# IT'S MILLER TIME: COULD A 9TH CIRCUIT DECISION PLACE NIL LEGISLATION ON ICE?

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## INTRODUCTION

> "If the procedures of the NCAA are 'to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable…'" – Hon. Ferdinand F. Fernandez.[1]

In 2019, California passed SB-206, also known as the Fair Pay Act.[2] The Act eviscerated one of the National Collegiate Athletic Associations' most fiercely litigated positions, compensation for collegiate athletes.[3] For the greater part of the last century, the rulemaking organization has controlled collegiate athletics with an iron grip. The NCAA promulgates regulations supporting its goal of "amateurism" and mandating that all of its member institutions enforce the same.[4] That is, collegiate athletes are defined as "amateurs." They compete "only for the pleasure, and the physical, mental, moral, and societal benefits directly derived therefrom."[5] Thus, athletic compensation was a red line that, if crossed, would bar student-athletes from participating in sports regulated by the NCAA.[6]

Responding to the bill, the NCAA denounced it as "unconstitutional" and violating the very definition of what the NCAA is, "[A] national model of collegiate sports" which "requires mutually agreed upon rules."[7] Although the NCAA did not state a

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[1] Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 640 (9th Cir. 1993).

[2] CAL. EDUC. CODE § 67456.

[3] The National Collegiate Athletic Association hereinafter, "NCAA."

[4] *See, e.g.*, Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329 (2007).

[5] *Id*. at 331-32.

[6] *See* NCAA, 2022–23 NCAA DIVISION I MANUAL 39 (2022-23), https://www.ncaapublications.com/productdownloads/D123.pdf.

cause of action making the law unconstitutional, the words "national model" and "mutually agreed upon rules" suggest a challenge through the Dormant Commerce Clause.[8] This is not surprising as there is precedent out of the 9th Circuit court, which has struck down a similar Nevada law in *NCAA v. Miller*.[9]

The courts have long held that the NCAA is a unique organization and, as the court in *NCAA v. Board of Regents* noted, controls a unique market where the product itself is competition.[10] Integral to this product is a mutually agreed-on set of rules. The rules include the size of the field, procedures for recruitment, and the number of players on a team. Thus, the unilateral adoption of a restriction by a competitor, like California's SB-206, could very well lead to a loss of competitiveness on the field.[11]

The problem the NCAA faces is that society, and seemingly the Supreme Court, is disenfranchised with the rebel yell that is "amateurism."[12] Netting over $15 billion in revenue last year, collegiate athletics is big business.[13] Yet somehow, that money always seems to slip through the sure-handed athletes who drive its creation. Stuck between its organizational mandate and strengthening social pressure, the NCAA is literally between a rock and a hard place.

Under pressure, and in the wake of the California law, the NCAA has adopted a policy of non-enforcement, enabling "college athletes…to take advantage of name, image, and likeness

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[7] *NCAA Responds to California Senate Bill*, NCAA MEDIA CTR. (2019), https://www.ncaa.org/news/2019/9/11/ncaa-responds-to-california-senate-bill-206.aspx#:~:text=We%20urge%20the%20state%20of,approach%20for%20all%2050%20states; *see also* Chris Sagers, *Letter to Gavin Newsome, RE: Constitutionality of the SB-206* (Sept. 24, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3460551 [https://perma.cc/2KDF-VJ66].

[8] Chris Sagers, *Letter to Gavin Newsom in Reply to the NCAA: Constitutionality of California SB 206, the 'Fair Pay to Play Act'* (Sept. 27, 2019), https://ssrn.com/abstract=3460551.

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

[10] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984) ("What the NCAA and its member institutions market in this case is competition itself—-contests between competing institutions.").

[11] Miller, 10 F.3d at 639 (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102-04 (1984)).

[12] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring).

opportunities."[14] This sets a dangerous precedent for the NCAA as an organization that depends on "mutually agreed" national uniform standards. It gives states who do not want to comply with or agree with NCAA-mandated rules the ability to simply legislate their way out in the name of health, safety, and welfare.

This article points out that a challenge to NIL legislation by the NCAA is not as utterly hopeless as some would believe. First, this paper will describe some of the current pay-for-play legislation, including some unintended pitfalls. Then, it will move on to a brief overview of one of many methods that can be used to invalidate state laws, the Dormant Commerce Clause. Lastly, it will conclude by applying the Dormant Commerce Clause to some principles within the state laws to show how the NCAA might mount a viable challenge to the legislation.

## II. THE PAY FOR PLAY STATUTES

"Collegiate student-athletes put everything on the line," yet "colleges reap billions from them…in the same breath," all while blocking their ability to earn a single dollar.[15] While Governor Newsom may be correct, "SB-206 guarantees athletes nothing but theoretically enables them to make millions."[16] SB-206, which took effect in 2021, is noteworthy specifically for what it does and does not require.

The bill has a few operative sections, each with its own mandates and restrictions. First, Section 67456(a)(1), prevents "postsecondary educational institution[s]" from upholding any "rule, requirement, standard, or other limitation" that would prevent a student "of that institution" from earning compensation

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[14] Michelle Brutlag Hosick, *NCAA Media Center: NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx.

[15] *Governor Newsom Signs SB 206, Taking on Long-Standing Power Imbalance in College Sports*, OFF. OF GOVERNOR GAVIN NEWSOM (2019), https://www.gov.ca.gov/2019/09/30/governor-newsom-signs-sb-206-taking-on-long standing-power-imbalance-in-college-sports/.

[16] M. Ryan Kearney, *When the States Step Out of Bounds: State Regulation of Student-Athlete Compensation and the Dormant Commerce Clause*, 42 LOY. L.A. ENT. L. REV. 221, 236 (2022).

in connection with their name, image, and likeness.[17] Second, Section 67456(a)(2-3), requires that collegiate athletic associations, including the NCAA, "shall not prevent" a student from receiving compensation in connection with their name, image, and likeness. Additionally, it further prohibits the NCAA, or similar institutions, from punishing universities because of students receiving compensation.[18]

Curiously, however, the bill has prohibitions for student-athletes, which cut against its grain.[19] For example, in deference to NCAA bylaws, Section 67456(b) provides that "[a] postsecondary educational institution" or "athletic association…shall not provide a prospective student-athlete with compensation" in connection with their name, image, and likeness.[20] This means that all of the NIL deals the students eventually enter into must be organized through third-party relationships, shifting the power out of the athlete's hands and into the negotiator's. In addition, Section 67456(e)(1) prevents "student-athletes" from entering into contracts for name, image, and likeness compensation if that contract conflicts with a provision of their respective team's contract.[21]

### *The Pay for Play Statutes are Not Adequate*

While they seem relatively harmless, these provisions create severe implications for interstate commerce and create restrictions on players and their ability to negotiate lucrative deals. The law is also a landmine for students and schools navigating it. The bill limits what partnerships athletes can enter into. A student who chooses to attend a school sponsored by Nike, if offered a shoe deal, must only deal with Nike.[22] Further, suppose Nike is affiliated with a specific school and seeks to endorse a player who later goes

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[17] CAL. EDUC. CODE § 67456(a)(1) (West).

[18] *Id*. §§ 67456(a)(2-3).

[19] *See generally*, *id*. §§ 67456(b)-(e). The bill has many prohibitions against student-athletes which include those mentioned above, but also places prohibitions contracts that imply moral turpitude, as well as reporting requirements as an enforcement mechanism.

[20] *Id*. § 67456(b).

[21] *Id*. § 67456(e)(1).

[22] *Id*.

to that school. In that case, it looks suspiciously like an inducement, which is still punishable by ineligibility under NCAA bylaws.[23]

For example, Brian Bowen was a top recruit for the 2017 basketball class and eventually committed to playing Division I basketball for the University of Louisville.[24] However, Bowen's dreams were dashed when his NCAA eligibility was revoked due to improper payments from Adidas, who sponsors the University of Louisville, to Bowen's father.[25] The payments from a third party were determined to be a bribe which induced Bowen's commitment to the university.[26] As NIL legislation currently stands, there is no way to differentiate between payments by advertisers to a player in connection with their name, image, and likeness and payments seeking to induce talented young players to schools already represented by their brands. In this way, not only does the California law increase the likelihood that the average player will be exposed to some form of inducement, but it also encourages advertisers to induce generational talents to attend organizations they actively represent.

Continuing with the Bowen saga, depositions by his legal team uncovered disclosures from an Adidas representative concerning the larger-than-life NBA star Zion Williamson.[27] "Responding to queries from Bowen's legal team," an Adidas lawyer disclosed that the company "may have transferred $3,000 a month" for an undisclosed period of time to the Williamson family, as well as payments to the junior circuit team that Williamson's father coached.[28] Williamson, who committed to Duke, later negotiated one of the most significant branding contracts in history, a $75-million multi-year deal to represent Nike's Jordan Brand.

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[23] NCAA, 2022-23 NCAA DIVISION I MANUAL § 12.01.1. Inducement can also lead to criminal indictment.

[24] Bowen v. Adidas America Inc., No. 21-1746, 3 (4th Cir. Oct. 12, 2023).

[25] *Id*.

[26] *Id*.

[27] Kurt Streeter, *Zion Williamson's Year in College Was Worth More Than He Got*, THE N.Y. TIMES (May 9, 2021), https://www.nytimes.com/2021/05/07/sports/ncaabasketball/zion-williamson-adidas-lawsuit.html#:~:text=rules%2C%20such%20payments%20%E2%80%94%20if%20proved,which%20is%20sponsored%20by%20Nike.

[28] *Id*. These payments are similar to the payments that Bowen lost his eligibility for and would have disqualified Wiliamson from playing in the 2018-2019 season.

Had the payments successfully lured Zion to an Adidas school, the provisions in Section 67456(e)(1) would have prevented Zion from entering into the massive deal or entering into a contract with Nike until after he left his university. This is just one example of how the law potentially restricts athletes in their ability to negotiate deals or leverage their name, image, and likeness.

### *Enter the Era of Collectives*

In addition, the law has led to the advent of powerful "collective" organizations, whose formation exploded after Judge Kavanaugh's famous "[t]he NCAA is not above the law" concurrence in *Alston*.[29] Currently, there are at least 120 collectives. Of the 65 schools in the Power Five, 92% have at least one collective representing them.[30] Their primary function is to create and facilitate NIL deals. They essentially function as the war chest schools use for recruiting talent.[31] The problem this creates is the classic manager-owner dilemma. Most of these collectives are organized and run by prominent alumni and influential supporters of the programs.[32] In many ways, the schools are setting up a situation where third-party alums can withhold funds if they disagree with recruiting decisions. Schools do not realize it yet, but they may have already given away the keys to the kingdom when it comes to recruiting.

### *The Talent Cold War*

California's law has also created a legal "arms race," with other states passing similar laws in order to remain competitive in recruiting. The result is a "patchwork of different laws," which has made the NCAA's job of imposing a uniform standard near impossible despite having instituted an interim name, image, and likeness policy.[33] There are now twenty-seven states with active

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[29] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2169 (2021).

[30] Pete Nakos, *What Are NIL Collectives and How Do They Operate?* ON3NIL (July 6, 2022), https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/

[31] *Id.* The collectives negotiate with third parties on behalf of the university and students. This is extremely murky and skirts the lines concerning inducement in many ways.

[32] *Id.*

NIL laws, and the laws are constantly being repealed and reshaped in order to maintain a competitive edge in recruitment. Georgia and Alabama, two of the first states to legislate alongside California, recently repealed their NIL laws because the interim policy adopted by the NCAA proved less restrictive than their respective states' policies, handicapping their recruiting processes.[34]

### *Where Should the NCAA Go from Here?*

The NCAA should consider a challenge to the state NIL statutes through the *dormant* provision of the Commerce Clause. While the proceedings arising out of *NCAA v. Alston*[35] may bankrupt the organization, NIL legislation threatens to destroy the organization as a whole. Although SB-206 only deals with student-athlete compensation,[36] the bill's validity is based on the state's police power. That is the ability to legislate with the legitimate purpose of improving the health, safety, and welfare of the state's citizens.[37] In that same vein, a state could potentially legislate its way around any NCAA bylaw it disagrees with, citing some legitimate state purpose. Thus, while a lost challenge likely erodes the NCAA's ability to govern intercollegiate sports, not challenging the law has the same effect.

Favorable to the NCAA, the 9th Circuit has previously used the Dormant Commerce Clause ("DCC") to invalidate a similar state law.[38] In addition, dicta in the court's holding seemed to link the NCAA's unique structure and purpose to a rarely used doctrine in

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[33] *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; *see also* Hosick, *supra* note 14.

[34] *See* GA. H.B. 617(c)(4)(B)(iii), (iv). Georgia's law was actually an interesting solution which may have actually complied with NCAA regulations, requiring that any compensation in connection with NIL deals be placed into trust until at least one year after the athlete graduated.

[35] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2169 (2021). The antitrust case was recently decided in favor of the Plaintiff's and remanded with a possibility of finding serious liability in the form of damages; *See also* Steve Berkowitz, *Federal Judge's Ruling Puts Billions at Stake for NCAA*, USA TODAY (Nov. 3, 2023), https://www.usatoday.com/story/sports/college/2023/11/03/judge-ruling-puts-billions-at-stake-for-ncaa/71444496007/.

[36] CAL. EDUC. CODE §§ 67456(a)(2-3).

[37] U.S. CONST. art. I, § 8, cl. 3.

[38] *Infra*, note 44.

the DCC toolkit known as the extraterritoriality doctrine.[39] A savvy jurist could use the doctrine to make a narrow holding in light of the NCAA's unique construction. This would avoid the federal government having to step in and regulate collegiate sports.

To support the idea of a DCC challenge to NIL legislation, the 9th circuit has law in the NCAA's favor with the jurisdictional authority to hear a challenge to California's SB-206. Moreover, the NCAA should act on this challenge sooner rather than later. The longer the laws stay valid, the more entrenched they will become. Contracts will be made, NIL deals will be executed, and the cooperatives will grow exponentially faster. It is now or never.

## III. THE DORMANT COMMERCE CLAUSE

The Commerce Clause vests in Congress the power to "regulate commerce amongst the several states."[40] From within the Commerce Clause, the Supreme Court has long recognized a "*dormant*" provision that acts to place restraints on the state's ability to pass legislation that unduly interferes with interstate commerce.[41] This implicit or dormant restraint has evolved into the doctrine known as the *Dormant* Commerce Clause.[42] It functions to deter the economic protectionism that plagued our nation in its early days.[43] The restraint is not absolute, however, and some degree of local autonomy is to be expected and respected.[44]

To determine if a state law violates the dormant provision of the Commerce Clause, the Supreme Court has laid out a two-tiered approach.[45] First, the court looks to the statute to see if it facially or "(1) directly regulates interstate commerce; (2) discriminates against interstate commerce; or (3) favors in-state economic interests over out-of-state interests."[46] If any of these three things

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[39] *Id*. at 639.

[40] U.S. CONST. art. I, § 8, cl. 3.

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

[42] Hereinafter, *Dormant Commerce Clause* or ("DCC").

[43] *See also* Gibbons v. Ogden, 22 U.S. 1 (1824) (holding that a law passed by a New York legislature granting a New York steamboat operator a 20-year monopoly over New York State navigable waters violated the Commerce Clause).

[44] *Davis*, 553 U.S. at 338; *see also*, Cooley v. Bd. of Wardens, 53 U.S. 299 (1852) (finding that a Pennsylvania law requiring all vessels to hire local pilot for inland waters or face a fine did not violate the Commerce Clause)

[45] Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 638 (9th Cir. 1993).

are true, "[the statute] violates the Commerce Clause per se."[47] The statute will survive only if the state can show that its legitimate purpose cannot be served by reasonable, nondiscriminatory alternatives.[48] Second, if the statute has only indirect effects on interstate commerce, it will be subjected to a balancing test. The test determines whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.[49]

In addition to traditional challenges via the Dormant Commerce Clause, also within its toolkit lies the faded *extraterritoriality* doctrine.[50] It arises out of the court's established view that state laws with the practical effect of projecting legislation outside the state's borders is invalid under the Commerce Clause.[51]

### *A. NIL Legislation Likely Violates the Dormant Commerce Clause*

NIL legislation likely violates the dormant provision of the Commerce Clause. First, the statutes, as written, likely regulate interstate commerce directly. For example, SB-206 requires that the NCAA not enforce its bylaws on student-athletes or their universities in connection with compensation they earn.[52] Because of the impracticability of expelling universities whose states enact NIL legislation, the NCAA must, by its organizational mandate, adopt the NIL legislation to maintain uniform standards throughout. Thus, the practical effect of the statutes is to regulate commerce outside their respective states' borders.

Second, the statute may discriminate against interstate commerce by bestowing benefits on in-state universities while burdening out-of-state universities. NIL legislation undoubtedly creates recruiting incentives that universities can use to attract top

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[46] *Id*.
[47] *Id*.
[48] *Davis*, 553 U.S. at 338.
[49] Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).
[50] *Miller*, 10 F.3d at 638.
[51] *Infra*, note 80 at 245.
[52] *See* CAL. EDUC. CODE § 67456.

talent over their out-of-state peers. This type of legislation is generally invalid *per se*.

Third, in the absence of direct regulation or discrimination of interstate commerce, the state's interest in NIL legislation is not legitimate. Though athletes deserve meaningful legislation which will improve their ability to leverage their name, image, and likeness, SB-206 and its progeny do not impute benefits to in-state interests that outweigh the burdens they create.

Last, lying within the toolkit of the Dormant Commerce Clause is the *extraterritoriality* doctrine. Being one of the less used doctrines by the Supreme Court, it has interesting implications for use on an organization as unique as the NCAA. The extraterritoriality doctrine may offer the 9th Circuit and Supreme Court the ability to make a narrow holding to save the NCAA and avoid a governmental takeover of collegiate sports.

### *SB-206 and Similar Laws do not Facially Discriminate*

Facial discrimination refers to discrimination by a statute that is overt or plainly expressed on the face of the law.[53] "Statutes that clearly discriminate against interstate commerce are routinely struck down…unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."[54] Common examples of facial discrimination include taxes on out-of-state products and prohibitions on importation of out of state goods.

While it does name the NCAA directly, SB-206 does nothing to discriminate against interstate commerce facially.[55] The bill requires simply that neither the NCAA nor California universities enforce any rule that would prevent students from receiving compensation for their name, image, and likeness. Thus, on its face, the bill imparts no economic advantage at the disadvantage of another and likely cannot be challenged facially.

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[53] *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (finding that a law prohibiting the sale of milk unless pasteurized within 5-miles of city limit was discriminatorily favoring local producers); *see also* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) (finding that a tax on milk, with credit for the purchase of locally made milk was discriminatorily favoring local producers).

[54] *Healy*, 512 U.S. at 192.

[55] Sagers, *supra* note 8.

*NIL Legislation Directly Regulates Interstate Commerce*

Aside from regulating interstate commerce *facially*, the courts will look to see if the statute *directly* regulates interstate commerce. In *NCAA v. Miller*, the court found that a Nevada law directly regulated the NCAA by targeting "national collegiate athletic associations which have member organizations in 40 or more states."[56] Likewise, due to its multi-state regulation of athletic recruitment and transportation of athletes and teams, the court concluded that the NCAA is an organization which engages in interstate commerce.[57] The court further made the connection that a law whose only target was an organization engaged in interstate commerce, directly regulated interstate commerce, and was therefore invalid.[58]

The primary issue the NCAA will have in showing direct regulation by current NIL legislation is that the bills are written in the negative and avoid language regarding NCAA penalties.[59] Specifically, the Nevada law at bar in *Miller* had two operative provisions that, when applied together, contributed to the law's invalidity. First, the Nevada law required that the NCAA adopt specific procedural due process mechanisms, such as the right to confront all witnesses, access to exculpatory statements, and that NCAA hearings be open to the public.[60] Second, the statute prevented the NCAA, from "impairing the rights or privileges of membership" to any institution as a result of compliance with the

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[56] Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 638 (9th Cir. 1993).

[57] *Id*. The court made the connection from the antitrust holding in NCAA v. Board of Regents, 468 U.S. 85 (1984). The court would later use antitrust principles from that case to build on the idea that the NCAA is a unique organization that is a prime candidate for the extraterritoriality doctrine.

[58] *Infra*, note 80 at 245.

[59] Ramogi Huma, *Written Testimony – US Senate Commerce*, NAT'L COLL. PLAYERS ASS'N (2020), https://www.commerce.senate.gov/services/files/259A1F0D-49EF-4D9C-A1AD-78A45DFAA620. Ramogi Huma, the executive director of the NCPA, outlined specific tactics that state legislatures could use to avoid running afoul of the Dormant Commerce Clause. One of the tactics was to avoid direct language prohibiting the assessment of penalties or controlling the NCAA's enforcement policies. Huma also suggested that Congressional action should be taken to void all current penalties being assessed under the NCAA's NIL bylaws.

[60] Nat'l Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1481 (D. Nev. 1992) Also known as "Miller I."

statute.[61] In other words, the NCAA could not just expel Nevada schools to avoid liability under the statute.[62]

Operating together, the two sections of the Nevada law forced the NCAA to adopt the procedural mechanisms prescribed by Nevada and removed any market choice to expel Nevada universities from the organization.[63] The court reasoned that as organized, "[t]he Statute would have profound effect[s]" on the way the NCAA enforces "its rules regulations."[64] Further, because NCAA organizational mandates require even-handed application of its enforcement mechanisms "uniformly on a national basis,"[65] the statute's practical effect would be to regulate commerce on a national level which violated the Dormant Commerce Clause.[66]

Like the Nevada law, current NIL legislation, such as SB-206, implicitly and directly regulates the NCAA. § 67456(a)(2) specifically prohibits "athletic association[s], conference[s], or other group[s] or organization[s] with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, shall not prevent…[student-athletes]" from participation in intercollegiate athletics due to receipt of compensation in connection with their name, image, and likeness."[67] § 67456(a)(3) is similar, but rather prohibits the NCAA from enforcing its rules against member institutions in connection with their students receiving compensation in "relation to the student's name, image, and likeness."[68]

The language of the specific sections is expansive to avoid directly targeting the NCAA; however, in practice, it is no different than the Nevada law, which targeted a "group of institutions in 40 or more states who are governed by the rules of the association relating to athletic competition."[69] The NCAA consists of more than 500,000 college athletes, from 1,100 member schools across the

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[61] *Id*.

[62] *Miller*, 10 F.3d at 639.

[63] *Id*.

[64] *Id*. at 638.

[65] *Id*. at 638 (quoting Nat'l Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1484 (D. Nev. 1992), *aff'd*, 10 F.3d 633 (9th Cir. 1993)).

[66] *Id*. at 639.

[67] CAL. EDUC. CODE § 67456(a)(2) (West 2021).

[68] *Id*. § 67456(a)(3).

[69] NEV. REV. STAT. § 398.055 (1989).

United States and Canada. Any statute, whether constructed broadly or directly to target "associations relating to [collegiate] athletic competition," inherently targets the NCAA.[70]

The most significant difference between the Nevada and California laws is that California's SB-206 has no prohibition on the NCAA removing California member universities from the NCAA.[71] Without the prohibition on expulsion, the NCAA faces a market choice; either expel the California schools from the NCAA and maintain uniformity throughout, or in the alternative and in opposition with its organizational mandates, the NCAA would have to maintain a separate system of enforcing penalties within and without California. Even if the NCAA chose the latter, SB-206 would still have a "profound effect [on the way the NCAA] regulates the integrity of its product" because the organization relies on even-handed enforcement on a national basis.[72]

In that same breath, the Senate Report on NIL legislation from the National Collegiate Players Association ("NCPA") noted that it would be impractical, and therefore not a choice at all for the NCAA to expel colleges in states that adopted NIL legislation.[73] The reasons for this are numerous. Aside from the apparent loss of revenue from the expulsion of these schools, the NCAA represents over 500,000 student-athletes, many of whom receive significant financial benefits from the NCAA.[74] Expulsion of the member schools wouldn't just serve to help maintain the NCAA's bottom line and organizational mandate, it would also irreparably harm the careers of a significant portion of the population that its bylaws have so evolved to protect.

In *Miller*, the court held that the practical effect of the Nevada law would be to directly control commerce on a national basis. Here, the NCAA still must abide by its organizational mandate which

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[70] *Overview*, NCAA (2023), https://www.ncaa.org/sports/2021/2/16/overview.aspx.

[71] *See e.g.*, CAL. EDUC. CODE § 67456 (West 2021). *Contra* Nev. Rev. Stat §§ 398.155-255.

[72] Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 639 (9th Cir. 1993). The very fact that California "plays by a different" rulebook would undermine the purpose of the NCAA, thereby diminishing its product.

[73] Huma, *supra* note 59 ("In addition, and most importantly, it will not be practical for the NCAA to expel so many colleges from the numerous states that are likely to adopt similar laws.").

[74] *Miller*, 10 F.3d at 638.

requires that enforcement of its bylaws be accomplished "even-handedly and uniformly on a national basis."[75] However, faced with the impracticability of expelling the California colleges it must then, by its own mandate, adopt the California enforcement procedures and then enforce it nationally.[76] Thus, because the choice is no choice at all, the California statute has the practical effect of regulating commerce on a national level which *per se* violates the Dormant Commerce Clause.[77]

*NIL Legislation Discriminates Against Interstate Commerce*

Moving on from direct regulation, the courts will also see whether a law implicitly discriminates against interstate commerce or favors in-state economic interests over out-of-state economic interests.[78] "Discrimination" in this sense "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[79] "Laws that are motivated by 'simple economic protectionism' are subject to a 'virtually *per se* rule of invalidity,'" which places the burden on the state to "show a legitimate local purpose," with no less discriminatory alternative.[80] In the vein of discrimination, the court has been silent as to what level of discrimination is tolerable. [81] However, laws that have the effect of being administered with an "unequal hand" and "evil heart" are often found to be discriminatory.[82]

In determining whether or not SB-206 discriminates against interstate commerce, many scholars have deferred to a six-page

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[75] *Id*. at 639.

[76] Although the California law doesn't specifically require the NCAA to do anything, non-enforcement of a current by-law certainly must count as repealing a by-law. In addition, the NCAA, faced with the impractical decision of expelling schools in states with NIL legislation, has in fact adopted an interim NIL policy.

[77] *Miller*, 10 F.3d at 639.

[78] *Id*. at 638.

[79] United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007).

[80] *Id*. at 338 (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1984)). This is also known as "strict scrutiny."

[81] M. Ryan Kearney, *When the States Step Out of Bounds: State Regulation of Student-Athlete Compensation and the Dormant Commerce Clause*, 42 LOY. L.A. ENT. L. REV. 221, 240 (2022).

[82] Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

letter written by Chris Sagers to California Governor Gavin Newsom addressing the bill's constitutionality.[83] On the topic of whether or not SB-206 discriminates, Sagers concludes:

"SB 206 does not discriminate against any commerce in any way. Players from states that don't authorize similar NIL benefits remain free to play in California and to compete against California athletes."[84]

Despite this short and sweet conclusion, SB-206 and similar state NIL laws do have meaningful discriminatory effects that benefit in-state universities while burdening out-of-state universities. Among a laundry list of things affected by NIL legislation are the market for athletic talent, disruptions in recruitment, school choices amongst athletes, and legal and regulatory challenges. These challenges undoubtedly occur while navigating the now ever-changing legislative landscape.

Under NCAA bylaws, before NIL legislation, student-athletes were limited to certain amounts of remuneration, primarily limited to financial aid and qualified education-related expenses.[85] Under this system, schools had two primary arguments about why top talent should attend their program. The first being that their university's program was superior to others. The facilities, coaching, and a successful track record of winning would help them reach their aspirations of reaching the league.[86] The other was an economic argument that private universities like Duke, due to their higher cost of attendance, were better economic deals. The all-in cost of attendance granted to the players as financial aid was, in essence, a larger compensation package in addition to the allure of an Ivy education.[87]

Post NIL legislation, however, schools are competing with a whole new set of rules. In a recent survey encompassing all NCAA divisions, 75% of athletes list NIL availability as a factor they consider when making recruitment decisions. This effectively gives any state with less restrictive NIL laws an upper hand in

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[83] Sagers, *supra* note 8. Chris Sagers is a law professor of 17 years at Cleveland State University.

[84] *Id*. at 6.

[85] *See e.g.,* NCAA, 2022–23 NCAA DIVISION I MANUAL (2018).

[86] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1056 (9th Cir. 2015)

[87] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 965-66 (N.D. Cal. 2014), aff'd in part, vacated in part, 802 F.3d 1049 (9th Cir. 2015)

recruitment.[88] In addition, these numbers increased for the larger conferences where the most talented athletes seek to play.[89] This was especially noticeable amongst athletes entering the transfer portal, where NIL legislation may not have been available upon entering their undergraduate institutions.[90] Amongst these athletes, 67% responded NIL availability would play a role in deciding whether or not they should accept an offer at a competing institution.[91]

The states, too, are recognizing the paradigm shift that has occurred as states enact less and less restrictive legislation in the NIL arena. For example, NIL legislation was recently repealed in Georgia, South Carolina, and Alabama. These state's laws, while similar to SB-206, included a restrictive provision that placed NIL payments in trust until after the athlete graduated from their undergraduate institution.[92] Despite being clever workarounds to the NCAA bylaws, the states repealed the legislation, with their universities citing issues remaining competitive in recruiting, opting rather to be governed by the NCAA's updated policy on NIL enforcement.[93]

As a counter to this argument, many, like Sagers, have raised the "free market" theory in that unlike other invalidated statutes, "SB-206 does not truly insulate its universities from competition" because "other states are free to convey the same benefits" through legislation.[94] While this is true, there are hiccups to this argument, mainly that the talent pool for athletes is incredibly small. Numbering 500,000 NCAA athletes in total, collegiate athletes account for less than .15% of the United States' population.[95] Of

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[88] Bill Carter, *The Impact of NIL on College Recruiting and Why Alabama's New Advantage Center Is a Case Study*, SPORTS BUS. J. (Feb. 21, 2023), https://www.sportsbusinessjournal.com/SB-Blogs/OpEds/2023/02/21-Carter.aspx.

[89] *Id.*

[90] *Id.* SB-206 went into effect in 2021, so many players currently in the NCAA have new options in the transfer portal for lucrative deals in other markets.

[91] *Id.* It makes sense that the Power-Five would have higher rates of athletes concerned with NIL availability because Power-Five student-athletes are the most likely to be courted with lucrative NIL deals.

[92] *See e.g.*, GA. H.B. 617(c)(4)(B)(iii), (iv).

[93] Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, OPENDORSE (May 25, 2023), https://biz.opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/.

[94] Kearney, *supra* note 81, at 240.

those 500,000 student-athletes, only 2% percent will have the skills to make it onto a professional roster and likely will be the most sought-after in recruitment. When the sample size that the legislation seeks to target is so tiny, even slight advantages gleaned through legislation will likely lead to outsized results for their in-state universities.

Granted, the profound implications and benefits bestowed to in-state institutions by NIL legislation and the small talent pool that the legislation seeks to target, the courts may very well find that NIL legislation does, in fact, discriminate against interstate commerce.

### *Under the Balancing Test are the State's Interests Legitimate?*

In the absence of direct regulation, or discrimination of interstate commerce, "[o]ccasionally the Court has candidly undertaken a balancing approach" which weighs the incidental effects on interstate commerce versus the local putative benefits of the statute.[96] Sometimes called the *Pike* balancing test, it is often used to strike down overtly protectionist laws. The balancing test, however, has fallen out of favor with the Supreme Court as the evolution of rational basis has led to deference to local legislatures.[97]

SB-206 and other state-concerned NIL legislation will undoubtedly have incidental burdens on interstate commerce. Indeed, a student-athlete in California with a lucrative endorsement valid at the University of California will have to make tough decisions in considering a transfer to the University of Georgia. Will his contract even be legal? What about the national organization who endorsed him, how do they enforce their end of

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[95] *Overview*, NCAA (2023), https://www.ncaa.org/sports/2021/2/16/overview.aspx. The NCAA currently represents roughly 500,000 student athletes. When this number is divided by the current U.S. population of 331.9 million, it yields .15%. This percentage gets even smaller for Division I athletes, who at just over 190,000 in number, are highly sought after by NIL because of the gap in talent in this division.

[96] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). The Pike balancing test allows the Supreme Court to seemingly invalidate certain laws that burden interstate commerce. This is part of the reason the Supreme Court is hesitant to use it and thus, defers to the rationale of the legislatures. *See also* S. Pac. Co. v. State of Ariz. ex rel. Sullivan, 325 U.S. 761 (1945).

[97] Kearney, *supra* note 81, at 242.

the bargain in a state where their endorsement operations run afoul of reporting requirements in that state? These are burdens on interstate commerce that companies and athletes currently deal with.

In the face of these incidental burdens, the Court will then look to the local putative benefits the law confers. In *Pike*, the Court looked at an Arizona law. Despite the state's legitimate interest in having the plaintiff's product packaged in Arizona, the Court determined that this interest was not enough to justify that the plaintiff relocate his packaging plant for $200,000. The Court concluded that "[t]he nature of the burden is, constitutionally, more significant than its extent."[98]

Again, proponents of SB-206 and similar state legislation have dismissed the *Pike* test as a legitimate avenue for invalidation of the law as the statute serves a "legitimate and widely-demanded purpose: restoring a measure of fairness to college athletics."[99] Admittedly, there is a need for some semblance of relief to college athletes, "eighty-six percent of whom live at or below the poverty line."[100] And despite touting that SB-206 and its progeny "[convey] sizeable in-state benefits,"[101] those benefits are overshadowed in that "SB-206 guarantees athletes nothing but theoretically enables them to make millions."[102]

NIL legislation is not legitimate because it does not address, in any meaningful way, student-athlete compensation. Only 17% of student-athletes received NIL deals in 2022.[103] Of those deals, the average player received roughly only $1,300.00 per year.[104] Additionally, a bulk of the funds reserved through NIL deals are

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[98] *Pike*, 397 U.S. at 145. The Court also expressed suspicion about the statute's requirement that a business procedure, which could be recreated in a more efficient manner, be in-housed into Arizona. *See id*.

[99] Kearney, *supra* note 81, at 241.

[100] *Id*. at 243.

[101] *Id*. at 244.

[102] *Id*. at 236.

[103] Bill Carter, *Seven Data Points That Will Tell the Story of NIL in 2023*, SPORTS BUS. J. (Jan. 17, 2023), https://www.sportsbusinessjournal.com/SB-Blogs/OpEds/2023/01/17-Carter.aspx. 17% of Division I athletes received some sort of NIL deal during 2022. Of the 500,000 athletes in the three NCAA divisions, roughly 190,000 are Division I athletes. This means that roughly 6% of student-athletes are receiving NIL deals.

[104] *Id*.

directed towards generational talents, such as Arch Manning and Shedeur Sanders who are rumored to have made $2.9 million and $4.1 million respectively. Arguably, the laws' purpose, rather than empowering the average athlete, is to enable universities to employ funds seeking to obtain the best talents for their programs. Thus, the law deprives other universities of that talent.

Although student-athletes are indeed deserving of compensation, NIL legislation in its current form hardly carries a bucket. The law's local putative benefits are outweighed by the chaotic burdens they place upon interstate commerce. Roughly, 2% of athletes will make it into professional sports, and these athletes are the only ones who will likely have access to meaningful NIL deals.[105] Everyone else will just have to navigate the hurdles their success creates.[106]

### *The Extraterritoriality Doctrine*

Though the Supreme Court has not invalidated a state law through the *extraterritoriality* doctrine since *Healy v. Beer Institute* in 1989, a savvy jurist may very well see the appeal of its application to the NCAA.[107] When considering a holding such as one affecting the NCAA, the courts will consider the circumstances surrounding the decision. The recent decision in *Alston* has broken the 50-year-old argument that the NCAA's amateurism rules are "pro-competitive."[108] This paves the way, through federal antitrust law, to invalidate horizontal economic restrictions not grounded in the rule of reason. Additionally, it gives athletes a more suitable path toward compensation.[109]

Further, the Court has recognized that the NCAA has taken "upon itself the role of coordinator and overseer of college athletics,"

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[105] *NCAA Recruiting Facts*, NCAA (Aug. 2014), https://www.nfhs.org/media/886012/recruiting-fact-sheet-web.pdf.

[106] Greg Johnson, *NCAA Student-Athlete Transfer Trends*, NCAA MEDIA CTR. (Feb. 21, 2023, 2:00 PM), https://www.ncaa.org/news/2023/2/21/media-center-2022-transfer-trends-released-for-divisions-i-and-ii.aspx. Overall, 13% of Division I athletes entered the transfer portal, however only 7% actually transferred. It would be an interesting bullet point to see if any of the 5% who didn't transfer were discouraged by complications with their NIL deals. *See id.*

[107] Healy v. Beer Inst., Inc., 491 U.S. 324 (1989).

[108] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

[109] *Id.* at 2169.

and is "performing a traditional governmental function."[110] This function requires a uniform set of rules, which create a market for competition between its member institutions; in essence, they act as a referee.[111] Current NIL legislation, like SB-206, directly threatens the NCAA as an organization because it allows states to legislate their way out of NCAA by-laws they disagree with.

By the same logic, if California wanted to change the size of the playing field from 100 yards to 150 yards, they could legislate with the "legitimate state purpose of increasing the athletic and aerobic fitness of their athletes." This legislative freedom overtly destroys the ability of the NCAA to maintain their product which is competition.[112] If the Court holds SB-206 legal through a DCC challenge, other state regulations in this vein are sure to follow, and the NCAA would lose its power to regulate collegiate sports altogether.

This would inevitably lead to, and what most think is on the horizon, a complete governmental takeover of collegiate athletics, something the courts may be hesitant to endorse. Consequently, the *extraterritoriality* doctrine may be a perfect solution, which the 9th circuit already hinted at in the holding of *NCAA v. Miller*.[113] The NCAA is an incredibly unique organization, whose bylaws and structure require uniformity, thus any laws requiring the NCAA to adopt a procedure, are projected onto neighboring states.[114] The *extraterritoriality* doctrine was formed "considering the dangers of 'inconsistent legislation' arising from the projection" of one state's legislation into another.[115] Thus, the doctrine could be used to make

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[110] Par. v. Nat'l Collegiate Athletic Ass'n, 506 F.2d 1028, 1032 (5th Cir. 1975), *abrogated by* McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338 (5th Cir. 1988), and *abrogated by* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988). The holding that the NCAA is a state actor was overturned, but the Court's characterization of the NCAA is still accurate.

[111] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).

[112] *Id*.

[113] Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 639 (9th Cir. 1993).

[114] Par. V. Nat'l Collegiate Athletic Ass'n, 506 F.2d 1028, 1032 (5th Cir. 1975), *abrogated by* McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338 (5th Cir. 1988), *and abrogated by* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).

[115] Kearney, *supra* note 81, at 245 (quoting Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582 (1986)).

an extremely narrow holding, on an extremely unique organization, that prevents a public takeover of a private organization.

### *Brief Overview of the Extraterritoriality Doctrine*

"The *extraterritoriality* doctrine grew out of two cases involving price-affirmation statutes."[116] That is, state laws that require companies to ensure lower prices on select goods in-state versus out-of-state.[117] The first case, *Brown-Forman*, revolved around litigation ensuing from New York law which required that the "price of liquor to wholesalers" in New York be no higher than the lowest price sold "anywhere in another state."[118] The law's practical effect was to "[f]orce a merchant to seek approval in one State" before making a sale in another, thereby directly regulating interstate commerce.[119]

In *Healy*, apparently upset that the "price of beer was consistently higher" in Connecticut than her three bordering states, the legislature enacted a similar price-affirmation statute "tying prices" to those charged at the border.[120] The law's primary issue was that once a price had been affirmed in-state, it precluded any sales at higher prices out of state, thus directly regulating out-of-state commerce.[121] Interestingly, the Court in *Healy* took into consideration how interactions between differing states' laws may compound, thereby magnifying the direct regulation of interstate commerce.[122]

At the same time the Connecticut law required affirmation, a New York law required promotional discounts on beer prices that

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[116] *Id*.

[117] *Id*.

[118] Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 576 (1986). At the time, twenty other states had already established similar liquor laws, all hoping to achieve a similar purpose, and all interfering with interstate commerce.

[119] *Id*. at 582.

[120] Healy v. Beer Inst., Inc., 491 U.S. 324, 326 (1989). The current litigation was the result of the re-write of an already overturned statute which received a *facial* DCC challenge.

[121] *Id*. at 338. Merchants would have to declare their prices in border states for the month and then match those prices in Connecticut. Merchants couldn't alter prices in other states, until they had declared those prices and re-affirmed that their Connecticut prices conformed with the statute. Because of this, interstate commerce paid a heavy toll.

[122] *Id*. at 338-39.

remained in effect for 180 days.[123] The court noted the interaction between the two laws was punishing merchants by making the "cost of locking in their discounted New York price," as setting the ceiling for their Connecticut prices for the entire duration of the New York discount.[124] The Court reasoned that this kind of "potential regional and national regulation" of pricing mechanisms is reserved by the Commerce Clause, and "may not be accomplished piecemeal through the extraterritorial reach of individual state statutes."[125]

### *SB-206 Violates the Dormant Commerce Clause through the Extraterritoriality Doctrine*

In *Miller*, the 9th circuit concluded, that aside from direct regulation of interstate commerce, the Nevada law invoked the extraterritoriality doctrine and "violate[d] the Commerce Clause because of its potential interaction or conflict with similar statutes in other jurisdictions."[126] It reached its conclusion by noting at the time of the holding, eight other states had already enacted conflicting legislation.[127] These state's separate laws would impose separate restrictions on the NCAA, whose mandates require it to adopt the statutes to maintain uniform standards and protect the integrity of its product.[128] Even the adoption of one state's "burden of persuasion" as a due process mechanism, as the "least stringent standard," would directly regulate commerce because that state might consider its standard, for example, "more likely than not" a "maximum as well as a minimum."[129]

There are currently forty states with either currently enacted or proposed NIL legislation, many having varying degrees of legislative intervention.[130] Currently, New Mexico has the most

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[123] *Id*.

[124] *Id*. at 339.

[125] *Id*. at 340. Although dicta, this forms the basis that state regulation which is likely to create competing state regulation is subject to examination under the extraterritoriality doctrine.

[126] Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 639 (9th Cir. 1993).

[127] *Id*.

[128] *Id*.

[129] *Id*. at 640. Here the court connected the logic to the price affirmation in *Healy*. *See Healy*, 491 U.S. at 338-39.

[130] Braly Keller, *State Laws and Proposed Legislation*, OPENDORSE (May 25, 2020), https://biz.opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/.

athlete-friendly NIL protections.[131] In addition to protections for compensation in relation to the student's name, image, and likeness, the bill offers further substantive protections.[132] Some examples are: allowing student-athletes to enter into contracts with sponsors not affiliated with their university and accepting certain gifts such as food, shelter, and insurance from third parties.[133] California's SB-206 specifically prohibits athletes from entering into contracts "if a provision of the [athlete's contract] is in conflict with" the team's contract.[134]

As the NCAA must maintain uniformity, it may only comply with one statute contemporaneously. Thus, if the NCAA complies with the California statute, shoe companies that do business in both New Mexico and California will have to comply with the California law concerning student-athletes. Their options: leave business in California or accept lost deals in New Mexico as the cost of doing business. This is precisely the extraterritorial effect that the *Miller* court held as forbidden.[135] This is because, under the *extraterritoriality* doctrine, the Commerce Clause protects against laws that project one state's regulatory scheme into another, thereby directly regulating interstate commerce outside its own borders.[136]

## CONCLUSION

Justice Kavanaugh's assertation that "[t]he NCAA's business model would be flatly illegal in almost any other industry in America," is true.[137] However, that statement is akin to saying any other animal than a bird would fall to its death if it tried to fly. The

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[131] Drew Butler, *Comparing State NIL Laws and Proposed Legislation*, ICON SOURCE (2023), https://iconsource.com/blog/nil-laws-comparison/#:~:text=New%20Mexico%20earned%20the%20NCPA's,at%20a%20score%20of%2043%25.

[132] NM LEGIS 124 (2021), 2021 N.M. Laws Ch. 124 (S.B. 94).

[133] *Id*. § 3(A)(1)-(2), § 3(C).

[134] CAL. EDUC. CODE § 67456(e)(1) (West 2021). ("A student athlete shall not enter into a contract providing compensation to the athlete for use of the athlete's name, image, likeness, or athletic reputation if a provision of the contract is in conflict with a provision of the athlete's team contract.").

[135] Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 639 (9th Cir. 1993).

[136] *Id*.

[137] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring).

NCAA is not in "any other industry," and just like a bird's purpose is to fly, the NCAA's is to regulate the market for competition within collegiate athletics, a nationwide problem whose correct lens is federal law, not state.

Though the decision in *Alston* may eventually bankrupt the NCAA, state NIL legislation poses a much more significant threat; it leaves the organization without teeth. Without a successful challenge, states will remain armed with the option to pass legislation to bypass any NCAA rules they do not agree with or care to abide by. On the other hand, if the courts do not strike down the state laws, they may have to grapple with the fact that the NCAA is not long for this world and may have to be usurped by a federal agency such as the Federal Trade Commission, an agency above state regulation, to ensure uniform standards.

In any situation, time is not the NCAA's friend. Every year these laws sit on the books, the economic market around them entrenches itself, and soon enough, unwinding the laws will be just as painful as the idea of replacing the NCAA with a public agency. Yes, student-athletes deserve compensation. However, the states themselves cannot be the arbiters of what meaningful compensation looks like, they simply have too much skin in the game.