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M. Ryan Kearney
Northwestern Pitzker School of Law

WHEN THE STATES STEP OUT OF BOUNDS: STATE REGULATION OF STUDENT-ATHLETE COMPENSATION AND THE DORMANT COMMERCE CLAUSE

*By M. Ryan Kearney**

The college sports industry is must-see TV for millions of fans across the country and generates billions in revenue every year. That money accrues to coaches, universities, conferences, and the National Collegiate Athletic Association (NCAA), which orchestrates it all. Until recently, however, not one cent went to the players, outside of an academic scholarship that did not exceed the cost of their schooling. Commentators have long called for the NCAA to reform its student-athlete compensation restrictions. After decades of inaction by the NCAA, California passed SB-206 in September of 2019 to allow its student-athletes to receive compensation from third parties for commercial use of their names, images, and likenesses (NIL). Several other states soon followed, and as a result, on July 1, 2021, the NCAA ceased enforcing the NIL compensation restrictions in its bylaws. Unfortunately for the NCAA, its bylaws cannot override state law. States may continue to experiment if they wish to convey benefits to student-athletes above and beyond those granted by California's law or any subsequent NCAA rule changes.

Until Congress passes federal legislation, the NCAA's game plan may be a Dormant Commerce Clause (DCC) challenge to state compensation regimes. This Article is the first piece of legal scholarship to survey the landscape of state student-athlete compensation legislation and apply the Dormant Commerce Clause to the student-athlete compensation issue. This Article concludes the state student-athlete NIL regulation violates the extraterritoriality principle of the Dormant Commerce Clause because—unlike

* Law Clerk for the U.S. Court of Appeals for the Third Circuit. Many thanks to Professor Nadav Shoked of Northwestern Pritzker School of Law for his guidance on this piece, his mentorship in the law, and his willingness to lend an ear. I am also indebted to the staff and editorial board of the Loyola of Los Angeles Entertainment Law Review for their meticulous edits, especially Danielle Shehadeh, Georgia Johnson, and Katrina Crosby. Lastly, I am grateful for Max Rogers and his insight during the early stages of this piece.

state internet regulation, for example—it regulates the NCAA's conduct wholly outside the state's borders. The NCAA is a nationwide natural monopoly ripe for federal, not state, regulation. Accordingly, Congress should step up to the plate and provide student-athletes the opportunity to earn the compensation they rightfully deserve while preserving uniform rules among competitors, which are essential to the existence of any sports league.

TABLE OF CONTENTS

I. INTRODUCTION

NCAA student-athletes are amateur athletes—they participate in sports "only for the pleasure, and the physical, mental, moral, and social benefits directly derived therefrom."[1] Relying solely on this principle of amateurism, NCAA rules prohibited student-athletes from receiving any form of compensation tied to their participation in NCAA athletics, except for a scholarship not to exceed the university's cost of attendance.[2] Thanks to these restrictions, student-athletes have infamously run into trouble selling autographs,[3] accepting a loan to help pay for travel,[4] or even using their platform to raise money for COVID-19 relief.[5]

The NCAA cited the need to improve player safety and maintain even competition across schools to justify its stance on compensation.[6] Now, the public views amateurism with heightened skepticism because it allows the NCAA to profit off individuals who put their bodies on the line[7] but benefit

1. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 331–32 (2007).

2. *See* NCAA, 2018–19 NCAA DIVISION I MANUAL 5, 8 (2018).

3. *See* Tony Manfred, *The Johnny Manziel Autograph Scandal is Everything That's Wrong With the NCAA*, INSIDER (Aug. 14, 2013, 4:12 PM), https://www.businessinsider.com/johnny-manziel-autograph-scandal-ncaa-hypocrisy-2013-8 [https://perma.cc/8YGK-NRAM] (discussing Heisman trophy winner Johnny Manziel's violation of NCAA rules for selling autographs).

4. Zac Al-Khateeb, *Chase Young's Suspension: Explaining the NCAA Rules Violation that Will Sideline Ohio State Star*, SPORTINGNEWS (Nov. 13, 2019), https://www.sportingnews.com/us/ncaa-football/news/chase-young-suspension-explained-ncaa-rules-ohio-state/arho6ef8q9lo1vwf4ttqillyw [https://perma.cc/9TBL-85PP].

5. *See* Jenna West, *Trevor Lawrence Relaunches Fundraiser for Coronavirus Relief After NCAA Confusion*, SPORTS ILLUSTRATED (Mar. 30, 2020), https://www.si.com/college/2020/03/24/trevor-lawrence-coronavirus-campaign-shut-down-ncaa *[https://perma.cc/FNL8-P23U*] (discussing Clemson quarterback Trevor Lawrence and his efforts to raise money for Coronavirus relief with a GoFundMe campaign, which would have violated the NCAA's prohibition against using name, image, and likeness for crowdfunding had the NCAA not granted him a waiver).

6. Under the old system, injuries proliferated from a lack of universal safety regulations and the fact that older athletes often competed against younger college students. *See* Agota Peterfy & Kevin Carron, *Show Me the Money! NCAA Considering Paying Student-Athletes*, 76 J. MO. B. 68, 69 (2020).

7. The NCAA reported over one million injuries between 2009 and 2014, including approximately 50,000 concussions and 9,500 "[i]njuries requiring emergency transport." *See* Zachary Y.

from none of the income they help generate, beyond a scholarship not to exceed the cost of attending their schools. College sports programs collected $14.8 billion in total revenue in 2018,[8] and the median college sports program among the 130 Football Bowl Subdivision (FBS) schools[9] generated $106.3 million that same year.[10] Naturally, Division I Men's Basketball and Football receive the most attention because they generate significantly more revenue than other sports teams at most universities.[11] This revenue funds exhorbitant coaching salaries, with forty-nine college head football coaches currently earning more than $3 million per year[12] and the highest-paid coach, USC's Lincoln Riley, earning over $10 million per year.[13] "[T]he highest paid public employees in 41 out of 50 states are [college] football or basketball coaches."[14]

Critics insist that amateurism is a "profoundly immoral" system that prioritizes the interests of those profiting off the athletes over the interests of

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Kerr et al., *College Sports-Related Injuries—United States, 2009–10 Through 2013–14 Academic Years*, 64 MORBIDITY & MORTALITY WKLY. RPT. 1330, 1330, 1334 tbl.2 (2015).

8. U.S. Dep't of Educ., *What is the Total Amount of Revenue Reported?*, https://ope.ed.gov/athletics/Trend/public/#/answer/6/601/main?row=-1&column=-1 [https://perma.cc/4JAU-Y24H].

9. FBS is the most competitive, and consequently the most popular, segment of Division I college football. *See* Patrick Pinak, *College Football Trivia: What Does 'FBS' and 'FCS' Actually Mean?*, FAN BUZZ (Dec. 27, 2019, 12:27 PM), https://fanbuzz.com/college-football/what-does-fbs-stand-for/ [https://perma.cc/B2MX-SBL2].

10. Finances of Intercollegiate Athletics Database, NCAA, https://www.ncaa.org/sports/2019/11/12/finances-of-intercollegiate-athletics-database.aspx [https://perma.cc/C6GD-T4XL]. This figure rose from approximately $23 million in 2004. NCAA, NCAA REVENUES AND EXPENSES 2004–2016 12, tbl.2.1 (2017).

11. Cody J. McDavis, Comment, *The Value of Amateurism*, 29 MARQ. SPORTS L. REV. 275, 276 (2018). Aggregate revenue of 882 college football teams rose from $1.89 billion in 2003 to $5.85 billion in 2018, while aggregate revenue of 1,988 basketball teams rose from $1.13 billion in 2003 to $3.21 billion in 2018. *See* U.S. Dept' of Educ., *supra* note 8.

12. Steve Berkowitz et al., *College Football Head Coach Salaries*, USA TODAY (Oct. 14, 2021, 2:09 PM), https://sports.usatoday.com/ncaa/salaries/ [https://archive.ph/hrnJQ].

13. Jacob Camenker, *Brian Kelly Contract Details,* SPORTING NEWS (Dec. 1, 2021), https://www.sportingnews.com/us/ncaa-football/news/brian-kelly-contract-details-lsu-notre-dame/22ip4ln3y64919gqrlkop2cc7 [https://perma.cc/79DV-9N2L].

14. Chris Murphy, *Madness, Inc.: How Everyone Is Getting Rich Off College Sports—Except the Players* 8 (2019), https://www.murphy.senate.gov/imo/media/doc/NCAA%20Report_FINAL.pdf [https://perma.cc/8VET-GBMG].

the athletes themselves.[15] Although some student-athletes eventually earn massive paychecks in the professional ranks, the pool of student-athletes who go on to play professionally is incredibly small; in 2017, only 0.3% of NCAA football and basketball players were drafted into American professional leagues.[16] Female athletes have an even slimmer chance of earning income as professional athletes than their male counterparts, and those that do generally earn far lower salaries.[17] To make matters worse, speculative future payoffs cannot help athletes meet their financial needs while in college, many of whom come from impoverished backgrounds.[18] Indeed, athletes of color are disproportionately affected by the NCAA's compensation restrictions because they comprise the largest demographic in college football and basketball—the sports that generate the vast majority of industry revenue.[19]

California reinvigorated the student-athlete compensation debate in September of 2019 when it passed the Fair Pay to Play Act, also known as

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15. McDavis, *supra* note 11, at 278; *see, e.g.*, Murphy, *supra* note 14, at 12 ("The current system does more to advance the financial interests of broadcasters, apparel companies, and athletic departments than it does for the student-athletes who provide the product from which everyone else profits."); *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/F36E-VQWC].

16. *See* Dalton Thacker, *Amateurism vs. Capitalism: A Practical Approach to Paying College Athletes*, 16 SEATTLE J. SOC. JUST. 183, 184 (2017).

17. The average NBA salary for the 2019 season was $7.7 million, while the average WNBA salary for the same year was around $75,000. Jonathan Vanian, *Pro Basketball's Gender Pay Gap Is the 'Perfect Business Problem,' the WNBA's New Commissioner Says*, FORTUNE (Oct. 21, 2019, 6:55 PM), https://fortune.com/2019/10/21/wnba-gender-pay-gap-commissioner-cathy-engelbert/ [https://perma.cc/YZM9-8JQK].

18. One report concluded that eighty-six percent of college athletes live at or below the poverty line. *See* Ramogi Huma & Ellen J. Staurowsky, *The Price of Poverty in Big Time College Sport*, 4 NATIONAL COLLEGE PLAYERS ASSOCIATION (2011), https://www.ncpanow.org/research/body/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf [https://perma.cc/U8ZC-FP39].

19. Forty-four percent of men's college basketball players and thirty-nine percent of men's football players are African American. *Diversity Research: NCAA Race and Gender Demographics Database*, NCAA, https://www.ncaa.org/sports/2013/11/20/diversity-research.aspx [https://perma.cc/T9T4-84XB]; *see also* Dan Wolken, *How the Game Changed in College Sports: 'It's Like Lighting a Fuse'*, USA TODAY (Nov. 12, 2019, 6:00 AM), https://www.usatoday.com/story/sports/columnist/dan-wolken/2019/11/12/ncaa-how-name-image-likeness-debate-quickly-shifted/2522382001/ [https://perma.cc/GC9C-C7XX] ("These are largely African-American players that are being kept poor in order to enrich white athletic directors, coaches, and sports company executives.").

SB-206, which will allow every student-athlete at a California university to receive compensation from third parties for use of their name, image, and likeness (NIL) effective as of July 1, 2023.[20] Under SB-206, student-athletes could earn money by appearing in television commercials or selling autographs, so long as the student-athletes' schools do not pay them directly.[21] Legislatures in Colorado, Florida, Georgia, Michigan, Nebraska, and New Jersey have already passed similar bills, with many in the works in other states.[22] Several of them went into effect on July 1, 2021.[23]

With no choice but to accede to the rising tide of state legislation, the NCAA declared a non-enforcement policy on June 30, 2021, with respect to its NIL restrictions, giving student-athletes the opportunity to benefit from others' use of their NILs.[24] Yet the debate is far from over. Despite the NCAA's move towards reform, any subsequent rule changes are unlikely to satiate state legislatures because the NCAA's desire to preserve the "critical distinction"[25] between professional and amateur collegiate athletics is fundamentally inconsistent with the concept of student-athlete compensation.[26] More importantly, NCAA bylaws, which contain the relevant restrictions,

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20. *See* CAL. EDUC. CODE § 67456 (2019).

21. *See* Brakkton Booker, *College Athletes Are Now Closer to Getting Paid After NCAA Board OKs Plan*, N.P.R. (Apr. 29, 2020, 12:00 PM), https://www.npr.org/2020/04/29/847781624/college-players-are-now-closer-to-getting-paid-after-ncaa-board-oks-plan [https://perma.cc/3QSL-U8FH] (describing how student-athletes can profit off their NILs).

22. *See* Kristi Dosh, *Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLL. SPORTS (Jan. 20, 2022), https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/ [https://perma.cc/XL9R-3K94].

23. *See, e.g.*, FLA. STAT. § 1006.74 (2020); NEB. REV. STAT. § 48-3601 (2020).

24. *See* Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM) https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy [https://perma.cc/N62F-SMVW].

25. *See NCAA Responds to California Senate Bill 206*, NCAA (Sept. 11, 2019, 10:08 AM), https://www.ncaa.org/news/2019/9/11/ncaa-responds-to-california-senate-bill-206.aspx [https://perma.cc/N9SW-4N3Z].

26. As one federal appeals court has explained, "cash sums untethered to educational expenses" (such as from endorsements) are "a quantum leap" from amateurism. O'Bannon v. NCAA, 802 F.3d 1049, 1078 (9th Cir. 2015); *see also* 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) ("Despite the relatively narrow scope of [SB-206], it directly conflicts with the NCAA's model of amateurism.").

cannot override state law. As such, states will continue pushing the envelope to secure greater student-athlete NIL compensation rights,[27] and it is only a matter of time before more states require universities to pay student-athletes directly.[28] Finally, existing and proposed state laws vary widely in student-athlete compensation rights and restrictions,[29] to the extent that some highly-touted recruits may select their college of choice based on the relevant state's student-athlete NIL compensation regime.[30] And even if the NCAA did amend its bylaws to align with the NIL regime of one or more states, any restrictions on an athlete's ability to earn NIL compensation must withstand antitrust scrutiny.[31]

Fearing a "patchwork of different laws from different states"[32] that would destroy the level playing field necessary for fair competition in any sports league, the NCAA denounced the California Fair Pay to Play Act as

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27. *See* Peterfy & Carron, *supra* note 6, at 71 ("Should the [NCAA's] newly reformed guidelines create overly restrictive regulations governing athletes' ability to profit from their NILs, there is little doubt state legislatures will continue to be on the forefront of ensuring that student athletes are not exploited by . . . the NCAA.").

28. *See, e.g.*, S.B. 6722-B, 2019–2020 Reg. Sess. (N.Y. 2019) (requiring that schools apportion fifteen percent of ticket revenue to student-athletes at in-state universities).

29. *Compare* H.B. 617, 2021 Reg. Sess. (Ga. 2021) (prohibiting student-athletes from accessing their NIL earnings until at least one year after they leave school), *with* CAL. EDUC. CODE § 67456 (imposing no such restrictions).

30. Disparate state NIL laws have already factored into at least one top recruit's college decision. *See, e.g.*, Jake Aferiat, *Why Former Top QB Commit Quinn Ewers Reportedly Intends to Transfer from Ohio State, Possible Landing Spots*, SPORTINGNEWS (Dec. 3, 2021), https://www.sportingnews.com/us/ncaa-football/news/quinn-ewers-transfer-ohio-state-landing-spots/11004vyb20pyf1efi67w7v0p9k [https://perma.cc/HS2K-C3SR] (discussing number one overall football recruit for 2022, Quinn Ewers, who graduated from high school early to sidestep his home state's stringent NIL rules and "reap the benefits of the NCAA's new NIL (name, image and likeness) policy").

31. The U.S. Department of Justice has already warned the NCAA that any NCAA-imposed limitations on permissible student-athlete NIL compensation could run afoul of antitrust laws. *See* Dan Murphy & Adam Rittenberg, *NCAA Delays Vote to Change College Athlete Compensation Rules*, ESPN (Jan. 11, 2021), https://www.espn.com/college-sports/story/_/id/30694073/sources-ncaa-delays-vote-change-college-athlete-compensation-rules [https://perma.cc/ZTZ3-79P2]. Justice Kavanaugh commented on possible antitrust problems with student-athlete compensation restrictions in his concurring opinion in *National Collegiate Athletic Association v. Alston*, 141 S. Ct. 2141, 2166–68 (2021) (Kavanaugh, J., concurring).

32. *NCAA Statement on Gov. Newsom Signing SB 206*, NCAA (Sept. 30, 2019, 10:44 AM), https://www.ncaa.org/news/2019/9/30/ncaa-statement-on-gov-newsom-signing-sb-206.aspx [https://perma.cc/QAG5-LRFM].

"unconstitutional" but failed to explicitly advance a theory for this claim.[33] The NCAA's game plan, presumably, is a Dormant Commerce Clause (DCC) challenge to California SB-206 and similar state regulations.[34]

The DCC empowers courts to invalidate state laws that unduly interfere with interstate commerce.[35] The DCC usually applies to three categories of state law: laws discriminating against out-of-state commerce, laws imposing out-of-state burdens that clearly outweigh their in-state benefits (also known as "balancing"), and laws affecting commerce that takes place wholly outside the state (also known as "extraterritorial effects"). This Article contends that SB-206 and similar state laws withstand constitutional scrutiny under the discrimination and balancing prongs of the DCC, but they run afoul of the Supreme Court's extraterritoriality jurisprudence.

In any sports league, competitors must agree to abide by the same rules.[36] The need for uniform national rules compels the NCAA to adopt the least restrictive state NIL law on a national scale, thereby affecting commerce "wholly outside" the state in violation of the DCC. Even still, one state's NIL law is unlikely to be "least restrictive" in every sense, so changing NCAA bylaws to match one or more state laws cannot truly equalize the playing field. Only Congress has the power to do that. Prudent policy, therefore, demands that Congress step up to the plate and legislate a national solution to supplant the state-by-state patchwork of NIL compensation regimes.

Part I of this Article provides the first comprehensive survey of the state student-athlete NIL statutes already passed, as well as their legally significant differences and the varying proposals under consideration in other states. Part II gives an overview of the DCC—the most likely candidate for a constitutional challenge to student-athlete NIL legislation—and argues that

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33. *See NCAA Responds to California Senate Bill 206*, *supra* note 25.

34. Although California SB-206 and similar bills do not require that the NCAA pays players itself, and therefore do not cause the NCAA direct financial loss, the NCAA would presumably have standing to sue because the laws limit its contractual freedom with student-athletes and change its conduct to permit student-athlete NIL compensation. Moreover, Congress failed to legislate on the issue before July 1, 2021—the date the first state law goes into effect. The NCAA may attempt to enjoin enforcement of one or more state NIL statutes on the ground that they violate the DCC, while hoping that Congress scraps together a long-term solution.

35. Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENT. 395, 395 (1986).

36. *See, e.g.*, Robert Bork, THE ANTITRUST PARADOX 278 (1978) ("[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports.").

state NIL laws violate the DCC because they impermissibly regulate commerce "wholly outside" the state. Part III then discusses two key policies supporting Congressional intervention in the NIL game—the possibility of retaliatory state NIL legislation and the NCAA's status as a natural monopoly. Finally, Part IV proposes a specific, two-part federal solution to the student-athlete compensation dilemma that optimally balances student-athletes' right to fair treatment with the need for uniform national regulation of college athletics.

II. THE STATE STATUTES

SB-206 broke new ground in the student-athlete compensation debate by forcing in-state universities to allow their athletes to accept payment from third parties for use of the athletes' names, images, and likenesses. To date, twenty-eight states have passed their own NIL laws, and eleven others have NIL bills in the works.[37] Since California passed SB-206, developments in the NIL game have been well-documented by sports journalists but remain untouched by legal scholars. This Part first analyzes the California Fair Pay to Play Act and surveys two other laws passed by state legislatures in New Jersey and Georgia. Finally, it samples several proposals currently under consideration in other states and outlines their key differences from SB-206.

A. The California Fair Pay to Play Act (SB-206)

SB-206 takes effect on January 1, 2023, and provides that California universities may not prevent student-athletes from earning NIL compensation.[38] It prohibits, pursuant to Section 67456(a)(1), any "postsecondary educational institution" from "uphold[ing] any rule, requirement, standard, or other limitation that prevents a student of that institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness."[39] While Section 67456(a)(1) takes care of the universities, Sections 67456(a)(2) and (a)(3) of the SB-206 directly

37. *See NIL Legislation Tracker*, SAUL EWING ARNSTEIN & LEHR LLP (2021), https://www.saul.com/nil-legislation-tracker#3 [https://perma.cc/T64L-VPB5].

38. *See* Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12 [https://perma.cc/L47M-KJBN].

39. CAL. EDUC. CODE § 67456(a)(1) (2019).

target the NCAA and regional athletic conferences.[40] These entities can penalize neither the student-athletes who earn NIL compensation, nor the schools that allow their student-athletes to do so.[41] Although student-athletes traditionally could not hire agents to represent them in commercial endeavors, Section 67456(c) empowers student-athletes to hire an agent or lawyer to facilitate engagement with third parties that wish to pay for use of their NIL.[42]

While SB-206 grants student-athletes significant authority otherwise denied by the NCAA, it also contains several significant limitations on their ability to generate income. Section 67456(e)(1) has a no-conflict provision, which provides that "[a] student-athlete shall not enter into a contract providing compensation to the athlete for use of the athlete's name, image, or likeness if a provision of the contract is in conflict with a provision of the athlete's team contract" [43]—that is, a contract between the athlete's university and another company.[44] Furthermore, § 67456(e)(2) requires student-athletes to disclose any endorsement contracts to the athlete's university.[45] These provisions, taken together, could allow schools to block significant funds from flowing to the student-athletes. For example, student-athletes could not enter into an endorsement contract with Adidas if their university has a preexisting contract with Nike due to the competing nature of the brands.[46]

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40. *See id.* § 67456(a)(2)–(a)(3).

41. *See id.* § 67456(a)(2) ("An athletic association, conference, or other group or organization with authority over intercollegiate athletics . . . shall not prevent a student of a postsecondary educational institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness."); *see also id.* § 67456(a)(3) ("An athletic association, conference, or other group or organization with authority over intercollegiate athletics . . . shall not prevent a postsecondary educational institution from participating in intercollegiate athletics as a result of the compensation of a student athlete for the student's name, image, or likeness.").

42. *See id.* § 67456(c).

43. *Id*. § 67456(e)(1).

44. These contracts can be very lucrative. For example, Notre Dame's ten year contract with Under Armour is worth approximately $90 million. *See* Darren Rovell, *Under Armour Signs Notre Dame*, ESPN (Jan. 21, 2014), https://www.espn.com/college-football/story/_/id/10328133/notre-dame-fighting-irish-armour-agree-most-valuable-apparel-contract-ncaa-history [https://perma.cc/2KBC-FXXF].

45. *See* CAL. EDUC. CODE § 67456(e)(2).

46. *See* Steven A. Bank, *The Olympic-Sized Loophole in California's Fair Pay to Play Act*, 120 COLUM. L. REV. F. 109, 116 (2020) ("Although [SB-206] broadens the ability of athletes to

One scholar described the no-conflict provision as a "loophole" that diminishes the efficacy of SB-206.[47] Still, SB-206 drove a seismic shift in the balance of power between the NCAA, universities, and student-athletes for two reasons. First, SB-206 is a pioneer piece of legislation; it showed other states that they, too, can affect the change in student-athlete compensation demanded for years by sports commentators and activists alike,[48] and those states can do so without the restrictions implemented by California. The limitations that fetter California student-athletes' ability to generate income leave other states with significant room to take more money out of the hands of the commercial college sports enterprise and put it into the hands of student-athletes. States can do this by, for example, permitting student-athletes to enter into endorsements that conflict with university contracts or even by requiring universities to pay student-athletes directly.[49]

Second, SB-206 is a groundbreaking piece of legislation because, even with its restrictions, student-athletes have tremendous room to profit, although this notion has been met with criticism. In his letter to California Governor Newsom,[50] Professor Chris Sagers contends that SB-206 just slightly expands the result from *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation*.[51] There, the Ninth Circuit invalidated the NCAA's cap on education-related aid to student-athletes but upheld its restrictions on non-education-related aid.[52] After that decision—which was later affirmed by the Supreme

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profit off their college fame, the 'no conflicts' provision makes it unlikely that student athletes will share much in the 'gargantuan sums of money' the students generate for the school.").

47. *See generally id*.

48. *See supra* notes 6–19 and accompanying text.

49. *See infra* notes 71–72 and accompanying text.

50. *See* Letter from Chris Sagers, James A. Thomasa Professor of Law, to Gavin Newsom, Governor of Cal. (Sept. 24, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3460551 [https://perma.cc/2KDF-VJ66] [hereinafter Letter from Chris Sagers to Gavin Newsom] (arguing that SB 206 is constitutional in response to *NCAA Responds to California Senate Bill 206*, *supra* note 25).

51. *See generally* Alston v. NCAA (*In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig.), 958 F.3d 1239 (9th Cir. 2020).

52. The court accepted the NCAA's justification that its compensation restrictions maintain the "'distinction between college and professional sports.'" *See id*. at 1257 (quoting *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1082 (N.D. Cal. 2019)). It explained, however, that "only *some* of the challenged rules serve that procompetitive purpose: limits on above-[cost of attendance (COA)] payments unrelated to education, the COA cap on athletic scholarships, and certain restrictions on cash academic or graduation awards and incentives." *Id.*

Court—Professor Sagers insists that NIL benefits provided by SB-206 "will often be small, and should typically represent only relatively small increments over existing compensation" provided by the Ninth Circuit's holding.[53]

But notwithstanding SB-206's "no-conflict" provision,[54] student-athletes can sign endorsements with the same sports company that outfits their school. Such endorsements would "complement, rather than conflict with," existing university contracts.[55] Further, nothing stops student-athletes from appearing in advertisements for the myriad of other businesses that do not directly compete with university affiliates, which includes virtually any business that does not sell sports equipment or apparel.[56]

Even if most student-athletes see no compensation from SB-206, the benefits for marquee players in revenue-generating sports will be massive, and these are precisely the type of players for whom the SB-206 conveys the largest recruiting advantages. Generational athletes experience national fame even while still in high school. For example, ESPN televised basketball phenom Zion Williamson's decision to sign with Duke University, and the rapper Drake has worn his high school jersey.[57] Upon declaring for the NBA draft after only one year in college, Williamson inked a $75 million deal with Jordan brand.[58] Had he been a few years younger and signed with Stanford University instead of Duke University, he could have signed a similar multi-

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On the other hand, the caps on non-cash educational benefits do nothing to further the NCAA's procompetitive purpose, so the court invalidated these restrictions. *Id.*

53. *See* Letter from Chris Sagers to Gavin Newsom, *supra* note 50, at 5.

54. *See* CAL. EDUC. CODE § 67456(e)(1) (2019).

55. Bank, *supra* note 46, at 115. Nike, Adidas, and Under Armour already contract with ninety-seven percent of all FBS college programs; therefore they can endorse student-athletes at those schools without violating the "no-conflict" provision. *See* Zach Barnett, *Nike, Adidas or Under Armour? Who Wears What in FBS—2018, Edition,* FOOTBALL SCOOP (May 31, 2018), http://footballscoop.com/news/nike-adidasarmour-wears-fbs-2018-edition/ [https://perma.cc/7TEU-P4PA].

56. *See* Bank, *supra* note 46, at 115.

57. Murphy, *supra* note 14, at 10.

58. *See* Pete Blackburn & DJ Siddiqi, *Pelicans Star Zion Williamson, Nike's Jordan Brand Agree to Richest Rookie Shoe Deal in NBA History, per Report*, CBS SPORTS (July 24, 2019, 5:18 PM), https://www.cbssports.com/nba/news/pelicans-star-zion-williamson-nikes-jordan-brand-agree-to-richest-rookie-shoe-deal-in-nba-history-per-report/ [https://perma.cc/E3ZV-WQSW].

million dollar agreement with Jordan brand while still in college without violating SB-206's no-conflict provision.[59] SB-206 leaves athletes with tremendous room to profit, generating legal disputes over the State's power to do so.

B. Other Existing Pay to Play Laws

Florida,[60] Colorado,[61] Michigan,[62] Nebraska,[63] New Jersey,[64] and Georgia[65] are among the States that followed California's lead and passed NIL legislation. Several took effect on July 1, 2021—eighteen months earlier than California's SB-206.[66] New Jersey's and Georgia's have particularly interesting twists.

New Jersey's law is unique from the others because it is the only law that bans student-athletes from earning compensation in connection with certain industries: adult entertainment, alcohol, gambling of any kind, tobacco and electronic smoking, pharmaceuticals, controlled dangerous substances, and firearms.[67] While this makes sense from a public policy standpoint, since the vast majority of NCAA student-athletes are under twenty-one years old,

59. Cameron Miller, *The Real Price of Athletics at Stanford*, STAN. DAILY (Mar. 1, 2015, 8:58 PM), https://www.stanforddaily.com/2015/03/01/the-real-price-of-athletics-at-stanford/ [https://perma.cc/2G4E-PT9P].

60. *See* FLA. STAT. § 1006.74(2)(a) (2020).

61. *See* Compensation and Representation of Student Athletes, S.B. 20-123, 2020 Reg. Sess. (Colo. 2020).

62. *See* H.B. 5218 Pub. Act No. 366, 100th Leg., 2020 Reg. Sess. (Mich. 2020).

63. *See* Leg. B. 962, 2020 Reg. Sess. (Neb. 2020).

64. *See* New Jersey Fair Play Act, NJ ST 18A:3B-86.

65. *See* H.B. 617, 2021 Reg. Sess. (Ga. 2021).

66. *See* FLA. STAT. § 1006.74 (2020); NEB. REV. STAT. § 48-3601 (2020).

67. *See* N.J. S.B. 971, 83 §2(b).

student-athletes in the other five states remain free to accept endorsements from those industries.[68]

Georgia's law is the biggest outlier of those passed by state legislatures because it prohibits student-athletes from accessing their NIL earnings until at least one year after they graduate or leave school.[69] While student-athletes in California could start earning lucrative NIL paychecks immediately upon enrollment, student-athletes in Georgia must wait, potentially for several years. This is an important distinction for many student-athletes who come from struggling socioeconomic backgrounds.[70] Only a few states have passed NIL laws, but it is already clear that not every state will adopt California's statutory language in lockstep; each law has slight, but important, differences.

C. Pay to Play Bill Proposals

New York and South Carolina are two states considering NIL legislation, each with key differences from California's SB-206.[71] New York's bill requires in-state universities to take fifteen percent of revenue from ticket

68. *See* Foley & Lardner LLP, *The Landscape for College Athletes' Commercial Rights Is Changing*, JD SUPRA (Nov. 25, 2020), https://www.jdsupra.com/legalnews/the-landscape-for-college-athletes-12929/ [https://perma.cc/UE6S-93GT].

69. *See* Ga. H.B. 617(c)(4)(B)(iii), (iv). Interestingly, Georgia's law is reminiscent of the plan approved by the District Court but rejected by the Ninth Circuit in O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1007–08 (N.D. Cal. 2014). The District Court in that case enjoined the NCAA from prohibiting member schools from paying student-athletes up to $5,000 per year in deferred compensation payable upon the student-athletes' graduation. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1061 (9th Cir. 2015). The Ninth Circuit, however, struck down the injunction because it recognized that amateurism serves pro-competitive purposes. *See id.* at 1078–79. The district court's ruling, by mandating "cash sums untethered to educational expenses," presented "a quantum leap" from amateurism. *See id.* at 1078.

70. *See* Huma & Staurosky, *supra* note 18, at 4.

71. *See* Nicole Berkowitz & Susan Russell, *More States Step Up to the Plate with New Legislation to Address Student Athlete Compensation and the NCAA Passes the Ball to Congress,* JD SUPRA (Jan. 24, 2020), https://www.jdsupra.com/legalnews/more-states-step-up-to-the-plate-with-96795/ [https://perma.cc/3X8J-NN3P] (discussing bills introduced in Georgia, Illinois, Michigan, Missouri, Oklahoma, South Carolina, and Tennessee); *see also* Charlotte Carroll, *Tracking NCAA Fair Play Legislation Across the Country*, SPORTS ILLUSTRATED (Oct. 2, 2019), https://www.si.com/college/2019/10/02/tracking-ncaa-fair-play-image-likeness-laws [https://perma.cc/QX7B-MFBS] (discussing bills introduced in Kentucky, Minnesota, Nevada, New York, and Pennsylvania).

sales and apportion that revenue to college athletes.[72] Since higher ticket revenue per student-athlete promises greater financial compensation, this requirement could incentivize recruits to choose a school solely based on ticket revenues.[73]

Down south, South Carolina's bill requires schools to annually deposit $5,000 into a trust fund for each student-athlete to be paid upon graduation.[74] This proposal differs from SB-206 in two important ways—first, every student-athlete would receive at least $5,000, whereas SB-206 guarantees athletes nothing but theoretically enables them to make millions. Second, South Carolina, like Georgia, delays payment until after graduation, so student-athletes who wish to profit from their NIL rights while in college would likely choose a university in California over a peer school in South Carolina.

These are only two of the dozens of bills circulating state legislatures, and the list of states considering SB-206-type bills will only grow—each taking effect on a different date and imposing different requirements on both the NCAA and its member schools. The NCAA is right to fear a confusing "patchwork" of different laws in different states,[75] and early state NIL laws suggest that the potential for inconsistent regulation is "obvious."[76] Each proposal has its pros and cons as a matter of policy, but the state statutes are ineffectual if states lack the power to enact them. The most relevant legal barrier to states' power to do so is the DCC.

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72. *See* S.B. 6722-B, 2019–2020 Reg. Sess. (N.Y. 2019).

73. The college football world has already seen at least one high-profile recruit select his university for the promise of greater compensation opportunities, which was made possible by the NCAA's non-enforcement policy with respect to its NIL compensation restrictions. *See* Ryan Glasspiegel, *Travis Hunter's Signing Day Flip to Jackson State Sparks Seven-Figure Barstool Rumors*, N.Y. POST (Dec. 15, 2021, 5:52 PM), https://nypost.com/2021/12/15/travis-hunters-flip-to-jackson-state-sparks-barstool-nil-rumors/ [https://perma.cc/3V2S-FMH3].

74. S.B. 935, 2019–20 Gen. Assemb., 123d Sess. (S.C. 2019); Dan Murphy, *S. Carolina to Consider Fair Pay to Play-Type Bill*, ESPN (Sept. 13, 2019), https://www.espn.com/college-football/story/_/id/27607396/s-carolina-consider-fair-pay-play-type-bill [https://perma.cc/PH3X-LV6Q].

75. *See NCAA Statement on Gov. Newsom Signing SB 206*, *supra* note 32.

76. *See* Legato Vapors, LLC v. Cook, 847 F.3d 825, 835 (7th Cir. 2017) (invalidating Indiana law that dictated how out-of-state e-cigarette manufacturers must operate their facilities if any of their products are sold in Indiana).

III. THE DORMANT COMMERCE CLAUSE AND STATE NIL REGULATION

The Commerce Clause grants Congress the power to regulate commerce "among the several States."[77] Courts have long interpreted the Clause to contain a dormant prohibition against state laws that unduly interfere with interstate commerce, even in the absence of preemptory federal legislation on the subject.[78] Although not explicit in the text of the Constitution, this *Dormant* Commerce Clause draws support from the positive grant of power to Congress in the Commerce Clause and the problems of state protectionism that plagued the nation under the Articles of Confederation.[79] Still, these problems are counterbalanced "by . . . federalism favoring a degree of local autonomy,"[80] which renders the DCC a premier playing field for debates about the optimal balance of state and federal power.

State laws invalidated by the federal courts under the DCC fall into one of three buckets. First, courts apply strict scrutiny to any state law that discriminates against out-of-state commerce.[81] Strict scrutiny is an exacting standard of review, under which the State must show that its law's purpose cannot be adequately served through nondiscriminatory means.[82] Second, if the state law does not discriminate against interstate commerce, courts will likely apply the more lenient *Pike* balancing test.[83] This test invalidates a state law whose incidental burden on interstate commerce outweighs the law's putative local benefits.[84] Third and finally, even if the state law does

77. U.S. CONST. art. I, § 8.

78. *See* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007) ("Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute.") (internal citations omitted).

79. *See* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 167 (2010).

80. Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008).

81. *See United Haulers Ass'n, Inc.*, 550 U.S. at 338–39; *see also* Darien Shanske, *The Supreme Court and the New Old Public Finance: A New Old Defense of the Court's Recent Dormant Commerce Clause Jurisprudence*, 43 URB. LAW. 659, 665 (2011).

82. *See United Haulers Ass'n, Inc.*, 550 U.S. at 366 (Alito, J., dissenting).

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

84. *See id.*

not discriminate against out-of-state commerce, courts apply strict scrutiny to state laws with the "practical effect" of regulating commerce "wholly outside" the state's borders.[85]

This Part applies each test to state regulation of student-athlete NIL compensation. First, student-athlete NIL regulations—at least those currently on the books—do not discriminate against interstate commerce and therefore escape strict scrutiny under the discrimination prong. Second, state NIL laws convey long-demanded benefits to student-athletes, so they are unlikely to be invalidated under the *Pike* balancing test. Lastly, this Part contends that student-athlete NIL regulations violate the extraterritoriality principle. Because NCAA competitors must abide by the same rules, inconsistent state laws force the NCAA to amend its bylaws to allow NIL compensation on a national scale and thereby regulate commerce wholly outside the state's borders.

Before diving into the analysis, this Article acknowledges the current Supreme Court could be more hostile to DCC challenges than the previous Courts that produced the landmark DCC precedents on which this Article relies. While Justice "Alito seem[s] willing to enforce the [DCC] wholeheartedly,"[86] other Republican appointees—especially the originalists—may be more skeptical.[87] After all, "the dormant Commerce Clause doctrine cannot be found in the text of any constitutional provision but is (at best) an implication from one."[88] The tension between the DCC—an *implicit* constitutional value—and federalism—an *explicit* constitutional value—is undeniable. The DCC inhibits states' ability to serve as "small-scale social laboratories," which allow other states—or even the federal government—to learn from the states' policy successes and failures.[89] This tension in part inspired

85. Healy v. Beer Inst., 491 U.S. 324, 332 (1989).

86. *See* Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 1005 (2013) (citing United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 356 (2007) (Alito, J., dissenting)).

87. *See, e.g.*, Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1878 (2011) (explaining that "[w]ith typical bravado, the current Supreme Court's most originalist members have mounted a sustained attack on the dormant (or 'negative') Commerce Clause").

88. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2477 (2019) (Gorsuch, J., dissenting).

89. *See* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 598 (1987).

Justice Thomas's bold declaration that he will never again vote to strike down a state law on DCC grounds.[90] But aside from Justice Thomas, it is difficult to know how most current Supreme Court Justices might apply a sub-textual doctrine to the novel issue of student-athlete NIL compensation. Consequently, the states' legislative momentum makes student-athlete publicity rights a test case for modern Justices' emerging approaches towards the DCC. If a state NIL law does reach the Supreme Court, the resulting decision would answer important questions that are unclear.

A. Student-Athlete NIL Regulations Do Not Discriminate Against Out-of-State Commerce

Courts apply strict scrutiny to any state laws that discriminate against out-of-state commerce explicitly, in purpose, or in effect,[91] but SB-206 does not discriminate against interstate commerce in any respect.

1. Overview of the Discrimination Prong

Strict scrutiny is a "virtually per se rule of invalidity," [92] so the initial determination of whether a state law is discriminatory almost always controls the outcome. Discrimination in this context means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[93] Differential treatment includes, for example, laws that effectively prevent articles of interstate commerce from moving across state lines[94] or insulate in-state economic actors from the competition with

90. *See* Hillside Dairy, Inc. v. Lyons, 539 U.S. 59, 68 (2003) (Thomas, J., dissenting).

91. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 n.15 (1981). The Clause prohibits state laws that discriminate either in purpose or in effect because the anti-discriminatory premise will go underenforced if only applied to laws that are discriminatory on their face. *See* Denning, *supra* note 86, at 499–500.

92. City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978).

93. Or. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93, 99 (1994).; *see also* Shanske, *supra* note 81, at 706 ("[T]he heart of what a state or local government may *not* do is to use the coercive power of the state to reward in-state versus out-of-state economic actors").

94. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949); *see also* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997) ("The negative or dormant implication of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby impede[d] free private trade in the national marketplace") (citations and internal quotation marks omitted).

economic actors out-of-state. [95] Now, federal courts are most willing to enforce the DCC against protectionist or discriminatory state laws.[96] In fact, "[t]he bulk of the Supreme Court's [DCC] cases—especially in recent years—has indeed concerned discriminatory state legislation that suggests underlying protectionism."[97]

2. Applying the Discrimination Prong to Student-Athlete NIL Regulations

Because SB-206 does not discriminate on its *face*,[98] the analysis proceeds to discriminatory *effects*. The Court has never clearly articulated how much discrimination is tolerable.[99] In this context, the NCAA could argue that SB-206 and similar laws empower in-state universities to provide a benefit to student-athletes that schools in other states cannot. By giving in-state universities significant recruiting advantages over their out-of-state peers, the laws would effectively insulate in-state universities from abiding by the NCAA's amateurism bylaws.

Unlike statutes invalidated in the Court's discrimination cases, SB-206 does not truly insulate its universities from competition for student-athletes on the recruiting trail because other states are free to convey the same, or greater, advantages to their universities by passing NIL legislation. Just as states are free to attract economic actors by adopting right-to-work laws[100]

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95. *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 350–52 (1977) (invalidating facially neutral North Carolina law that banned apple vendors from using quality ratings besides the USDA's, which adversely impacted Washington apple growers thanks to Washington's unique labeling program).

96. *See* Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring) ("The key point of today's dormant Commerce Clause jurisprudence is to prevent States from discriminating against out-of-state entities in favor of in-state ones.").

97. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 797–98 (2001). The Court's most recent DCC case, for example, fits that description. *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2457 (2019) (striking down Tennessee's two-year residency requirement for obtaining liquor licenses as "blatantly" protectionist because it discriminated against out-of-state residents who wished to sell liquor in the state).

98. *See* Letter from Chris Sagers to Gavin Newsom, *supra* note 50, at 5.

99. *See* Denning, *supra* note 86, at 500.

100. As of 2014, twenty-four states have passed right-to-work laws. *See* Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 857 (2014). Right-to-work laws prohibit unions from requiring nonmembers to pay for services that

or lowering taxes,[101] they can restore equal competition for student-athletes by giving their athletes NIL rights that equal or expand upon those granted by California. Numerous other states have already demonstrated that any state can restore an even market for recruits if, as a policy matter, it chooses to do so. Although the discrimination prong would be the NCAA's clearest path to relief,[102] any court is unlikely to hold that the state NIL regulations discriminate against interstate commerce.

B. State NIL Regulations Survive the Pike Balancing Test

If the state law neither discriminates nor imposes extraterritorial effects, courts will apply the *Pike* balancing test, which weighs the law's burden on interstate commerce against the importance of the legitimate state interest served by the law.[103] "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[104] A successful challenge to state NIL regulations under the *Pike* balancing test is improbable because they serve a legitimate and widely-demanded purpose: restoring a measure of fairness to college athletics.

1. Overview of the Pike Balancing Test

Although the test's language implies lenience, it derives its name from a case in which the Court struck down an Arizona statute that prohibited Arizona cantaloupes from being transported into a different state for

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the union has a legal obligation to provide. *See id.* Right-to-work states might attract employees who do not wish to pursue union membership because they can benefit from union representation without having to pay for the services they receive. *See id.* at 857–58.

101. For a discussion of the variance between state and federal tax schemes, *see generally* Mike Porter et al., *State Conformity to Federal Provisions: Exploring the Variances*, DELOITTE (July 10, 2017), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-state-conformity-to-federal-provisions-exploring-the-variances.pdf [https://perma.cc/B44R-7B4Q].

102. *See supra* note 96 and accompanying text.

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

104. *Id.*

packaging.[105] Recently, however, the Court has moved away from *Pike* balancing due to institutional skepticism about the judiciary's ability to balance competing interests and a more general consensus that balancing is an activity best suited for legislatures.[106] While even originalists like Justice Scalia were willing to strike down overtly protectionist state laws, they rarely apply the *Pike* balancing test with force—if at all—because the test is antagonistic to judicial restraint.[107] Before even applying the test to student-athlete publicity rights, it is safe to say that the Supreme Court, as currently composed, is unlikely to strike down a state law on balancing grounds.

2. Applying the Pike Balancing Test to Student-Athlete NIL Regulations

To apply the *Pike* balancing test here, courts would weigh the state interest in bringing student-athletes the fairness they deserve against the law's burden on interstate commerce—likely, the national interest in preserving amateurism in college sports.[108] Local benefits are undoubtedly significant; California, for example, has fifty-seven NCAA member schools,[109] and SB-206 broadens compensation opportunities for a financially-strapped class of

105. *Id.* at 139. The Court reasoned that the statute burdened interstate commerce by forcing out-of-state packagers to build expensive, commercially unnecessary packing plants in Arizona if they wished to ship Arizona cantaloupes. *See id.* at 144–45.

106. *See* Goldsmith & Sykes, *supra* note 97, at 820 ("[T]here is a growing consensus that courts . . . are ill-suited to make the many difficult value judgments that the [*Pike*] balancing test requires.").

107. *See, e.g.*, Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (explaining that the *Pike* balancing test is like asking "whether a particular line is longer than a particular rock is heavy"); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 360 (2008) (Scalia, J., concurring) ("The Court declines to engage in *Pike* balancing here because courts are ill suited to determining whether or not this law imposes burdens on interstate commerce that clearly outweigh the law's local benefits, and the 'balancing' should therefore be left to Congress.").

108. *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 350 (1977) (applying the *Pike* balancing test by "accommodat[ing] . . . the competing national and local interests").

109. *See NCAA Member Schools*, N.C.A.A., http://www.ncaa.org/about/resources/research/ncaa-member-schools [https://perma.cc/FD9P-67QG].

individuals, less than one percent of whom ascend to the professional ranks[110] and eighty-six percent of whom live at or below the poverty line.[111]

SB-206 and its sister statutes may burden interstate commerce to the extent that they vitiate the amateur status of student-athletes. The fact that collegiate athletes are amateurs stimulates demand in the "product" of college sports.[112] In dicta, *NCAA v. Board of Regents* acknowledged that amateurism preserves a unique "product"—athletic competition with "an academic tradition"—that distinguishes it from the minor leagues or other analogous professional sports.[113] This "product" broadens the choices available to both sports fans and athletes,[114] choices that would not be available but for the mutually agreed upon compensation restraints imposed by the NCAA.[115] Accordingly, the NCAA would argue that, by allowing student-athlete compensation, NIL legislation effectively takes a product off the market.

Notwithstanding diminution of the "product" of amateur college sports, the states can compellingly argue the equitable treatment of student-athletes outweighs the law's burden to amateurism. While the entertainment value of college athletics is important, amateurism comprises a mere portion of that value.[116] Moreover, "these student-athletes deserve more than our

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110. *See* Thacker, *supra* note 16, at 184, 187.

111. *See* Huma & Staurowsky, *supra* note 18, at 4. For additional discussion on the financial struggles and other inequities faced by student-athletes around the country, *see supra* notes 16–19.

112. *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 983 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015) (finding that "the popularity of college sports would likely depend on the size of payments awarded to student-athletes").

113. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101–02 (1984) ("In order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like.").

114. *Id.* at 102.

115. *See id.* ("[T]he integrity of the 'product' cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.").

116. Whether athletes get paid is far less important to the NCAA's product than maintaining uniform rules of competition and, consequently, compensation. *See infra* notes 157–65.

fanhood[,]"[117] and commentators largely agree that the need for student-athlete compensation reform is long overdue.[118] The overwhelming consensus in favor of student-athlete compensation[119] suggests that SB-206 conveys sizable in-state benefits, so the NCAA's challenge under the *Pike* balancing test would be a highly improbable Hail Mary in its judicial matchup with the states.

C. Student-Athlete NIL Regulations Create Extraterritorial Effects

Finally, courts also apply strict scrutiny to state laws that operate extraterritorially—i.e.., laws with the "practical effect" of regulating commerce that occurs "wholly outside" the State's borders.[120] Although SB-206 and its sister statutes are non-discriminatory and deliver important in-state benefits, they cannot escape strict scrutiny under the Supreme Court's extraterritoriality jurisprudence because sports leagues are a unique setting in which competitors must agree to abide by the same rules, whether those rules govern qualifications for athletic participation or the field of play itself. State NIL laws therefore force the NCAA to change its rules on a national scale and regulate commerce occurring wholly outside the State's borders.

1. Overview of the Extraterritoriality Doctrine

The extraterritoriality doctrine grew out of two cases involving price-affirmation statutes—state laws requiring a company doing business in interstate commerce to affirm that its in-state prices were no higher than its out-of-state prices. In *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, the Court invalidated a New York price-affirmation statute because "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate

117. *See* Murphy, *supra* note 14, at 13.

118. *See, e.g.*, Michael Rosenberg, *Change Is Long Overdue: College Football Players Should Be Paid*, SPORTS ILLUSTRATED (Aug. 26, 2010), https://www.si.com/more-sports/2010/08/26/pay-college [https://perma.cc/6R6J-XFN9].

119. *See* Patrick Hruby, *Paying College Athletes Gaining a Bipartisan Consensus as New Report Slams NCAA*, L.A. TIMES (Mar. 28, 2019, 6:00 AM), https://www.latimes.com/sports/more/la-sp-paying-college-athletes-20190327-story.html [https://perma.cc/ZLF8-5UY8].

120. *See* Healy v. Beer Inst., 491 U.S. 324, 332, 336 (1989).

commerce."[121] Three years later, in *Healy v. Beer Institute*, the Court struck down a similar Connecticut price-affirmation statute that required beer shippers to affirm that their in-state prices were no higher than their prices in neighboring states at the time of affirmation.[122] There, the Court forcefully declared its "established view" that a state law with the "'practical effect' of regulating commerce wholly outside that State's borders is invalid under the Commerce Clause."[123] This is true whether or not the state intended to give the law its extraterritorial reach.[124]

The *Healy* Court also considered the dangers of "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State,"[125]—which create tension between the Connecticut statute and other state regulatory regimes, including both those already in existence and those that "might be enacted throughout the country[.]"[126] Subjecting one entity to inconsistent state regulations contravenes the very purpose of the Commerce Clause—facilitating one national market for goods and services and empowering the national Congress to regulate that market uniformly.[127]

Since *Healy*, the Supreme Court has not invalidated a state law under the extraterritoriality doctrine, which remains "the least understood of the Court's three strands of dormant commerce clause jurisprudence."[128] Some fear the extraterritoriality test is overbroad; State laws often affect commerce outside the state's borders, so the broad language of *Brown-Forman* and

121. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582 (1986).

122. *See Healy*, 491 U.S. at 326.

123. *See id.* at 332.

124. *Id.* at 336 (citing *Brown-Forman*, 476 U.S. at 579).

125. *Id.* at 337 (citing CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88–89 (1987)).

126. *Id.* at 337–38.

127. *See* Cooter & Siegel, *supra* note 79, at 149 ("Legal obstacles to the movement of resources inhibit national markets. In contrast, a uniform regulatory framework lubricates national markets for some goods. Recognizing the federal government's decisive advantage over state governments, the drafters of the constitution in 1787 gave Congress the power to create unified national markets in Clauses 3 through 6.").

128. *See* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015).

Healy could threaten to invalidate clearly legitimate state regulations.[129] However, others maintain that extraterritoriality is better understood as an example of a situation in which the burdens of a state law far exceed the law's benefits within the meaning of *Pike*.[130]

One such critic, Professor Brannon P. Denning, contends that the Supreme Court "ultimately abandoned" the extraterritoriality doctrine—or, at least, limited it to the earlier price-affirmation cases—in *Pharmaceutical Research and Manufacturers of America v. Walsh*.[131] There, the Court upheld a series of Maine laws that required out-of-state drug manufacturers to subsidize Maine Medicaid patients' drug purchases in exchange for avoiding a costly "preauthorization" process, which they must otherwise endure before their drugs could be prescribed to state Medicaid patients.[132] The Court distinguished the case from *Brown-Forman* and *Healy* because, unlike in those cases, the state law did not regulate the price of an out-of-state transaction or tie the price of in-state products to their out-of-state prices.[133] Professor Denning explains that the Court's rejection of the plaintiff's extraterritoriality challenge marked a retreat from "*Healy*'s sweeping restatement" of extraterritoriality and possibly even killed the doctrine altogether, since the Supreme Court has not touched it since.[134]

Even if Professor Denning is correct that the Supreme Court retreated from extraterritoriality, lower courts did not get the message. Each circuit has at least entertained extraterritoriality challenges to state laws that have nothing to do with price affirmation.[135] More importantly, circuits have

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129. *See* Denning, *supra* note 86, at 980.

130. *See, e.g.*, Goldsmith & Sykes, *supra* note 97, at 806 ("[O]ur gloss on extraterritoriality simplifies dormant Commerce Clause jurisprudence, for it effectively folds the extraterritoriality concern into a balancing analysis framework . . .").

131. *See* Denning, *supra* note 86, at 980 (citing Pharm. Rsch. and Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003)).

132. *See Pharm. Rsch. and Mfrs. of Am.,* 538 U.S. at 653–54, 670 (2003).

133. *Id.* at 669.

134. *See* Denning, *supra* note 86, at 998–99.

135. *See, e.g.*, New York v. Mountain Tobacco Co., 942 F.3d 536, 542 (2d Cir. 2019) (New York law imposing stamp requirement for cigarettes sold in-state); Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 632 (6th Cir. 2010) (Ohio law imposing labeling requirements on milk processors); All. of Auto Mfrs. v. Gwadosky, 430 F.3d 30, 32 (1st Cir. 2005) (Maine law prohibiting car manufacturers from adding state-specific surcharges to wholesale prices).

invalidated state laws that, for example, regulated the production of e-cigarettes that are sold in-state;[136] limited carbon dioxide emitted during the generation of electricity that is later consumed in-state;[137] banned price-gouging for prescription drugs sold in-state;[138] and imposed stricter due process requirements on the NCAA when in-state student-athletes are subject to disciplinary proceedings.[139] Whether implicitly or explicitly, most circuits "therefore reject [the] argument that *Walsh* limited the extraterritoriality principle only to price affirmation statutes."[140]

So, why did Professor Denning swing and miss? One reason might be that some lower courts actually found ways to effectively limit *Healy*'s broad language to prevent the extraterritoriality doctrine from threatening legitimate state regulations. The Second Circuit, for example, held that a nondiscriminatory state regulation does not violate the DCC when it increases the cost of compliance, even if those costs lead the out-of-state actor "to abandon the state's market" entirely.[141] To the Second Circuit, a state law is only extraterritorial (and thus subject to DCC invalidation) if: first, it regulates conduct occurring *wholly* out-of-state, and second, it does so for reasons other than cost.[142] Contrary to this nuanced formulation of the extraterritoriality principle, Professor Denning seems to view any state law that affects out-of-state conduct as extraterritorial;[143] in this respect, his argument misses the mark. The extraterritoriality doctrine is still a viable one, even if the circumstances in which it applies are rare.

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136. *See* Legato Vapors, LLC v. Cook, 847 F.3d 825, 837 (7th Cir. 2017).

137. *See* North Dakota v. Heydinger, 825 F.3d 912, 913 (8th Cir. 2016).

138. *See* Assoc. for Accessible Med. v. Frosh, 887 F.3d 664, 666 (4th Cir. 2018).

139. *See* NCAA v. Miller, 10 F.3d 633, 640 (9th Cir. 1993). Although the case was decided a decade before *Walsh*, it remains good law in the Ninth Circuit. *See* Daniels Sharpsmart, Inc. v. Smith, 889 F.3d 608, 615–16 (9th Cir. 2018) (approving of the reasoning and outcome in *Miller*).

140. *Frosh*, 887 F.3d at 670.

141. *See* Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 111 (2d Cir. 2001) (upholding Vermont law imposing product-labeling requirements for in-state sales of light bulbs, even when the product is produced out-of-state).

142. *See id.* at 110–12.

143. *See* Denning, *supra* note 86, at 1008 (explaining that "taking the [extraterritoriality doctrine] seriously" would require courts to subject "common tort remedies," like punitive damages, "to its strictures.").

State regulation of the internet illustrates the difference between state laws that merely impose costs on out-of-state actors (not extraterritoriality) and those that wholly control out-of-state conduct (extraterritoriality). The first court to consider a DCC challenge to state internet regulation was *American Libraries Association v. Pataki*[144] in 1997. There, the Southern District of New York invalidated a New York law making it a crime to disseminate certain materials online deemed harmful to minors.[145] The court reasoned that "Internet users have no way to determine the characteristics of their audience that are salient under the New York Act—age and geographic location."[146] Because users cannot "bypass any particular state" online, they must "comply with the regulation imposed by the state with the most stringent standard or [forego] Internet communication."[147] The law, therefore, would chill the activities of people outside of New York who had no intention of communicating with people in New York—an extraterritorial effect.

In the last decade, most courts have been unwilling to extend *Pataki*,[148] some might argue, because the court's holding brings too many valid state regulations within grasp.[149] In an influential article published shortly after the *Pataki* decision, Professors Jack Goldsmith and Alan Sykes criticized the extraterritoriality doctrine as applied to state internet regulations for reasons similar to those expressed by Professor Denning—the doctrine's lack of a limiting principle[150] and the danger that it might infringe on legitimate exercises of state regulatory authority.[151]

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144. *See* Am. Libraries Ass'n v. Pataki, 969 F.Supp. 160 (S.D.N.Y 1997).

145. *See id.* at 163, 183–84

146. *Id.* at 167.

147. *Id.* at 183.

148. *See, e.g.*, Rousso v. Washington, 239 P.3d 1084, 1095 (Wash. 2010) (upholding state law that banned internet gambling).

149. *See, e.g.*, Denning, *supra* note 86, at 999 ("[T]he rise of the Internet (and state attempts to regulate it) . . . pointed up the consequences of enforcing *Healy*'s sweeping version of extraterritoriality, causing scholars to question its origins and application.").

150. *See* Goldsmith & Sykes, *supra* note 97, at 790. ("Scores of state laws validly apply to and regulate extrastate commercial conduct that produces harmful local effects.").

151. Professors Goldsmith and Sykes insist that "the dormant Commerce Clause argument, if accepted, threatens to invalidate nearly every state regulation of internet communications

A more plausible explanation for the judiciary's recent acceptance of state internet regulations is that these regulations no longer have extraterritorial effects, not that courts have tossed the extraterritoriality doctrine aside. The development of geolocation technology has reduced the burden on internet companies imposed by state regulations and has allowed them to alter their conduct based on a user's location.[152] Companies can locate consumers via IP addresses, which may act as a gatekeeping function such that IP addresses from one state will initiate one set of disclosures, while an IP address from another state will initiate a different set of disclosures.[153] Thus, the factual circumstances confronted by the *Pataki* court no longer exist; one state's law will no longer regulate a company's wholly out-of-state conduct because the company can see where its users are located.

In conclusion, the extraterritorial effects doctrine is still alive. Some courts have limited it to state laws that regulate out-of-state conduct for reasons other than cost,[154] which comports with the unique circumstances of the price-affirmation cases of the 1980s.[155] Similarly, early internet regulations could operate extraterritoriality before technology enabled companies to see where their users are physically located. Sports leagues might present similar concerns. Heretofore, the DCC's application to student-athlete compensation rights remains largely untouched, except for one brief letter to California Governor Newsom written before he signed SB-206 into law.[156] This Article now turns to that argument.

[because] nearly every state regulation of internet communications will have the extraterritorial consequences the [*Pataki*] court bemoaned." *See id.* at 786–87.

152. This was a reason behind the Ninth Circuit's dismissal of an extraterritoriality claim against a California internet regulation in *Greater L.A. Agency on Deafness, Inc. v. CNN*, 742 F.3d 414, 433 (9th Cir. 2014).

153. *See* Cale Guthrie Weissman, *What Is an IP Address and What Can It Reveal About You?*, BUS. INSIDER (May 8, 2015, 1:45 PM), https://www.businessinsider.com/ip-address-what-they-can-reveal-about-you-2015-5 [https://perma.cc/8K7T-4AS4].

154. *See, e.g.*, Nat'l Elect. Mfrs. Assoc. v. Sorrell, 272 F.3d 104, 111 (2d Cir. 2001).

155. *See* Healy v. Beer Inst., 491 U.S. 324, 324–25 (1989); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580–82 (1986).

156. *See* Letter from Chris Sagers to Gavin Newsom, *supra* note 50, at 3–5 (arguing that SB-206 does not violate the DCC).

2. Applying the Extraterritoriality Doctrine to Student-Athlete NIL Regulations

State regulation of student-athlete compensation dodges the discrimination prong and the *Pike* balancing test, but the extraterritoriality doctrine stands in its way. Disparate compensation regimes give some schools an unfair advantage over others in recruiting when those schools later compete in the field of play. That unfair advantage is what prompted the NCAA to amend its national bylaws to allow for student-athlete NIL compensation when its bylaws previously did not.[157] The need for uniform rules in sport distinguishes state laws regulating student-athlete NIL compensation from legitimate state laws, like state internet regulations, that impose costs on out-of-state actors but leave those actors free to tailor their conduct to different jurisdictions.[158] Due to the lack of jurisdictional flexibility, NIL regulations are similar to the price-affirmation statutes invalidated by the Supreme Court and virtually indistinguishable from another state law that the NCAA successfully challenged on extraterritoriality grounds in the Ninth Circuit.[159] SB-206 and similar laws force the NCAA to change its conduct on a national scale to preserve uniformity to the greatest extent possible, and therefore, have the "practical effect" of regulating the NCAA's activities "wholly outside" state borders.[160]

The judiciary has recognized uniform rules of competition as vital to the existence of any sports league. The Supreme Court emphasized in *NCAA v. Board of Regents* that "[w]hat the NCAA and its member institutions market . . . is competition itself—contests between competing institutions."[161]

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157. *See Board of Governors Moves Toward Allowing Student-Athlete Compensation for Endorsements and Promotions*, NCAA (Apr. 29, 2020, 8:30 AM), https://www.ncaa.org/about/resources/media-center/news/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and-promotions [https://perma.cc/J3CA-Q4VR] [hereinafter *Board of Governors Moves Towards Allowing Student-Athlete Compensation*] ("The divisions [of the NCAA] are expected to adopt new name, image, and likeness rules by January to take effect at the start of the 2021–22 academic year.").

158. *See, e.g.*, BORK, *supra* note 36, at 278 ("[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports.").

159. *See generally* NCAA v. Miller, 10 F.3d 633 (9th Cir. 1993); *supra* notes 166–82 and accompanying text.

160. *See* Edgar v. Mite Corp., 457 U.S. 624, 642–43 (1982) (plurality opinion).

161. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984).

Competition is only effective, the Court explained, if "the competitors agreed to create and define the competition to be marketed," including "such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed[.]"[162] Legal commentators agree that uniform rules are central to any sports league's primary marketable good—competition—without which the league could not exist.[163] For this reason, sports league restrictions are different from modern-day state internet regulations. National companies can tailor their conduct to different jurisdictions based on the IP address of their consumer,[164] so they need not "comply with the regulation imposed by the state with the most stringent standard or [forgo] Internet communication."[165]

The Ninth Circuit also emphasized the importance for uniform rules of competition in *NCAA v. Miller*, in which the NCAA successfully challenged a Nevada law on extraterritoriality grounds.[166] The law at issue required any national collegiate athletic association to provide Nevada schools, employees, student-athletes, and boosters with additional procedural due process protections during any internal enforcement proceeding in which sanctions could be imposed.[167] The court concluded that the Nevada statute violates the DCC, per se. The NCAA "markets interstate inter-collegiate athletic competition,"[168] for which there is considerable public demand. In order for that product to exist at all, the procedures required by the Nevada statute

162. *Id.*

163. *See* McDavis, *supra* note 11, at 282–83 ("[P]articipants must agree to be bound by rules and submit themselves to disciplinary procedures; teams must agree to a system for scheduling games and determining a champion; and, in some cases, agreements must be made to restrain unbridled competition because it can lead to an environment that lacks competitive balance—where a few teams dominate all others—which is bad for business of sport.").

164. *See* Weissman, *supra* note 153.

165. *See* Am. Libraries Ass'n v. Pataki, 969 F.Supp. 160, 183 (S.D.N.Y 1997).

166. *See generally* NCAA v. Miller, 10 F.3d 633 (9th Cir. 1993).

167. *Id.* at 637.

168. *Id.* at 638.

must be applied uniformly across the nation.[169] The statute, therefore, regulated commerce wholly outside the state of Nevada.[170]

In his brief letter to California Governor Gavin Newsom, Professor Chris Sagers contends that state NIL regulations are actually distinguishable from the statute at issue in *Miller*. He insists that SB-206 "does not regulate how the NCAA does anything in other states, and it does not regulate play or any other rules or conduct outside California."[171] By contrast, the Nevada statute "directly regulated the NCAA's internal operations, though it did its work in states other than Nevada."[172]

Professor Sagers' argument overlooks the need for uniform rules of competition in sport—rules that govern the participants' conduct both on and off the field. SB-206, like the Nevada law at issue in *Miller*, imposes an important obligation on the NCAA, albeit a negative one: the NCAA and its conferences may not discipline or exclude from competition student-athletes who are compensated for use of their NILs.[173] The NCAA in *Miller* could have applied two different disciplinary procedures—one for Nevada student-athletes and one for everyone else—to eliminate the possibility of extraterritorial effects. Here, too, the NCAA could let California play by a different set of rules regarding NIL compensation. But as the Ninth Circuit recognized, the product marketed by the NCAA—"interstate intercollegiate athletic competition"—is not possible but for a series of rules that are "applied even-handedly and uniformly on a national basis."[174]

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169. *See id.* at 639 (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984)) ("[T]he integrity of the NCAA's product cannot be preserved 'except by mutual agreement; if an institution adopted [its own athlete eligibility regulations] unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.'").

170. *See id.* at 640.

171. *See* Letter from Chris Sagers to Gavin Newsom, *supra* note 50, at 3.

172. *Id.*

173. *See* CAL. EDUC. CODE § 67456(a)(2) ("An athletic association, conference, or other group or organization with authority over intercollegiate athletics . . . shall not prevent a student of a postsecondary educational institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness."); *id.* § 67456(a)(3) ("An athletic association, conference, or other group or organization with authority over intercollegiate athletics . . . shall not prevent a postsecondary educational institution from participating in intercollegiate athletics as a result of the compensation of a student athlete for the use of the student's name, image, or likeness.").

174. *See Miller*, 10 F.3d at 638

Professor Sagers has an answer for this, too. In his letter, he points out that the NCAA already permits some inconsistent regulations at the conference level, so the potential inconsistencies in state-by-state NIL compensation regimes are no less significant than the inconsistencies already tolerated at the conference level.[175] These inconsistencies are caused by conference-by-conference autonomy to decide, for example, the number of athletics personnel necessary to support student-athletes, as well as to create academic legislation, "[l]egislation related to meals and nutritional demands," and other, similar rules.[176] As the argument follows, the NCAA's tolerance of inconsistent rules means that any inconsistencies attributable to SB-206 need not impact NCAA operations outside of California. But those inconsistent rules cover programs' day-to-day needs, not broad issues like NIL compensation that affect college athletics as a whole. State compensation laws, on the other hand, provide direct financial incentives for recruits to choose one school in a particular state over a school in a different state.[177]

Tolerating NIL-outlier states would compromise the integrity of the college sports product. Recruiting occurs on a national scale,[178] and these same student-athletes later compete in the field of play. Individual states can pass right-to-work laws or lower taxes to favor employment[179] because a national market for labor is nonexistent,[180] but universities around the country

175. *See* Letter from Chris Sagers to Gavin Newsom, *supra* note 50, at 4 ("College athletics are regulated not just by the NCAA, but also by many conferences and sub-national organizations. Their rules are complex, overlapping, and sometimes at odds, and the NCAA already permits play between teams subject to different rules.").

176. *See* NCAA, *supra* note 2, at 33–34.

177. *Compare* H.B. 617 (Ga. 2021) § (c)(4)(B)(iii), (iv) (prohibiting student-athletes from accessing their NIL earnings until at least one year after they leave school), *with* CAL. EDUC. CODE § 67456 (imposing no such restrictions); *see also* Glasspiegel, *supra* note 73 (discussing 2022 number one overall football recruit Travis Hunter, who flipped his commitment from Florida State to lesser-known program Jackson State on National Signing Day. Rumor has it that Hunter flipped his commitment to secure NIL compensation opportunities guaranteed to him by Jackson State's head football coach, Deon Sanders).

178. For example, of the top 100 football recruits from the high school class of 2020, only 32 attended a home-state university. *See 2020 Top Football Recruits*, 24/7 SPORTS, https://247sports.com/Season/2020-Football/CompositeRecruitRankings/?InstitutionGroup=highschool [https://perma.cc/CXF2-BR4G].

179. *See supra* notes 100–01.

180. *See* H. Fassman, *Spatial Labor Markets*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 14800, 14800 (Neil J. Smelser & Paul B. Baltes eds., 2001)

directly compete with one another in a manner that culminates in the crowning of one national champion.[181] College recruiting and subsequent competition on the playing field comprise a national market. The Commerce Clause dictates that such markets are best regulated by the national government, at least when the regulated entities cannot behave differently in different states.[182]

The importance of uniform rules in sport means that state NIL regulations are not so different from the price-affirmation statutes invalidated by the Supreme Court. Recall Professor Denning's argument that, by rejecting the plaintiff's claim in *Pharmaceutical Research and Manufacturers of America v. Walsh*, the Supreme Court limited the extraterritoriality doctrine to its earlier price-affirmation cases.[183] Even if he is correct, it requires no grand extension of the price-affirmation holdings to apply them to state NIL regulations because both laws have "ripple effects in other states."[184] The law at issue in *Healy*, for example, forced interstate beer distributors to set beer prices in neighboring states greater than or equal to the prices they charged in Connecticut.[185] Similarly, the "practical effect" of SB-206 is to force the NCAA to change its bylaws before any state bill takes effect, such that its new bylaws are compatible with California's legislative scheme and continue to harmonize the rules that govern student-athletes around the

(arguing that the notion of a "national labor market" is a fiction due to information asymmetry and mobility costs).

181. *See* Murphy, *supra* note 14, at 1 (The most notable example is the NCAA's extremely popular national basketball tournament, better known as "March Madness," which has been called "an American institution" and is one of the most viewed sporting events in the world).

182. *See* Cooter & Siegel, *supra* note 79, at 149.

183. *See* Denning, *supra* note 86, at 979–80 (citing 538 U.S. 644 (2003)).

184. *See* Legato Vapors, LLC v. Cook, 847 F.3d 825, 831 (7th Cir. 2017) (citing Healy v. Beer Inst., 491 U.S. 324, 324 (1989); Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 573 (1986)).

185. *Healy*, 491 U.S. at 337–38.

country.[186] Once passed, new NCAA bylaws will govern college athletics "wholly outside" of California.[187]

Yet if *Healy* applies, even adopting a narrower view of the case's expansive extraterritoriality language[188] would yield the same result. Recall the Second Circuit's holding that increased cost of complying with state law does not render that law unconstitutional, even if it forces the cost-bearer to "abandon the state's market" entirely.[189] Existing NIL regulations are distinguishable because they impose no costs on the NCAA—third parties will pay players, not the NCAA or its member schools. A holding that SB-206 violates the DCC would not threaten to invalidate scores of legitimate state regulations just because they impose out-of-state costs that incentivize the cost-bearer to change its out-of-state behavior.[190]

The final piece of the extraterritoriality principle considers the dangers of "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state."[191] Here, the need for uniform rules of competition across the country creates a tension between the manner in which California granted student-athletes NIL rights and the manner in which another state might choose to do so. When Professor Sagers drafted his letter to California Governor Newsom, no other state had passed a student-athlete compensation bill. Thus, no scholar has yet discussed the

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186. *See Board of Governors Moves Toward Allowing Student-Athlete Compensation*, *supra* note 152 ("The divisions [of the NCAA] are expected to adopt new name, image, and likeness rules by January to take effect at the start of the 2021–22 academic year.").

187. For example, a student athlete who grew up in Texas and attends college in Oklahoma is now subject to the NCAA's new NIL policy as it was forced to amend after the California Act passed.

188. *See, e.g.*, *Healy*, 491 U.S. at 336 ("[The DCC] precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."); Goldsmith & Sykes, *supra* note 97, at 790 (arguing that the above formulation of the extraterritoriality principle is "clearly too broad" because "[s]cores of state laws validly apply to and regulate extrastate commercial conduct that produces harmful local effects.").

189. *See* Nat'l Elect. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 111 (2d Cir. 2001).

190. *See* Goldsmith & Sykes, *supra* note 97, at 822 ("[T]hese out-of-state costs do not necessarily or even usually implicate dormant Commerce Clause scrutiny. . . . Absent a showing that the out-of-state costs are clearly excessive under the balancing analysis outlined above, they should not trigger condemnation under the dormant Commerce Clause.").

191. *See Healy*, 491 U.S. at 337.

consequences of other states' NIL bills, even though *Healy* makes clear that the tensions between existing state regulations and those that "might be enacted throughout the country" are a critical part of the extraterritoriality analysis.[192]

For instance, recall that Georgia's bill prohibits student-athletes from accessing NIL earnings until after they leave school, even though California's law imposes no such restriction.[193] The NCAA cannot satisfy both mandates at once while maintaining uniform rules across the country. Beyond Georgia, the possibilities are endless: future state legislation could forgo California's "no-conflicts'' provision,[194] set a minimum compensation level for use of an athlete's NIL rights, or demand that universities or the NCAA compensate student-athletes directly, as New York's proposal aims to do.[195] Even if the NCAA adopted the least restrictive state NIL regime on a national scale, that particular state's law is unlikely to be the "least restrictive" in every sense. Doing so, as a result, would destroy the uniform rules of qualification for athletic participation to the detriment of competition and the overall product of college sports.

In sum, sports leagues are unique entities. Equal competition must be preserved among all competitors, which distinguishes state regulation of student-athlete publicity rights from legitimate state regulations and makes extraterritorial effects inevitable. If a federal court does invalidate SB-206 or a similar state law, then Congress must get in the game, since that game cannot be played by the states. But even if the state laws are perfectly constitutional, Congress should still act because a national problem requires a national solution. Accordingly, the next Part moves from doctrinal analysis to a normative discussion of two key policies that support federal intervention, whether or not student-athlete NIL laws violate the DCC.

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192. *Id.*

193. *Cf.* H.B. 617, 2021 Reg. Sess. (Ga. 2021) § (c)(4)(B)(iii), (iv), *with* CAL. EDUC. CODE § 67456 (2019); *see also supra* Section I.B.

194. *See* CAL. EDUC. CODE § 67456(e)(1) (2019) ("A student-athlete shall not enter into a contract providing compensation to the athlete for use of the athlete's name, image, or likeness if a provision of the contract is in conflict with a provision of the athlete's team contract.").

195. *See* New York Collegiate Athletic Participation Compensation Act, S.B. 6722-B, 2019–2020 Reg. Sess. (N.Y. 2019).

IV. POLICIES SUPPORTING FEDERAL INTERVENTION

To shed light on the optimal resolution of the NIL debate going forward, this Article turns to two key policies that support federal intervention: (1) preventing state-by-state legislative retaliation and collective action problems; and (2) the difficulties associated with state regulation of nationwide natural monopolies. The Supreme Court has considered both policies in its DCC jurisprudence. This Part aims to demonstrate why these policies compel Congress to act, even if the state laws are constitutionally permissible.

A. Preventing State-by-State Retaliation and Collective Action Problems

Under the Articles of Confederation, states wielded unfettered ability to legislate in ways that affected other states.[196] The spillover effects of state legislation produced collective action problems: individual states acted rationally in securing advantages for their citizens but doing so kickstarted "constant cycles of discrimination and retaliation"[197] that produced irrational results for the nation as a whole.[198] Hoping to curb these interstate economic rivalries, the Framers scrapped the Articles in favor of the Constitution, which granted Congress the power to regulate interstate commerce.[199]

Cognizant of this historical context behind the Commerce power, Collective Action Federalism theorizes that the federal government is best-suited to regulate areas that would lead to collective action problems absent federal regulation.[200] Professors Robert Cooter and Neil Siegel explain that "much of what the federal government does best is to solve collective action

196. *See* Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979) ("[T]endencies toward economic Balkanization… plagued relations among the Colonies and later among the States under the Articles of Confederation.").

197. Denning, *supra* note 86, at 485.

198. *See* Cooter & Siegel, *supra* note 79, at 117.

199. *See* U.S. CONST. art. I, § 8.; *see also* Denning, *supra* note 86, at 479 (explaining that the Constitution's framers intended "to ensure that the rivalries that had so riven the states during the Confederation Era were not renewed.").

200. *See* Cooter & Siegel, *supra* note 79, at 118.

problems that the states cannot solve on their own."[201] The theory helps discern which areas are best regulated by the states and which are best regulated by Congress.[202]

Regulation of student-athlete NIL compensation fits into the latter category. The NCAA reasonably fears that some states' schools will obtain an unfair recruiting advantage as state legislatures duel to increase compensation opportunities for their student-athletes and schools try to gain a competitive edge against out-of-state peers until the pretense of amateurism is finally defeated.[203] While few will have sympathy for the entity that makes billions off the backs of unpaid players, *some* degree of amateurism is probably desirable to distinguish the unique product of college sports from its professional counterparts.[204] Individual states that decimate amateurism could, therefore, wipe a national product off national markets.

To understand why states might "race to the bottom" of student-athlete NIL compensation, first understand how seriously many universities take their sports programs. Success on the field often leads to increases in private donations and academic benefits[205] and more broadly exposes the university

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201. *See id.*

202. *See, e.g.*, United States v. Darby, 312 U.S. 100, 110 (1941) (upholding federal labor law under the Commerce Clause because, if Congress could not regulate labor conditions, the States would "sprea[d] and perpetuat[e] such substandard labor conditions among workers of the several States").

203. *See NCAA Responds to California Senate Bill 206*, *supra* note 25 ("[T]his bill would wipe out the distinction between college and professional athletics and eliminate the element of fairness that supports all of college sports.").

204. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101–02 (1984) (explaining first that amateurism "differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball;" and second that amateurism is only possible "by mutual agreement"); *supra* notes 112–15 and accompanying text.

205. Allen R. Sanderson & John J. Siegfried, *The National Collegiate Athletic Association Cartel: Why It Exists, How It Works, and What It Does*, 52 REV. OF INDUS. ORG. 185, 191 (2018); *see also* Knight Commission on Intercollegiate Athletics, *Quantitative and Qualitative Research with Football Bowl Subdivision University Presidents on the Costs and Financing of Intercollegiate Athletics: Report of Findings and Implications*, at 11, https://www.knightcommission.org/wp-content/uploads/2017/09/kcia-president_survey_2009.pdf [https://perma.cc/T3Q3-EZZD] [hereinafter Knight Commission Report] ("A significant majority of FBS presidents believe that athletics success provides substantial benefits to their institutions[,] . . . includ[ing] tangible benefits such as increasing applications, quality of the student body, and donations to the university."); Brad Wolverton et al., *The $10-Billion Sports Tab*, CHRON. OF HIGHER EDUC. (Nov. 15, 2015), http://www.chronicle.com/interactives/ncaa-subsidies-main#id-table_2014 [https://archive.is/dTetl]

to prospective students.[206] From their inception, sports programs helped universities attract more applicants and consequently admit more academically competitive students.[207] Aside from the tangible academic and financial benefits, "[a]thletics builds allegiance to the institution and brings national prominence and pride."[208]

Given the importance of athletic success, some universities stop at no length to gain a competitive advantage in athletics. Under the current legal landscape of uniform compensation laws, schools must direct their ferocious competition to other outlets, like spending tens of millions of dollars on top-notch athletic facilities to attract the nation's best athletes.[209] Based on the degree to which schools already compete with each other to give their athletic programs an edge, sports reporters have predicted that the universities with favorable state compensation laws will use them to slam-dunk over schools operating under a different compensation regime.[210] Schools like the University of Oregon, for example, with billionaire donors and favorable state laws, could guarantee sponsorships to certain top recruits, a powerful incentive to commit to the school of the donor's choice.[211] One can

("College leaders say such investments [in football] help attract prospective students and build connections with donors and other supporters.").

206. For example, Loyola University Chicago's undergraduate admissions website even saw a fifty-percent increase in page visitors after the school's men's basketball NCAA Tournament run in 2018. *See* Dawn Rhodes, *With NCAA Success, Loyola Now Looks for Gains Off the Court*, CHI. TRIB. (Mar. 21, 2018, 5:50 PM), https://www.chicagotribune.com/sports/college/ct-met-loyola-basketball-university-publicity-20180321-story.html [https://archive.is/LCEP5] ("The bottom line is [the basketball team's success] gives the university a chance to tell its story in a very broad, public way.").

207. *See* Sanderson & Siegfried, *supra* note 205, at 191–92.

208. Knight Commission Report, *supra* note 205, at 44.

209. *See* Murphy, *supra* note 14, at 9 (discussing Clemson University's $55 million football complex with a theme park, miniature golf course, sand volleyball courts, laser tag, bowling alleys, and a movie theater).

210. *See* Ari Wasserman, *This Week in Recruiting: NIL Reform and a New World of College Football Pitches*, THE ATHLETIC (Apr. 29, 2020), https://theathletic.com/1783566/2020/04/29/this-week-in-recruiting-name-image-likeness-ncaa/ [https://archive.ph/Hz7jg].

211. *See* Sean Cunningham, *The Oregon Ducks' Special Relationship with Nike and Billionaire Phil Knight*, INSIDE HOOK (Mar. 31, 2017, 5:00 AM), https://www.insidehook.com/article/finance/university-oregons-unique-relationship-nike [https://perma.cc/WJ2S-UKRK] (discussing Nike Founder and Oregon Alum, Phil Knight, whose donations to the university's athletic programs have topped $300 million).

reasonably assume that if Oregon allows student-athlete compensation, donors' money will find its way into players' pockets.[212]

States have every incentive to make the most favorable laws for student-athlete compensation, which could impair national collegiate athletic competition and reduce amateurism to a relic of older times. As a result, Congress should enter the game to preempt the possibility of retaliatory legislation, establish a consistent regulatory regime, and preserve the uniform "product" of college sports.

B. Nationwide Natural Monopolies and Externalities of State Regulation

Natural monopolies often arise in markets for a good or service that operate most efficiently when only one firm provides the good or service. This may be the case when high fixed costs prevent other firms from entering the market,[213] or because one firm can satisfy all demand.[214] If multiple firms occupied the market, they would each incur costs that otherwise only one firm would incur if only that firm occupied that market.[215] The postal service is a classic example—multiple services competing in one area must each develop their own costly shipping infrastructure when just one infrastructure would suffice if one firm satisfied all market demand.[216] In addition, natural monopolies, by definition, are predisposed to expand beyond state borders. For the postal service, for example, this is true because expansion creates

212. *See* Sanderson & Siegfried, *supra* note 205, at 206 ("[I]t is inevitable that with no pay limit, some universities will offer their better players financial incentives to stay on their team, and will include cash in offers to new recruits.").

213. Shanske, *supra* note 81, at 669.

214. Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548 (1969).

215. *See id.*

216. *See* Cooter & Siegel, *supra* note 79, at 148.

network effects[217]—each additional pick-up and drop-off point makes the service more valuable by expanding it to new users in new locations.[218]

The NCAA, like all sports leagues, is a natural monopoly.[219] Just as costly shipping channels and delivery vehicles can keep new entrants out of the postal service market, the need for a minimum number of competing teams, fans, and sponsors can do the same for new sports leagues.[220] And, like the postal service, sports leagues accrue network effects. For instance, league expansion makes the league more valuable, because more teams means more viewers, and more viewers make the league more attractive for the sport's star players.[221]

Scholars largely agree that federal regulation is appropriate when a natural monopoly expands beyond state lines because states can only regulate the monopoly's behavior within their own borders.[222] But disparate state laws handcuff natural monopolies tighter than most businesses because the high fixed costs that characterize natural monopolies make it especially

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217. *See* Thomas A. Piraino, *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 898–99 (1999) ("The advantages generated as networks increase in size are referred to as 'network externalities.'").

218. *See* Cooter & Siegel, *supra* note 79, at 148.

219. *See* Piraino, *supra* note 217. Note that the NCAA is, in a sense, both a natural monopoly and a natural monopsony. It is a natural monopoly because it satisfies all demand for educational services "sold" to student-athletes. *See* Michael H. LeRoy, *Courts and the Future of "Athletic Labor" in College Sports*, 57 ARIZ. L. REV. 475, 488 (2015). It is a natural monopoly because it purchases the whole supply of student-athlete labor. *See* Sanderson & Siegfried, *supra* note 205, at 196–97. This choice of nomenclature, however, does not matter for the foregoing analysis. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1071 n.14 (9th Cir. 2015) (citing *O'Bannon*, 7 F. Supp. 3d at 973, 991–93) (acknowledging that using either term to describe the NCAA "did not alter either the . . . analysis of how the market functioned or its assessment that student-athletes are harmed by the NCAA's compensation rules.").

220. *See* Piraino, *supra* note 217, at 899 ("Because of the network externalities of the major sports leagues, it is unlikely that a new league in any of the sports could convince fans, potential team members, sponsors and media companies that it had a reasonable chance of competing effectively against an existing league.").

221. *See id.* (explaining that professional sports leagues "are each able to provide their fans with a unique entertainment experience" that would otherwise be unavailable if the leagues did not have a "national scope").

222. *See, e.g.*, Cooter & Siegel, *supra* note 79, at 148 ("With a natural monopoly at the national level, the federal government appropriately stands ready to constrain the dominant firm through antitrust laws and regulations, or to provide the service itself.").

difficult for them to behave differently in different states.[223] A natural monopoly might therefore adopt one state's regulation on a national scale, but this leads to externalities—unpriced costs or benefits that result when activities in one state spill over to another, leaving the other state with no power to change the activities that affect it, whether through the political process or otherwise.[224] Professors Cooter and Siegel explain that the best regulatory body for a given activity is "the smallest unit of government that internalizes the effect of its exercise,"[225] i.e., the smallest unit of government that can regulate the natural monopoly in a uniform manner and thereby minimize spillover effects. For nationwide natural monopolies, that would be Congress. By granting Congress the power to regulate interstate commerce, the Framers established a constitutional baseline that national firms, particularly natural monopolies, are often best regulated by the national government.[226]

The need for uniform regulations of the postal service is analogous to the need for uniform rules of competition in sport. Competitors in sport must agree to play by the same rules on the field and abide by the same rules off of it.[227] While agreements between competitors ordinarily invite antitrust scrutiny, all four major professional sports leagues have antitrust exemptions because the public demands a product from sports leagues that cannot survive without mutual agreement.[228] Even the judiciary has consistently

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223. *See* S. Pac. Co. v. Ariz. ex rel. Sullivan, 325 U.S. 761, 771–75 (1945) (explaining this idea in the context of the railroads, another classic example of natural monopoly).

224. *See* Cooter & Siegel, *supra* note 79, at 138.

225. *Id.* at 137.

226. *See id.* at 159–60 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193–97 (1824)) (explaining that the Commerce Clause reflects the constitutional assumption that "[w]hen commerce from different states intermingles, large economic advantages come from uniformity, access, and coordination in the channels and instrumentalities of commerce").

227. *See* Stefan Szymanski, *The Sporting Exception and the Legality of Restraints in the US*, *in* HANDBOOK ON THE ECONS. OF SPORTS 730 (Edward Elgar ed., 2006) (describing sports leagues as a joint venture which requires the agreement of restraints among all members).

228. Most professional sports leagues enjoy a series of piecemeal antitrust exemptions from Congress. *See, e.g.*, Leah Farzin, *On the Antitrust Exemption for Professional Sports in the United States and Europe*, 22 JEFFREY S. MOORAD SPORTS L.J. 75, 76 n.4 (2015) (discussing the NFL, NHL, and NBA's antitrust exemption for the purpose of selling television broadcast rights). The MLB was granted a blanket antitrust exemption by the Supreme Court on the dubious ground that baseball is not "commerce." *See* Fed. Baseball Club of Balt., Inc. v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200, 208–09 (1922).

reaffirmed that mutual agreement is necessary to the product of athletic competition.[229]

In fact, the need for uniform rules sparked the NCAA's existence. University officials banded together in 1906 and created the Intercollegiate Athletic Association of the United States (IAAUS), now called the NCAA, to regulate player safety in an increasingly dangerous athletic environment.[230] At that time, violence was a "prisoner's dilemma"[231] because violence led to wins, winning led to more fans, and more fans led to more money.[232] The IAAUS—and later the NCAA—mitigated the violence and chaos in collegiate athletics because they served as governing bodies over all participants, enforcing rules of competition and preventing defection that would otherwise persist without fixed rules.[233]

Just as the postal service enhances service by adding pickup points, thereby giving its consumers more places from which they can send and receive mail, the NCAA expanded member schools to effectuate its safety restrictions—and later, its compensation restrictions—which would be meaningless if member schools competed against nonmember schools that played by a different set of rules.[234] Today, the NCAA operates on a national scale: its 1,100 member schools span all fifty states and commonly recruit players

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229. *See*, *e.g.*, NCAA v. Alston, 141 S. Ct. 2141, 2156 (2021) ("Without some agreement among rivals . . . the very competitions that consumers value would not be possible."); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984) ("[T]he integrity of the 'product' [of sport] cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.").

230. *See* Sanderson & Siegfried, *supra* note 195, at 193. In fact, over 300 student-athletes died as a result of football injuries during the fifteen-year period prior to the formation of the IAAUS. *See* ANDREW ZIMBALIST, *Unpaid Professionals: Commercialism and Conflict in Big Time-College Sport* 8 (1999).

231. A prisoner's dilemma is a situation in which two actors acting in their own self-interests produce an inferior outcome to one that they could have reached through mutual cooperation. *See* Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1, 6 (2003).

232. *See* Sanderson & Siegfried, *supra* note 195, at 193.

233. *See id.* at 193–94.

234. *See* Cooter & Siegel, *supra* note 79, at 148 (discussing the postal service); McDavis, *supra* note 11, at 293 (discussing the need for uniform national regulations in athletic competition); Sanderson & Siegfried, *supra* note 195, at 193–94 (same).

from out-of-state for athletic participation.[235] As such, the NCAA fears that the state-by-state compensation model would preclude "a level playing field for all student-athletes" because "[a] national model of collegiate sport requires mutually agreed upon rules."[236]

Whether student-athletes are paid is not legally significant, but the variance in compensation regimes is. At best, the NCAA adopts one state's law on a national scale to preserve uniform compensation restrictions and prevent one school from gaining an unfair competitive advantage in the market for talented recruits, but this outcome would lead to externalities—costs and benefits that remain unpriced in states yet to pass student-athlete NIL laws.[237] More importantly, though, uniformity is not even possible unless Congress takes a shot. For one, the differences in state NIL laws and bill proposals are significant enough to give some schools recruiting advantages over out-of-state peers.[238] For another, one state could blow up the entire system at any time, just as SB-206 did in 2019 and destroy the product of fair competition.[239] Therefore, the NCAA—a nationwide natural monopoly—is ripe for federal, not state, regulation.

In sum, preventing state-by-state retaliation and protecting federal authority to regulate nationwide natural monopolies are two key policies that support federal intervention in the regulation of student-athlete NIL compensation, whether or not state NIL laws violate the DCC. If Congress decides to get in the game, the next issue becomes: what might federal NIL regulation look like?

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235. *NCAA Member Schools*, *supra* note 109.

236. *See NCAA Responds to California Senate Bill 206*, *supra* note 25.

237. *See* Cooter & Siegel, *supra* note 79, at 136.

238. *Compare* New Jersey Fair Play Act, NJ ST 18A:3B-86 § 2(b) (prohibiting student-athletes from earning compensation in connection with alcohol, tobacco, and gambling industries), *with* S.B. 6722-B, 2019–2020 Reg. Sess. (N.Y. 2019) (requiring in-state universities to apportion ticket revenue to student-athletes).

239. *See Board of Governors Moves Toward Allowing Student-Athlete Compensation for Endorsements and Promotions*, *supra* note 157.

V. THE OPTIMAL FEDERAL SOLUTION

After California passed SB-206, the NCAA finally called for Congress to "come off the bench"[240] and use its lawmaking authority under the Commerce Clause[241] to set preemptive national guidelines for student-athlete compensation.[242] Other students and scholars have already recommended changes to NCAA compensation rules, but they largely miss the point.[243] Varying state regulatory schemes have already shown that the NCAA cannot unilaterally restore uniform rules of competition to college athletics.[244] It cannot reconcile, for example, a California regime that permits multi-million dollar NIL deals[245] with a Georgia regime that prevents student-athletes from accessing NIL earnings until after graduation.[246] If—as Part II argues—state regulation of student-athlete NIL compensation is unconstitutional, then Congress must act because the states cannot. Even if states can permissibly regulate the NIL playing field, Part III explained why Congressional regulation is superior to the state-by-state approach.

Although federal legislation could adopt the substance of California's law, it should not do so for two reasons. First, some upper limit on NIL compensation is needed to protect competition among universities for high-profile recruits and preserve the distinction between collegiate athletics and the

240. Aimonetti & Talley, *supra* note 26, at 32.

241. *See* U.S. CONST. art. I, § 8 cl. 3. Existing federal proposals rely on the enforcement authority of the Federal Trade Commission, which Congress created pursuant to its Commerce Clause authority. *See*, *e.g.*, Fairness in Collegiate Athletic Act, S. 4004, 116th Cong. § 4(a)(2) (2020).

242. *See Board of Governors Moves Toward Allowing Student-Athlete Compensation for Endorsements and Promotions*, *supra* note 157 ("[The Board] will engage Congress to . . . [e]nsur[e] federal preemption over state name, image, and likeness laws.").

243. *See, e.g.*, Benjamin Feiner, *Setting the Edge: How the NCAA Can Defend Amateurism by Allowing Third-Party Compensation*, 44 COLUM. J.L. & ARTS 93 (2020); Andrew Weiss, *The California Fair Pay to Play Act: A Survey of the Regulatory and Business Impacts of a State-Based Approach to Compensating College Athletes and the Challenges Ahead*, 16 RUTGERS BUS. L.J. 259 (2020).

244. *See*, *e.g.*, David G. Bayard, *After Further Review: How the NCAA's Division I Should Implement Name, Image, and Likeness Rights to Save Themselves and Best Preserve the Integrity of College Athletics*, 47 S.U. L. REV. 229, 254–55 (2020).

245. *See* CAL. EDUC. CODE § 67456 (2019).

246. *See* H.B. 617, 2021 Reg. Sess. (Ga. 2021).

professional sports leagues.[247] High-value players—for example, players that could potentially earn more than $100,000 in a free NIL market—are precisely the type of players who could alter the destiny of a program and therefore convey the largest and most unfair recruiting advantages. One federal proposal aims to remedy this problem by prohibiting boosters from paying athletes "directly or indirectly" as a recruiting tool, but that distinction remains unclear.[248] In contrast to vague, difficult-to-enforce prohibitions, an upper limit offers a concrete metric to reduce high value players' incentive to select a school based on the likelihood of commercial exposure or based on a billionaire's promise of a lucrative contract in exchange for attending their alma mater.[249]

Second, SB-206 does not provide a bare minimum level of compensation for athletes with less marketable NILs because "[e]ndorsement deals naturally would concentrate remuneration to a few marquee players in football and basketball, leaving behind students competing either in less noteworthy positions or in less lucrative sports."[250] According to one estimate, lesser-known players, even those who start for football powerhouses, will have difficulty earning more than about one thousand dollars per year from their NIL.[251] Even athletes at the top of their sport could have trouble generating exposure if they play non-revenue generating sports with lesser public exposure—sports like swimming or track and field that are rarely shown on television. Therefore, SB-206 fails to ensure that all student-athletes have the means to pay for food or travel home.[252]

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247. *See supra* notes 57–59, *infra* notes 248–49. Note that if the NCAA, as opposed to Congress, attempted to establish a salary cap, any one state could nullify it, just as SB-206 nullified the NCAA's former NIL compensation regime.

248. *See* Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. (2nd Sess. 2020).

249. A promise that Phil Knight could easily make. *See* Cunningham, *supra* note 211.

250. Aimonetti & Talley, *supra* note 26, at 37.

251. *See* Stewart Mandel & Nicole Auerbach, *What Could College Athletes' Social Media Brands Be Worth?*, ATHLETIC (May 7, 2020), https://theathletic.com/1796999/2020/05/07/college-athlete-name-image-likeness-value/?redirected=1 [https://archive.ph/kBEdO].

252. *See* Kevin McNamara, *With Little Money, Many Scholarship Athletes Struggle to Get By*, PROVIDENCE J. (Jan. 24, 2015, 11:00 PM), https://www.providencejournal.com/article/20150124/SPORTS/301249983 [https://perma.cc/ZBC6-MZ6M].

Instead, this Part proposes a two-tiered compensation regime that builds upon the framework already proposed by Justin Aimonetti and Christian Talley.[253] First, this Part calls for Congress to grant student-athletes the universal right to earn NIL compensation up to $100,000 per year before tax. Second, this Part endorses Aimonetti and Talley's means-tested stipend to cover athletes' basic needs and advances a novel argument in favor of their idea. Together, these two measures would allow marquee student-athletes to profit off their NILs without sacrificing the financial well-being of lesser-known athletes or giving any university an unfair competitive advantage in the market for recruits.

A. Maximum Name, Image, and Likeness Compensation

First, the federal law should permit student-athletes to earn NIL compensation up to $100,000 yearly, before tax. A $100,000 compensation ceiling would permit marquee players to reap the fruit of their talents in a financially significant way without eliminating amateurism from college athletics altogether.[254] Student-athletes would also pay federal taxes on their earnings, which gives the government a mechanism for enforcing the monetary cap via civil penalties against any student-athlete or business who violates the maximum compensation amount. Finally, a federal cap avoids antitrust scrutiny that the NCAA would encounter if it decided to implement the cap itself through a bylaw amendment.[255]

In contrast to a cap on NIL earnings, Aimonetti and Talley vindicate amateurism by proposing a trust system where athletes deposit unlimited NIL earnings into an account they could access after they leave college.[256] But immediate access to limited funds is a superior solution. The trust system makes compensation available to student-athletes at the same time many of them will make lucrative contracts in the professional leagues. Although NCAA athletes rarely play professionally, generally speaking, the same cannot be said of the high-value players who could likely earn more than

253. *See* Aimonetti & Talley, *supra* note 26, at 37.

254. Without a compensation limit, some student-athletes could potentially make multi-million dollar deals. *See supra* notes 57–59. For a discussion of the benefits of amateurism, *see supra* notes 112–15 and accompanying text.

255. *See* Credit Suisse Sec., LLC v. Billing, 551 U.S. 264, 270 (2007) (noting that statutes may "preclude[] application of the antitrust laws" to certain private actors).

256. *See* Aimonetti & Talley, *supra* note 26, at 38.

$100,000 from their NILs.[257] NIL money is worth more to student-athletes in college than after graduation, since most will find a primary source of income in the professional leagues or the traditional job market. Letting them access these funds while in college stabilizes their finances through two distinct phases of their lives.[258]

B. Monthly Stipend

Second, the federal law should permit (but not require) universities to distribute to all student-athletes a basic, means-tested stipend derived from ticket or television broadcasting revenue,[259] each of which make up the vast majority of sports revenue for most universities.[260] Any school that opts into the stipend system must provide stipends for all its student-athletes, not just student-athletes from revenue-generating sports. As a result, a means-tested stipend would benefit student-athletes across different sports and schools more equitably than would the NIL market alone.[261] As additional protection, student-athletes would still receive their stipends after suffering long-term or career-threatening injuries out of respect for the sacrifices they made to their universities.

To understand how this stipend would interact with the current compensation regime, two Ninth Circuit decisions should be taken into consideration: *O'Bannon v. NCAA*[262] and *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation* [*Alston*].[263] In *O'Bannon*, the plaintiffs asserted that NCAA restrictions on student-athlete NIL compensation violated the

257. For example, only three starters on the Ohio State University football team are estimated to have NILs worth more than $100,000, and all three are projected NFL draft picks. Sam Weber, *NIL Earning Potential of Ohio State Football Student-Athletes*, OPENDORSE (May 13, 2020), https://opendorse.com/blog/nil-earning-potential-of-ohio-state-football-student-athletes/ [https://perma.cc/6PSZ-2Q4H].

258. Economists call this concept "income-smoothing" and consider it a generally desirable outcome. *See* Jonathan Morduch, *Income Smoothing and Consumption Smoothing,* 9 J. ECON. PERSP. 103, 108–11.

259. *See* Aimonetti & Talley, *supra* note 26, at 37–38.

260. *See* Murphy, *supra* note 14, at 3, 11–12.

261. *See supra* notes 237–39 and accompanying text.

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

263. *See In re* NCAA, 958 F.3d 1239, *aff'd*, 141 S. Ct. 2141 (2021).

Sherman Act.[264] The court's holding was two-fold: first, the NCAA can cap student-athlete compensation, but it cannot set that cap below the full cost of attendance (COA).[265] Second, the court determined that amateurism has pro-competitive effects,[266] so the NCAA can freely restrict "cash sums untethered to educational expenses" because this form of compensation is a "quantum leap" from amateurism.[267] Picking up where *O'Bannon* left off, *Alston* determined that any limit on non-cash education-related benefits violates the Sherman Act because this type of limit does nothing to further amateurism.[268] Limits on compensation unrelated to education, on the other hand, are permissible because they serve amateurism's procompetitive purpose.[269] The stipend proposed here would go beyond *O'Bannon* and *Alston* by allowing limited, means-tested cash payments from universities to their student-athletes that go above cost of attendance and are unrelated to education.

The stipend will be means-tested to "ensure that each dollar from the stipend generated an appreciable marginal benefit for needy athletes and would prevent situations in which well-off athletes received a windfall."[270] Therefore, the means-testing component safeguards the spirit of amateurism[271] while providing more student-athletes with the funds needed to pay for basic essentials in support of their academic and athletic endeavors. Importantly, it also minimizes cost-inhibitive consequences of the stipend for university sports programs.[272] No student-athlete would receive compensation above what is necessary to afford basic essentials and support a lifestyle conducive to athletic and academic success.

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264. *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

265. *O'Bannon*, 802 F.3d at 1075–76, 1079.

266. *Id.* at 1076.

267. *Id.* at 1078.

268. *In re NCAA*, 958 F.3d at 1256–68.

269. *Id.* at 1527.

270. *See* Aimonetti & Talley, *supra* note 26, at 38 n.69.

271. Some degree of amateurism is desirable because it stimulates demand in the "product" of college sports. *See supra* notes 112–15.

272. *See* Aimonetti & Talley, *supra* note 26, at 38 n.70.

Potential budgetary difficulties also explain why the stipend is permissive and not mandatory. Indeed, many university sports programs already struggle to fund themselves with sports revenues alone[273] and often draw from donors and student tuition to support athletic departments.[274] No school must provide a stipend if doing so would bankrupt the athletic department or require canceling existing sports teams. Even if smaller colleges lack the financial resources to pay means-tested stipends, their inability to do so will not affect the competitive landscape for recruits. The schools that regularly compete for top athletic talent can likely afford to offer means-tested stipends,[275] and market pressures—e.g., the pressure to compete for such top recruits—will ensure that all schools who can afford means-tested stipends opt-into the stipend system. If doubts still linger about the affordability of the stipend for universities, Congress could require athletic conferences to chip in. Conferences profit extensively from the existing regime but face few of the costs associated with running athletic departments that universities are responsible for.[276]

Means-tested stipends are more equitable to student-athletes and less harmful to athletic department finances than existing state and federal proposals that force schools to give athletes a fixed portion of ticket revenues[277] or that only share profits with student-athletes in revenue-generating

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273. *See* Daniel L. Fulks, *Revenues and Expenses: Division I Intercollegiate Athletics Programs Report (2004–2015)*, NCAA, http://www.ncaapublications.com/productdownloads/D1REVEXP2015.pdf [https://perma.cc/WGP4-3UVW] (finding that only twenty four out of thirty five1 Division I institutions reported positive net revenues in 2015).

274. *See* Matt Krupnick, *Would Your Tuition Bills Go Up If College Athletes Got Paid?*, MONEY (Nov. 28, 2014), https://money.com/college-athletes-sports-costs-students/ [https://perma.cc/F274-DYNQ].

275. Brad Crawford, *Ranking College Sports' Highest Revenue Producers*, 247 SPORTS (July 17, 2020), https://247sports.com/LongFormArticle/College-football-revenue-producers-USA-Today-Texas-Longhorns-Ohio-State-Buckeyes-Alabama-Crimson-Tide-149248012/#149248012_ [https://perma.cc/RC6U-P8WZ].

276. In 2018, the Power Five Conferences—the five most competitive conferences with the biggest sports programs—combined to earn $2.8 billion in revenue. *See* Andrew Carter, *ACC Revenue Soars, but Is Outpaced By the Big Ten and SEC*, NEWS & OBSERVER (May 30, 2019, 12:48 PM), https://www.newsobserver.com/sports/article230980543.html [https://archive.is/9LJ45*]*.

277. For example, New York's proposed law would require athletic departments to give fifteen percent of annual revenue to student-athletes. *See* S.B. 6722-B, 2019–2020 Reg. Sess., at 7(a) (N.Y. 2019).

sports.[278] The means-tested concept similarly preserves a level playing field across universities within the same tier[279] of athletic competition when stipends tied to a percentage of the university's revenue would not. Because student-athlete compensation depends on financial means, athletes will have no incentive, for example, to choose school X over school Y because school X generates higher ticket revenues per athlete and would therefore offer larger stipends. Means-testing thus avoids another pitfall of the state-by-state approach that several bill proposals actually fail to remedy—incentivizing recruits to choose one school over others based on arbitrary criteria like annual ticket revenues.

Together, the two-tiered solution provides a financial safety net for student-athletes in various sports that balances equity for student-athletes with the benefits of amateurism and the need to preserve uniform rules of competition in college athletics.

VI. CONCLUSION

Student-athlete compensation is a national problem that requires a national solution. The DCC protects federal authority to regulate nationwide natural monopolies because state regulation of such firms inevitably alters their operation on a national scale. Due to the need for uniform rules across all competitors in sport, California's SB-206 forced the NCAA to change its rules around the country, which spread the effects of California's law to commerce wholly outside the State of California. Hoping to avoid long and costly litigation with the states, the NCAA has called for Congress to get in the game and tackle the student-athlete compensation problem, as federal legislation is necessary to level the playing field for all student-athletes. Whether Congress, the states, or the NCAA takes the next step, only one thing is certain: college athletics will never be the same.

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278. The federal bill introduced by Senators Cory Booker and Richard Blumenthal fits this description. *See* College Athletes Bill of Rights, S. 5062, 116th Cong. § 5(b)(A)(i) (2020); Ross Dellenger, *Inside the Landmark College Athletes Bill of Rights Being Introduced in Congress*, SPORTS ILLUSTRATED (Dec. 17, 2020), https://www.si.com/college/2020/12/17/athlete-bill-of-rights-congress-ncaa-football [https://perma.cc/65NK-BTTG].

279. "The same tier" could mean the Power Five Conferences or, if feasible, all FBS institutions.