ruling by the U.S. Court of Appeals for the Ninth Circuit that struck down NCAA caps on student-athlete academic benefits (i.e., reimbursements and pay for academic-related expenses) on antitrust grounds. This decision was the first domino to fall relating to NCAA regulation of student-athletes receiving financial assistance and the effect on their athletic eligibility.

36. *Id.*

37. Kwanghyuk David Yoo, *SCOTUS analysis: NCAA v. Alston*, EMERY LAW NEWS CTR. (Aug. 2, 2021), <https://law.emory.edu/news-and-events/releases/2021/08/scotus-yoo-ncaa-v-alston.html> [<https://perma.cc/Y9FA-N73H>].

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*



function of the *Alston* decision was that it helped recognize that the NCAA relied heavily on amateurism to exploit student-athlete labor without compensating the student-athletes.<sup>42</sup> This has opened the door to the understanding that student-athletes and universities should align their business interests and allow the student-athletes an equal opportunity to tap into the competitive market. The Court implied that amateurism served to eliminate market dynamics and reduce competition in the labor market of student-athletes.<sup>43</sup>

### C. Current NIL Policy

The NCAA, after the *Alston* decision, lifted restrictions on student-athletes to allow them to monetize their names, images, and likenesses.<sup>44</sup> The interim policy adopted by the NCAA fills in gaps left by states that have not implemented their own NIL legislation.<sup>45</sup> There currently exists no overarching set of laws that regulate all student-athletes or universities in a uniform manner.<sup>46</sup> The interim policy adopted by the NCAA removes restrictions, but does not have many regulations that help guide the student-athletes through this unprecedented era. The ability of student-athletes to take full advantage of this economic opportunity depends on a system of regulation and enforcement that applies to all student-athletes and universities alike. National uniformity will ensure that student-athletes can receive an education from the institution of their choice, as well as have an economic opportunity to monetize their name, image, and likeness in an equal way regardless of where they choose to attend school.

A state-by-state approach to NIL regulation will inevitably create a lack of competitive balance amongst schools across the country. With a state-by-state, patchwork approach to regulation, student-athletes will likely find certain states provide a better opportunity to monetize their names, images, and likenesses. If this persists, the lack of competitive balance will translate onto the field, court, etc. Universities in states with less desirable rules in the eyes of student-athletes could suffer with recruitment and subsequently, performance. The NCAA consistently claims that they have tried to preserve competition. If the NCAA's priority

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42. *Id.*

43. *Id.*

44. Gregory A. Marino, *The NCAA declares Independence from NIL Restrictions*, FOLEY AND LARDNER LLP. (Aug. 2021), <https://www.foley.com/en/insights/publications/2021/08/ncaa-declares-independence-nil-restrictions> [<https://perma.cc/E3R4-XP4L>].

45. *Id.*

46. *Id.*

truly is to preserve competition, then they should be leading the charge for NIL regulation to ensure the most effective, efficient means of regulation.

The state-by-state patchwork approach is not in the best interest of student-athletes. Not only do certain states have different regulations, but certain states have different effective dates for their laws. This creates additional factors which student-athletes must consider when they are deciding which university to attend. The student-athletes now have to familiarize themselves with the various state laws and when the different restrictions become effective. Clearly, learning one set of uniform rules that would regulate their actions regardless of which school they choose to attend would be preferable. The ability of student athletes to take full advantage of this new economic opportunity depends on a system of regulation and enforcement that applies to and regulates all student-athletes and universities alike.

## II. A PATCHWORK APPROACH: STATE BY STATE REGULATION OF NIL RIGHTS

### A. *Interim Policy adopted by the NCAA*

President of the NCAA, Mark Emmert, stated in late June of 2021 that, “the current environment - both legal and legislative - prevents us from providing a more permanent solution and the level of detail student-athletes deserve.”<sup>47</sup> This statement from Mark Emmert seems to be disingenuous and tends to show that the NCAA, an association allegedly looking out for the best interests of the student-athletes, has thrown in the towel. The interim policy adopted by the NCAA provides the following guidance to schools, student-athletes, recruits, and their families:

Individuals can engage in NIL activities that are consistent with the law of the state where the school is located.<sup>48</sup> Colleges and universities may be a resource for state law questions.<sup>49</sup> College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image, and likeness.<sup>50</sup> Individuals can use a professional services provider for NIL activities.<sup>51</sup> Student-athletes should report NIL activities to their respective

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47. NCAA, *supra* note 2, at 4.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

universities.<sup>52</sup>

The NCAA emphasized that the interim policy put into place was to reinforce their commitment to avoid pay-for-play<sup>53</sup> and improper inducements tied to recruitment and selection of universities for incoming recruits.<sup>54</sup> Division III President's Council chair, Fayneese Miller, alleges that the new NCAA interim policy "provides college athletes and their families some sense of clarity around name, image, and likeness".<sup>55</sup>

The interim policy is exactly what it claims to be, a temporary, pro-tem policy that will be in effect until federal legislation is passed or until the NCAA adopts new rules.<sup>56</sup> As this temporary policy went into effect, states had already begun to pass their own legislation to regulate NIL rights so as to be on the forefront of this new opportunity for student-athletes.

#### B. State NIL Laws

This portion of the article will not serve to scrutinize the different State laws passed in regards to NIL rights; rather, it will reveal certain inconsistencies which require federal regulation to assuage. More than half of the country's state legislatures<sup>57</sup> have enacted laws relating to student-athletes' name, image, and likeness rights.<sup>58</sup> Nearly all of the enacted legislation places more restrictions on student-athlete endorsement

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52. *Id.*

53. "Pay-for-play", sometimes referred to as "pay-to-play", is the concept of compensating student-athletes strictly based on their on-field performance, similar to a salary in professional sports.

54. *Id.*

55. *Id.*

56. *Taking Action: Name, Image and Likeness*, NAT'L COLLEGIATE ATHLETIC ASS'N (June 30, 2021), <https://www.ncaa.org/about/taking-action> [<https://perma.cc/GL4V-B4LR>]; 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](https://www.espn.com/college-sports/story/_/id/31737039/ncaa-clears-student-athletes-pursue-name-image-likeness-deals) [<https://perma.cc/3T5Z-M82M>] ("The NCAA's board of directors decided . . . to officially suspend the organization's rule").

57. These states include OR, CA, AZ, CO, NM, OK, TX, LA, MO, IL, MS, AL, GA, FL, SC, VA, CT, MD, OH, and PA.

58. Thomas DiBiasio, *Most States pass NIL laws for Student Athletes*, MULTI STATE (September 2021), <https://www.multistate.us/insider/2021/9/21/most-states-pass-name-image-and-likeness-laws-for-student-athletes> [<https://perma.cc/WK5G-RJL6>].

contracts than the current NCAA interim policy.<sup>59</sup> Currently, there are twenty-two states that have their own laws in effect and seven other states<sup>60</sup> with laws that go into effect between 2022 and 2025.<sup>61</sup>

Florida Senate Bill 646, referred to as the “Intercollegiate Athlete Compensation and Rights Bill”, allows student athletes to enter into contracts to license their personal NIL while maintaining eligibility for college athletics.<sup>62</sup> The Florida Bill provides that only a third-party, unaffiliated with the athlete’s school, may provide compensation. Additionally, the bill states that compensation must be “commensurate with the market value of the authorized use of the athlete’s name, image, and likeness”.<sup>63</sup> However, the terms “unaffiliated” and “commensurate with market value” remain undefined in the Florida Bill.

California Senate Bill 201, known as the “Fair Pay to Play Act”, took effect on September 1, 2021 and prevents “postsecondary institutions from preventing or hindering student-athletes from earning compensation on their name, image, and likeness”.<sup>64</sup> The California Bill also allows student-athletes to hire agents for representation in their business dealings.<sup>65</sup>

The Nebraska “Fair Pay to Play Act”, enacted by LB 962 and going into effect on July 1, 2023, restricts postsecondary institutions from promulgating “any rule, requirement, standard, or limitation that would prevent student-athletes’ rights, privileges, or participation in college athletics due to acquisition or reputation created by NIL opportunities”.<sup>66</sup> It further prevents Nebraska-based collegiate athletic associations from penalizing or preventing student-athletes from “fully participating in a collegiate sport because such student-athlete earns compensation for the use of NIL rights”.<sup>67</sup> However, student-athletes in Nebraska are precluded from contracting with sponsors for NIL contracts if the contract requires such student-athlete to display the sponsor’s apparel or to otherwise advertise the sponsor during official team activities or if the compliance with the contract would conflict with a pre-existing team contract.<sup>68</sup> There is also a mandatory disclosure requirement which obligates student-

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59. *Id.*

60. These states include NV, MT, NE, AR, TN, MI, and NJ.

61. *Id.*

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

63. *See* § 1006.74(2)(a).

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

65. *See Id.* at § 2(c)(1), (e)(1).

66. *See* Neb. Rev. Stat. §§ 48-3601 - 48-3609.

67. *Id.* at § 48-3603(3).

68. *Id.* at § 48-3605(1).

athletes in Nebraska to disclose any compensation received based on their NIL to their respective institutions.<sup>69</sup>

New Jersey Senate Bill 971 will not go into effect until the year 2025.<sup>70</sup> This Bill allows student-athletes to profit from their NIL, but prevents student-athletes from earning 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.”<sup>71</sup>

Louisiana State Bill 60 has mandated that Louisiana Universities “shall conduct a financial literacy and life skills workshop for at least five hours at the start of the student athlete’s first and third academic years.”<sup>72</sup>

The lack of uniformity presented above places an extra burden on prospective collegiate athletes when making a decision on where to attend school. States are passing legislation that they believe will be better suited for the student-athletes in their states, which is a respectable goal. However, this places a burden on high school students who are trying to decide where they want to spend the next four to six years of their lives. They not only have to take into account the school’s academic and athletic programs, but also the regulations implemented by the state in which the school is located. The intervention of federal legislation is vital to easing the decision making process for student-athletes in choosing where to spend their pivotal developmental years.

### III. A FOR EFFORT: ATTEMPTS AT FEDERAL REGULATION

#### A. *Current Proposed Federal Bills*

A federal law would help to alleviate any competitive or commercial advantage that currently exists in college athletics. Congress has not passed any federal bill to address NIL rights in college athletics, though not for a lack of trying by several senators. There have been several bills

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69. *Id.* at § 48-3604.

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

71. *Id.* at § 18A:3B-87(2)(b).

72. Christine M. Colwill, *Louisiana State Bill 60 allowing Student Athletes to profit from their Name, Image, and Likeness*, LEXOLOGY (June 14, 2021), <https://www.lexology.com/library/detail.aspx?g=d6a4d885-7260-4279-844a-58bd34a692ea> [https://perma.cc/47XN-ZHG7].

proposed over the last few years, with likely more to come as the number of student-athletes marketing their NIL rights grows.

One Federal Bill, titled “College Athlete Bill of Rights,” was introduced by Senators Booker (D-NJ), Blumenthal (D-CT), Gillibrand (D-NY), and Schatz (D-HI) on December 18, 2020.<sup>73</sup> This bill includes provisions that “prohibit an institution of higher education, an intercollegiate athletic association, or a conference from restricting the ability of college athletes to market the use of their names, images, likenesses, or athletic reputations.”<sup>74</sup> It also includes a provision that penalizes institutions for violating the protections afforded to student-athletes.<sup>75</sup> This bill also establishes a Commission on College Athletics “to protect the economic interests of college athletes and promote the health, wellness, and safety of college athletes and establish a medical trust fund to cover the cost of out-of-pocket expenses relating to any sports-related injury.”<sup>76</sup> Additionally, it includes a provision that directs the Centers for Disease Control and Prevention to establish health, wellness, and safety guidelines for intercollegiate athletic programs.<sup>77</sup>

Another Federal Bill was introduced by Senator Wicker (R-MS) on December 10, 2020.<sup>78</sup> This bill would “permit student athletes to earn compensation for the use of their name, image, and likeness; protect student athletes and their families from deceptive business practices or exploitation from unscrupulous actors; and provide educational resources to student-athletes regarding earning compensation for the use of their NIL.”<sup>79</sup> Furthermore, the bill would “preserve amateurism by prohibiting institutions from classifying student athletes as employees and prohibiting boosters from directly or indirectly paying student athletes and their families for the use of their NIL.”<sup>80</sup> The bill would also prohibit third parties from entering into NIL agreements or offering NIL agreements to

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73. *NIL Legislation Tracker*, SAUL, EWING, ARNSTEIN, AND LEHR, L.L.P. (Dec. 21, 2021), <https://www.saul.com/nil-legislation-tracker#1> [<https://perma.cc/377N-YTEH>].

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. NIL, *supra* note 73.

79. *Wicker introduces Bill Establishing National Framework for Student Athlete NIL*, U.S. SENATE COMM. ON COM., SCI., AND TRANSP. (Dec. 10, 2020), <https://www.commerce.senate.gov/2020/12/wicker-introduces-bill-establishing-a-national-framework-for-student-athlete-name-image-likeness> [<https://perma.cc/8482-MWRX>].

80. *Id.*

a student-athlete prior to enrollment at an institution.<sup>81</sup> When discussing the bill, Wicker said, “[A] nationwide framework governing student athlete name, image, and likeness compensation is necessary to preserve competition, protect student athletes, and maintain the academic integrity of collegiate institutions.”<sup>82</sup>

#### IV. RAMIFICATIONS OF REGULATING NIL RIGHTS

##### A. *Oh Won’t You Stay With Me?: Incentivizing Completing Educations*

The introduction of NIL rights into the college landscape will incentivize a majority of student-athletes to remain in school longer. Student-athletes can monetize their own NIL and use the funds to provide for their family, support themselves, or use the money for the same purposes that have previously led to early departures to pursue professional sports.

A major reason athletes leave college early to pursue a career in professional sports is the potential to get paid extraordinarily well. Unfortunately, fewer than two percent of all college athletes will go on to play professional sports.<sup>83</sup> Many players have families that have struggled all of their lives and need a way to help support them.<sup>84</sup> Blame should not be placed on these college kids for wanting to support their families. The federal government, NCAA, and institutions around the country should do everything they can to support student-athletes in monetizing their NIL while still encouraging them to focus on their academics.

Shaun Harper, a leading scholar on diversity, equity, and inclusion at the University of Southern California Marshall School of Business, conducted a study on student athletes and universities in 2018.<sup>85</sup> Black male athletes were actually less likely to graduate than black men who did

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81. *Id.*

82. *Id.*

83. Erik Cliburn, *The Equity Debate in College Sports goes beyond Financial Compensation*, INSIGHT INTO DIVERSITY (May 17, 2021), <https://www.insightintodiversity.com/the-equity-debate-in-college-sports-goes-beyond-financial-compensation/> [https://perma.cc/QR65-ZRTJ].

84. “Pressure is the homeless man, who doesn’t know where his next meal is coming from. Pressure is the single mom, who is trying to scuffle and pay her rent. Don’t get me wrong — there are challenges [to playing the game]. But to call it pressure is almost an insult to regular people. — Damian Lillard.

85. *Id.*

not play sports at sixty percent of the universities in the study.<sup>86</sup> One of the greatest challenges to student-athlete success is the sheer amount of time that players are required to devote to their sport.<sup>87</sup> A Pac-12 study revealed that college athletes spend about fifty hours per week playing their sport.<sup>88</sup> Research by the National Association of Colleges and Employers shows that female student-athletes were six percent less likely and male student-athletes were seventeen percent less likely to work as interns compared with college students overall.<sup>89</sup> One in five student-athletes reported that their athletic obligations prevented them from pursuing such opportunities.<sup>90</sup> This means that college-athletes will not have time for a job, and even if they did have a job, the balancing act that would be required is too much of a burden. A consistent, equal opportunistic federal law will ease the burden placed on student-athletes while in college by providing them vast opportunities to monetize their NIL while still devoting necessary time to their sport.

*B. The Risk of Injury and Possible Long-term Implications of Being a College-Athlete*

Some athletes choose to forego eligibility and enter the draft of their respective sport out of fear of a potential injury that could hurt their draft stock or even end their career altogether. Marcus Lattimore, a record-setting, freshman of the year running back and a Heisman hopeful for the South Carolina Gamecocks, experienced this exact situation in college.<sup>91</sup> His sophomore year, he suffered a torn ACL and MCL in his left knee.<sup>92</sup> He was able to recover from that injury and, for the most part, picked up right where he left off on the field.<sup>93</sup> He rushed for 627 yards and 10 touchdowns his junior year leading up to the Tennessee game.<sup>94</sup> With five

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86. *Id.*

87. *Id.*

88. Herman Davis, *College v. Pros - Is It Wise for Students to LEave School Early?*, OREGON SPORTS NEWS (May 5, 2017), <https://oregonsportsnews.com/college-vs-pros-is-it-wise-for-students-to-leave-school-early/> [<https://perma.cc/6GB2-QPZV>].

89. *Id.*

90. *Id.*

91. Edward Aschoff, *The Rise, and Fall, and Rise again of Marcus Lattimore*, ESPN (May 13, 2016), [https://www.espn.com/college-football/story/\\_/id/15528475/former-south-carolina-gamecocks-rb-marcus-lattimore-finds-new-life-happiness-knee-injuries](https://www.espn.com/college-football/story/_/id/15528475/former-south-carolina-gamecocks-rb-marcus-lattimore-finds-new-life-happiness-knee-injuries) [<https://perma.cc/BX48-ZD2E>].

92. *Id.*

93. *Id.*

94. *Id.*



minutes remaining in the third quarter, Lattimore took a handoff and was tackled by Tennessee linebacker Herman Lathers.<sup>95</sup> That tackle altered the trajectory of not only Lattimore's career, but his life. He suffered a dislocated kneecap, multiple torn ligaments, and severe nerve damage.<sup>96</sup> A previously projected first round draft choice, Lattimore was drafted in the fourth round of the 2013 National Football League (NFL) draft, and spent his entire rookie season on injured reserve recovering.<sup>97</sup> He planned to make a comeback to the NFL, but the injury was too much to overcome.<sup>98</sup> He announced his retirement from football before playing a single down in the NFL.<sup>99</sup>

This is the unfortunate fear of so many college athletes that play sports such as football where the risk of injury is high. They fear that their careers could be ended, and they would have no opportunity to make the kind of life changing money that professional sports offer. Consistent regulation of NIL rights would provide student-athletes the best opportunity to establish a foundation and a safety net of resources should anything happen to them which would prevent them from pursuing their dreams of playing a professional sport.<sup>100</sup>

### C. NIL Rights Opening the Door to Opportunity

Prior to July 1, 2021, if any student-athlete monetized their name, image, and likeness, they would lose their eligibility to compete in intercollegiate sports. This limited the opportunities that could be pursued by these student-athletes, and required them to walk a constant tight-rope to retain their eligibility.

Marshall offensive lineman Will Ulmer had to use the alias "Lucky Bill" or pass up on money when he played live country music in venues near the Thundering Herd's campus prior to gaining rights to his personal

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95. Davis, *supra* note 89.

96. Paul Palladino, *49ers running back Marcus Lattimore retires due to knee injury*, SPORTS ILLUSTRATED (Nov. 5, 2014), <https://www.si.com/nfl/2014/11/05/san-francisco-49ers-marcus-lattimore-retires-knee-injury> [https://perma.cc/2HXA-XNGF].

97. *Id.*

98. *Id.*

99. *Id.*

100. Tom Dart, *College athletes are unpaid. What if injury ruins their chance of turning pro?*, THE GUARDIAN (Sep. 6, 2021), <https://www.theguardian.com/sport/2021/sep/06/college-athletes-are-unpaid-what-if-injury-ruins-their-chance-of-turning-pro> [https://perma.cc/BWX3-YV7U].

NIL.<sup>101</sup> Ulmer, who has been playing music since he was eight years old, told ESPN he hopes to start making money by booking live gigs this summer.<sup>102</sup> Before Ulmer was granted NIL rights, he was not allowed to promote any of his shows with his real name or accept any money for his performances for fear of losing his eligibility to play football.<sup>103</sup>

Uniform NIL regulation will also allow student-athletes to continue to use their platforms for the betterment of their communities and fellow student-athletes. Florida State quarterback McKenzie Milton and Miami quarterback D'Eriq King signed on as co-founders of Dreamfield Co., a business built to help athletes pursue speaking events, public appearances, and other new money-making opportunities.<sup>104</sup>

Florida State offensive lineman Dillan Gibbons announced on July 1, 2021 that he was using the new rule change to raise money via GoFundMe to help Timothy Donovan, an ailing friend who suffers from an incurable nervous system disease.<sup>105</sup> Gibbons used the money to help Donovan and his family attend the Seminoles game against Notre Dame this past season, helping to fulfill a dream of Donovan's.<sup>106</sup>

Before these student-athletes had NIL rights, these actions and opportunities would have come at the expense of never participating in college athletics again. These examples show the good that can come from student-athletes profiting from their own name, image, and likeness. This can continue to take place in a more productive manner if Federal legislation regulates these rights in a consistent, uniform way.

## V. MOVING FORWARD IN THIS NEW ERA OF COLLEGE ATHLETICS

### A. *The Power of the Federal Government to Regulate NIL Rights*

There has yet to be federal legislation implemented that would uniformly regulate NIL rights. Now is the time to focus on what is best for student-athletes. States across the country have implemented NIL laws and regulations that are inconsistent. This will impact recruiting, and it

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101. Dan Murphy, *Let's make a deal: NCAA athletes cashing in on name, image, and likeness*, ESPN (July 1, 2021), [https://www.espn.com/college-sports/story/\\_/id/31738893/ncaa-athletes-cashing-name-image-likeness](https://www.espn.com/college-sports/story/_/id/31738893/ncaa-athletes-cashing-name-image-likeness) [<https://perma.cc/LH8Q-R8DQ>].

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

adversely affects student-athletes who have already committed to a school. The confusion and variety of current state laws should be preempted by federal legislation which would allow for equal economic opportunity as well as clarity as the country enters this new era of NIL monetization.

It is well established by the Supremacy Clause in Article IV, Paragraph II of the United States Constitution that federal law preempts state law when the two laws are in conflict.<sup>107</sup> The Supreme Court has recognized three different types of preemption: (i) express preemption, (ii) field preemption, and (iii) conflict preemption.<sup>108</sup> The focus here needs to be on an express preemption which explicitly preempts all state NIL laws, both those currently in existence and those that are prospective. The Employment Retirement Income Security Act of 1974 (ERISA) provides an example of an express preemption clause which preempts state law claims that “relate to” ERISA plans under two different definitions provided by the Supreme court.<sup>109</sup> Justice Blackmun “craft[ed] a functional test for express preemption, 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”.<sup>110</sup> § 514(a) of ERISA was enacted by Congress to limit plan liability by preempting claims under state law to “supplant the ‘patchwork of state law previously in place.’”<sup>111</sup>

Any potential federal legislation on NIL rights should model this language to preempt state laws that are in “reference to” or “connect[ed] with” student-athlete compensation due to NIL rights. This would allow federal lawmakers to introduce uniform NIL legislation across the United States.

### B. A Proposal for Moving Forward

The current state laws should not be thrown by the wayside without considering their benefit. There are several provisions implemented by different states that serve a valuable purpose and benefit student-athletes. This portion of the article will advocate for provisions that should be included in a potential federal statute.

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

108. Michael D. Fasciale, *The Patchwork Problem: A Need for National Uniformity to Ensure an Equitable Playing Field for Student-Athletes’ Name, Image, and Likeness Compensation* (Jan. 21, 2022) <https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1821&context=shlr> [<https://perma.cc/D9FJ-7CDH>].

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

110. *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)

111. U.S. CONST., *supra* note 106, at cl. 2.

No institution should “prohibit or suspend any student from competing in an intercollegiate athletic competition or otherwise penalize a student because the student has received NIL compensation or agreed to be represented by an agent.”<sup>112</sup> The federal statute should prohibit the ability to:

Negotiate, discuss, or receive compensation for the use of their NIL rights or athletic reputation prior to the earlier of: the first day of a semester, session, or term in which the student athlete is registered for full-time courses at a postsecondary educational institution, or the first practice or competition.<sup>113</sup> Student-athletes should not be deemed an employee, agent, or independent contractor of a postsecondary institution, athletic association, or conference based on their participation in intercollegiate athletics.<sup>114</sup>

Student Athletes should not be able to enter into a NIL agreement if it “conflicts or unreasonably competes with the terms of an existing agreement entered into by the institution.”<sup>115</sup> To protect the institutions, there should also exist a provision stating that postsecondary education institutions cannot be “subject to a claim for damages of any kind, including but not limited to a claim for unfair trade, competition, or tortious interference.”<sup>116</sup>

Similar to Alabama House Bill 82, each school should establish an athlete injury and wage fund, divided into a health savings account and an athlete wage account that is funded by a certain percentage of the revenue from athletic event ticket sales.<sup>117</sup> At the conclusion of each academic year, the institution should divide its athlete wage fund account equally amongst the student athletes who attended the institution that academic year.<sup>118</sup> The athlete injury health savings account will provide a student athlete who suffers a career-ending or long-term injury during a game or team practice with compensation upon his or her graduation.<sup>119</sup> This could help ease the anxiety some athletes have about potential career ending injuries. It would also encourage student-athletes to continue to pursue their degree.

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112. H.R. 1084, 66th Leg., Reg. Sess. (Wa. 2021).

113. H.R. 2264, 2021 H., Reg. Sess. (Ka. 2021).

114. S. 2313, 2021 S., Reg. Sess. (Ms. 2021).

115. H.R. 1351, 2021 H., Gen. Assemb. (Tenn. 2021).

116. S. 2338, 102d Gen. Assemb., Reg. Sess. (Ill. 2021).

117. H.R. 82, 2020 H., Reg. Sess. (Al. 2020).

118. *Id.*

119. *Id.*

Similar to Louisiana and Florida laws, each institution in every state should 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”.<sup>120</sup> The workshop shall, at a minimum, include information concerning financial aid, debt management, budgeting, time management skills, and available academic resources.<sup>121</sup> The timing of these workshops is important. At this stage of life, the traditional college-age adult (eighteen to twenty-two years) may be faced with one or a combination of developmental issues, which may include achieving competence, managing emotions, becoming autonomous, and establishing identity.<sup>122</sup>

Additionally, external stressors such as athletic and academic performance, roommate challenges, and family struggles can also impact a college student.<sup>123</sup> This is all on top of the workload that comes with playing college sports such as workouts, team meetings, practices, etc. These financial literacy and life skills workshops will help the freshmen entering college gain meaningful knowledge on how to traverse the tricky landscape of not only college in general, but also the world of NIL rights. When it comes to basketball, athletes are allowed to leave school after one year and enter the National Basketball Association (NBA) draft process. For sports such as football, athletes are permitted to leave school and enter into the NFL draft process after their third year. The timing of these workshops will ensure that the athletes will get some education on financial responsibility before they leave school and enter into the professional world, should that be the decision they choose to make.

The world of NIL rights is, without a doubt, convoluted. Ultimately, what is best for the student-athlete must be the guiding star for federal lawmakers. The states have provided certain regulations that serve as an effective starting point for moving forward with an expressly preemptive federal statute.

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120. See S. 646, 2020 S., Reg. Sess. (Fl. 2020); See also S. 60, 2021 S., Reg. Sess. (La. 2021).

121. *Id.*

122. Jennifer Drum et al., *Athlete and Non-Athlete Adjustment to College* (Aug. 12, 2014), <https://files.eric.ed.gov/fulltext/EJ1092786.pdf> [<https://perma.cc/SZQ4-CB2W>].

123. *Id.*

## CONCLUSION

“The journey of a thousand miles begins with a single step.”<sup>124</sup> This journey through the new era of NIL rights will undoubtedly be a one-thousand-mile journey. States have taken the first step in implementing regulations, but it is now time for the federal government to step in. Current state legislation has provided a starting point for moving forward in this new era of student-athletes profiting from their own name, image, and likeness. However, inconsistencies have arisen based on several states implementing different regulations that they think best serve their student-athletes. Inconsistency leads to confusion, and there is a heavy burden placed on high school and college student-athletes to understand the variety of regulations throughout the country. The priority should be the best interest of the student-athlete. It is incumbent on the federal government to implement uniform legislation that preempt state law and clarify the opportunities and restrictions placed on student-athletes. This will ensure consistency across the country, and will allow student-athletes the best opportunity to monetize their name, image, and likeness.

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124. A Chinese proverb that means one must begin their journey if they hope to reach their goal or destination.