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The "Wild West" of State NIL Laws: Asking for Congress to Bail Out the NCAA

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The "Wild West" of State NIL Laws: Asking for Congress to Bail Out the NCAA

Cover Page Footnote

Evan Crowder is a law student at the University of Georgia School of Law. A double dawg, he graduated from the University of Georgia, where he earned a bachelor's degree in finance with a legal certification and a criminal justice studies minor. During law school, Evan served on the editorial and managing boards of the Journal of Intellectual Property Law and was a member of the Wilbanks CEASE Clinic. Additionally, Evan is a diehard Georgia Bulldogs, Atlanta Falcons, and Atlanta Braves fan.

NOTE

THE “WILD WEST” OF STATE NIL LAWS: ASKING
FOR CONGRESS TO BAIL OUT THE NCAA

*Evan Crowder**

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I. INTRODUCTION

In the beginning, amateurism was an easy philosophy on which college athletics could lay its foundation. In fact, it was likely the catalyst for the explosion of college sports in virtually every school across the country. In 1910, the National College Athletic Association (“NCAA”) (formerly known as the Intercollegiate Athletic Association) was granted rule making authority, which vested it with the ability to regulate athlete amateurism and eligibility.¹ From that moment forward, the definition and idea of what it means to be an amateur collegiate athlete has been constantly reconstructed.

“Student athletes,” a term first coined by Walter Byers in 1951, are supposed to be students before they are athletes.² This may seem like an altruistic interpretation of these athletes’ situations, but it is often an unrealistic illusion that we actively participate in.

Student athletes, especially college football players, quickly realized that they provide much more value to the institution they play for through their on-field performance than they receive from a free education.³ The cost to the school associated with putting a football player in an empty lecture hall seat is essentially zero, but the institutional benefit derived from some of the sport’s biggest stars can range into the millions of dollars.⁴

It is this misalignment of incentives that has led to rapidly changing amateurism in college athletics. Until recently, student athletes were unable to receive compensation related to their name, image, or likeness (“NIL”) as a reward for their on-field performance.⁵ They were unable to be compensated for signing autographs, entering sponsorship deals, or even the jerseys sold

¹ Wes Gerrie, *More than Just the Game: How Colleges and the NCAA are Violating their Student-Athletes’ Rights of Publicity*, 18 TEX. REV. ENT. & SPORTS L. 111, 114 (2018) (citations omitted).

² Arash Afshar, *Collegiate Athletes: The Conflict Between NCAA Amateurism and A Student Athlete’s Right of Publicity*, 51 WILLAMETTE L. REV. 101, 121 (2015).

³ Evan Desai, *Survey shows student-athletes feel taken advantage of by NCAA*, GLOBAL SPORTS MATTERS (Oct. 29, 2019), <https://globalsportmatters.com/business/2019/10/29/survey-shows-student-athletes-feel-taken-advantage-of-by-ncaa/>.

⁴ Tom Huddleston Jr., *College Football Stars could be Earning as much as \$2.4 million Per Year, Based on NCAA Revenues: Study*, CNBC (Sept. 2, 2020), <https://www.cnbc.com/2020/09/02/how-much-college-athletes-could-be-earning-study.html>.

⁵ Michelle Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June. 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> (providing the new NIL policy changes).

bearing their name.⁶ “[C]ompensation was limited to education-related benefits” only.⁷ This includes the cost of “tuition, fees, room and board, books, and cash” stipends for incidental expenses athletes may come across.⁸

Legal action was inevitable, and in 2019 current and former college athletes decided to challenge what appeared to be the NCAA’s monopoly over their own name, image, and likeness.⁹ The resulting legal battle, which culminated at the Supreme Court level in *NCAA v. Alston*, opened the door for college athletes to receive compensation for their image.¹⁰ State legislatures acted almost instantly, with many states swiftly passing NIL laws to regulate how athletes can benefit from their name, image, and likeness.¹¹

In this Note, I will analyze the different approaches taken by states in passing their NIL laws, and whether schools circumventing these laws using collectives necessitates the need for NIL to be legislated at the federal level. I conclude that by leaving regulation up the states, schools, and conferences, the NCAA has failed to maintain a playing field that protects the competitive integrity of college athletics, and that there is a need for federal NIL legislation.

II. BACKGROUND

A. ATHLETE COMPENSATION AND TREATMENT PRE-*ALSTON*

Treatment of student athlete compensation and scholarship was subject to dynamic change for decades before the recent developments. In 1916, the NCAA decided that a college athlete was someone who played their sport purely for the enjoyment and development of social skills, physical physique, and mental fortitude.¹² In 1948, by way of the Sanity Code, the amateur college athlete was granted the ability to have their tuition and fees covered in order to attend the

⁶ Paul Greene, *College Athletes Can Be Sponsored*, GLOBAL SPORTS ADVOCATES, <https://www.globalsportsadvocates.com/faqs/ncaa-athletes-can-compete-and-enter-sponsorship-deals.cfm#:~:text=If%20you%20had%20asked%20this,agreements%20and%20continue%20to%20compete.>

⁷ Ezzat Nsouli & Andrew King, *Name, Image, and Likeness in US College Athletics: One Year Later*, SQUIRE PATTON BOGGS (July 11, 2022), <https://www.sports.legal/2022/07/name-image-and-likeness-in-us-college-athletics-one-year-later/>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141, 2145 (2021); *see also* Nsouli & King, *supra* note 7 (explaining how *Alston* affects college athlete compensation opportunities).

¹¹ Tim Tucker, *NIL Timeline: How We Got Here and What’s Next*, ATLANTA J. CONST. (Mar. 18, 2022), <https://www.ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHK5DKMAF6STQ6KZ4/>.

¹² Afshar, *supra* note 2, at 109.

school they played for.¹³ This trend continued when Walter Byers was named head of the NCAA in 1951.¹⁴ Early in his tenure, Byers fought hard to prevent schools from treating student athletes as if they were professionals by limiting their compensation to a regulated level,¹⁵ which effectively kept the playing field stable for dissimilarly-sized schools across the country.

While this may have been his initial stance, with the rise of televised sports also came the commercialization of college athletics.¹⁶ College sports expanded into a multi-billion (yes, billion with a “B”) dollar industry, and Byers would even go as far as to support student athletes’ right to endorsements.¹⁷ Before retiring, Byers convinced the NCAA to add the right for student athletes to have a small “laundry money” stipend and their room and board be covered by their athletic scholarship.¹⁸ Change began in 2011 when the NCAA allowed Division 1 schools to provide a \$2,000 stipend for student athletes to supplement their educational cost of attendance.¹⁹

In 2014, the *O’Bannon v. NCAA* case was brought by former UCLA basketball player Ed O’Bannon challenging the legitimacy of student athletes’ rights regarding the amateurism regulations.²⁰ O’Bannon argued for his right to use his image and sought compensation for his image being used in the EA Sports college basketball video game.²¹ The case concluded in the Ninth Circuit where the court agreed with the lower court’s ruling that NCAA amateurism rules violated antitrust laws, but the higher court took away athletes’ stipends beyond the cost of attendance.²² The court’s reasoning was to ensure that cash

¹³ Gerrie, *supra* note 1, at 115-117 (citing Daniel E. Lazaroff, *The NCAA in its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 333 (2007)); Afshar, *supra* note 2, at 109.

¹⁴ Afshar, *supra* note 2, at 121 (citations omitted).

¹⁵ *Id.*

¹⁶ Andrew Zimbalist, *Analysis: Who Is Winning in the High-Revenue World of College Sports?*, PBS (Mar. 18, 2023), <https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports>.

¹⁷ Afshar, *supra* note 2, at 121-22 (citations omitted).

¹⁸ *Id.* at 109, 121-22 (quoting Kristin R. Muenzen, *Weakening Its Own Defense? The NCAA’s Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 262–63 (2003)).

¹⁹ *Id.* at 109, 122-23 (citations omitted).

²⁰ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1049 (9th Cir. 2015); *see also* Joe Nocera, *What Tournament? N.C.A.A.’s Biggest Event May Be at a Higher Court*, N.Y. TIMES (Mar. 22, 2016), <https://www.nytimes.com/2016/03/23/sports/ed-obannon-lawsuit-ncaa-tournament.html> (describing the events leading up to the case).

²¹ Nocera, *supra* note 20.

²² *Id.*

compensation not closely tied to education did not damage the student athletes' designated status as amateurs.²³

Then, in 2019, California became the first state to pass NIL legislation.²⁴ The law, dubbed the Fair Pay to Play Act, permitted college athletes to be "paid for their name, image and likeness beginning in 2023."²⁵ The NCAA quickly responded with strong opposition, arguing that it would ruin amateurism in college sports, and despite this, other states eventually began drafting similar laws of their own.²⁶ The NCAA had never faced such opposition to the amateur model until this point, and all the questions and uncertainty surrounding the compensation of college athletes was addressed by the highest court in the land.²⁷

B. STATE OF COLLEGE ATHLETICS POST-*ALSTON*

On June 21, 2021, the United States Supreme Court issued its decision in *NCAA v. Alston*, dramatically changing college sports forever.²⁸ In this unanimous decision, the Court struck down the NCAA's policy caps on benefits and compensation related strictly to education.²⁹ Shortly thereafter, on July 1, 2021, the NCAA released an interim policy that allows college athletes to benefit from their name, image, and likeness.³⁰ The interim policy outlines how athletes can engage in NIL activities that are consistent with the laws of their state, and if their state has yet to enact NIL legislation, then they are authorized to engage in NIL activities without violating NCAA rules.³¹

Today, 32 states have current or enacted (but not effective) NIL legislation.³² The legislative differences between different state NIL laws leave schools,

²³ *O'Bannon*, 802 F.3d at 1078; see also Nocera, *supra* note 20 ("Because, it said, cash compensation not related to education would damage amateurism.").

²⁴ Emily Giambalvo, *What to Know about Name, Image, and Likeness and How it Will Affect the NCAA*, WASH. POST (June 29, 2021, 10:30 PM), <https://www.washingtonpost.com/sports/2021/06/15/nll-ncaa-paying-college-athletes/>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Nat'l Collegiate Athletic Ass'n v. *Alston*, 141 S. Ct. 2141, 2166 (2021)

²⁸ See *Alston*, 141 S. Ct. at 2169 (2021) (stating that student athletes can receive compensation beyond education); see also Theresa Loscalzo & Monica Matias, *Legal Framework for NIL One Year After NCAA v. Alston – Next Steps for Universities*, JDSUPRA (May 11, 2022), <https://www.jdsupra.com/legalnews/legal-framework-for-nll-one-year-after-6571507/> (describing the impact of *NCAA v. Alston* on college sports).

²⁹ *Alston*, 141 S. Ct. at 2169.

³⁰ See Hosick, *supra* note 5 (providing the details of the new policy); see also Loscalzo & Matias, *supra* note 28 (same).

³¹ Hosick, *supra* note 5.

³² *Your Guide to Federal and State Laws on Name, Image and Likeness Rules for NCAA Athletes*, SAUL EWING, <https://www.saul.com/nll-legislation-tracker> (last visited Nov. 8, 2023).

athletes, and parents at a disadvantage when figuring out where they fit into the new scheme. To add to the confusion, when one state feels that its law puts its schools at a competitive disadvantage, it repeals or amends its existing law to attract high school athletes to its institutions.³³

III. ANALYSIS

A. STATE NIL LAW APPROACHES

Student athletes everywhere can now profit off their name, image, and likeness, but state laws remain an important and confusing piece of the puzzle. Under the NCAA’s interim NIL policy, a student attending a school in a state with an active NIL law must comply with that state’s laws.³⁴ Additionally, students at institutions in states without an NIL law can engage in activities relating to their name, image, and likeness without violating any NCAA rules.³⁵

One of the primary concerns with every state enacting its own NIL law is that some will be more or less restrictive than others.³⁶ If one state’s law is more advantageous for athletes than another’s, will that be a deciding factor for college athletes when making their school decision? Further, will this provide academic institutions in less restrictive states with a competitive advantage in the “new” market for college athletes? Some of these questions are similar to the questions raised by Justice Kavanaugh’s concurrence in *Alston*.³⁷

To answer some of these questions, the state of Alabama provides some insight. As one of the first states to enact its law following the Supreme Court’s ruling in *Alston*, Alabama sought to have a law that would be less restrictive than what many anticipated would be a highly restrictive interim policy adopted by the NCAA.³⁸ Signed into law on April 20, 2021, Kyle South, an Alabama Representative, stated that the law’s purpose was to ensure that Alabama universities were not at a recruiting disadvantage to universities in other states.³⁹

³³ Loscalzo & Matias, *supra* note 28.

³⁴ Hosick, *supra* note 5.

³⁵ *Id.*

³⁶ Dan Murphy, *Universities, NCAA See Pros and Cons of New State NIL Laws*, ESPN (July 1, 2023), https://www.espn.com/college-sports/story/_/id/37940566/universities-ncaa-nil-laws-texas-texas-am.

³⁷ Nat’l Collegiate Athletic Ass’n v. *Alston*, 141 S. Ct. 2141, 2166–69 (2021) (Kavanaugh, J., concurring).

³⁸ Andrew H. King, *How US Federal and State Legislatures Have Addressed NIL*, NAT’L L. REV. (July 13, 2022), <https://www.natlawreview.com/article/how-us-federal-and-state-legislatures-have-addressed-nil>.

³⁹ *Alabama Has Repealed Its NIL Law – Can Alabama’s Student-Athletes Still Get Paid?*, BURR & FORMAN LLP (Feb. 16, 2022), <https://www.burr.com/newsroom/articles/alabama-has-repealed-its-nil-law-can-alabamas-student-athletes-still-get-paid>.

Naturally, both Auburn University and the University of Alabama gladly endorsed the NIL bill's passage.⁴⁰ Shortly after, the NCAA not only adopted its interim policy but also voted to ratify a new constitution that would overhaul its rules at all levels of college athletics regarding an athlete's name, image, and likeness.⁴¹

After the NCAA's actions, Representative South sponsored Alabama House Bill 76 to repeal the state's NIL Act less than one year after he originally sponsored it.⁴² "On February 3, 2022, Governor Kay Ivey signed the bill," officially repealing the original NIL Act.⁴³ South later stated, "[The NCAA] passed a set of rules for their member institutions, and where we find ourselves is state rules were more restrictive than what the NCAA set forth"⁴⁴

This is an example of a situation that became a reality for many states, and one that could continue as NIL rules, regulations, and laws continue to change. "Lawmakers in Louisiana, Mississippi, Missouri, Tennessee, and South Carolina have similarly followed Alabama's lead" by either amending or suspending their initial NIL legislation.⁴⁵

Most amendments "remove[d] an institutional involvement prohibition which barred schools from engaging with third parties in facilitating deals for their college-athletes."⁴⁶ States felt this was appropriate since the NCAA's interim policy makes no mention of third parties.⁴⁷ This is the loophole that opened the door for schools to begin taking advantage of "independently" run collectives.⁴⁸

While the patchwork of state NIL laws will certainly manufacture confusion among athletes and fans alike, there are certain characteristics that most state laws have in common.⁴⁹ For instance, most state NIL laws contain provisions restricting the duration of contracts that student athletes can enter.⁵⁰ Most laws provide that the contract length cannot "extend past the time the athlete participates in collegiate athletics at a particular institution."⁵¹ Another common restriction shared by state laws "forbids NIL activity from being tied to athletic

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Hosick, *supra* note 5.

⁴⁸ Chase Garrett, *What Are NIL Collectives and What Do They Do?*, ICON SOURCE, <https://iconsource.com/blog/nil-collectives/>.

⁴⁹ Nsouli & King, *supra* note 7.

⁵⁰ *Id.*

⁵¹ *Id.*

performance.”⁵² In essence, this means that deals cannot be tied to an athlete’s participation or achievement, indicating that an athlete’s compensation has no tie to the specific institution they play for.⁵³ This provision, adopted by most state laws and the NCAA interim policy, is the “legal bar on pay-for-play” that most fans were concerned about following the Supreme Court’s ruling in *Alston*.⁵⁴

Despite the state NIL laws having at least some similarities across the board and many states abiding by the NCAA interim policy, there are still calls for a uniform federal law.⁵⁵

B. FEDERAL NIL FRAMEWORK

Much of the concern creating the calls for a federal NIL framework stems from potential unfairness in the recruiting process.⁵⁶ In September 2021, the National Labor Relations Board issued a memo following the *Alston* ruling that classified “private college athletes as employees who deserve the same rights” as professionals.⁵⁷ This highlights the urgency for uniformity.

Most of the attention from fans and former NCAA president Mark Emmert is focused on persuading Congress to fix the NIL state law patchwork issue.⁵⁸ After holding a hearing on NIL, the House Subcommittee on Consumer Protection and Commerce chair Jan Schakowsky was critical of the NCAA’s flip-flopping on its policy.⁵⁹ She stated, “[f]or years, Congress was told by the NCAA and others to let them govern themselves However, in the wake of the proliferation of name, image, likeness laws in states around the country, and not to mention also Supreme Court cases, today they are coming asking us to intervene.”⁶⁰

Despite this, “Mark Emmert, in his opening statement, called on Congress to meet the ‘urgent’ need for a ‘federal framework’ around NIL.”⁶¹ The main concerns held by those advocating for federal legislation are the fears that state

⁵² *Id.*

⁵³ Bryan Finck, *What Athletes Can and Can’t Do under NIL*, DREAMFIELD (Oct. 7, 2021), <https://www.dreamfield.co/resources/what-athletes-can-and-cant-do-under-nil>.

⁵⁴ Nsouli & King, *supra* note 7.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Maria Carrasco, *Congress Weighs in on College Athletes Leveraging Their Brand*, INSIDE HIGHER ED (Sept. 30, 2021), <https://www.insidehighered.com/news/2021/10/01/congress-holds-hearing-creating-federal-nil-law>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

laws fail to provide adequate, uniform protection for vulnerable student athletes who are participating in a national market and that this lack of uniformity is creating an uneven playing field among schools in different states.⁶²

Since 2019, eight federal laws have been introduced that bear resemblance to an attempt to regulate NIL.⁶³ However, none of these laws have garnered enough support for passage in Congress.⁶⁴ Although none of these laws have had any success in the legislature, it is clear that there is a need for a level playing field (or at least some parity) when it comes to regulation of the student athlete “market.”⁶⁵

An example of an introduced bill demonstrates the continued interest in establishing some sort of federal legislation. Namely, “[t]he Amateur Athletes Protection and Compensation Act was introduced by Senator Moran of Kansas in February 2021.”⁶⁶ “[T]he bill would ‘[p]rohibit the NCAA, athletic conferences[,] or schools from rendering an amateur intercollegiate athlete ineligible on the basis of entering into a contract or receiving covered compensation’ for NIL rights.”⁶⁷ In essence, this would deprive the NCAA, conferences, and their member schools from declaring a student athlete ineligible for receiving NIL-related compensation. Instead, that authority would rest in Congress, effectively nullifying the NCAA’s interim policy.⁶⁸

There have also been two more recent attempts to introduce (or re-introduce) bills for the benefit of college athletes. The College Athlete Bill of Rights, sponsored by Senator Cory Booker, was re-introduced in the Senate on August 2, 2022, where it was referred to the Committee on the Judiciary.⁶⁹

Additionally, the Collegiate Athlete and Compensation Rights Act, sponsored by Senator Roger Wicker, was re-introduced on September 14, 2022, where it was then referred to the Committee on Commerce, Science, and

⁶² *Id.*

⁶³ *Alabama Has Repealed Its NIL Law – Can Alabama’s Student-Athletes Still Get Paid?*, *supra* note 39.

⁶⁴ *Id.*

⁶⁵ See Dennis Romboy, *College Athletic Conferences Urge Congress to Pass NIL Legislation*, DESERET NEWS (Nov. 1, 2023), <https://www.deseret.com/sports/2023/11/1/23941880/name-image-likeness-nil-college-sports-urge-congress-federal-law> (explaining how the current state of NIL threatens competitive parity).

⁶⁶ *Alabama Has Repealed Its NIL Law – Can Alabama’s Student-Athletes Still Get Paid?*, *supra* note 39.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Your Guide to Federal and State Laws on Name, Image and Likeness Rules for NCAA Athletes*, *supra* note 32; see also College Athletes Bill of Rights, S. 4724, 117th Cong. (2022) (re-introducing the bill).

Transportation.⁷⁰ In reference to the bill’s purpose, Wicker said, “[t]o protect the players, maintain a level playing field in college sports, and preserve as much as we can of the amateur nature of college sports, it is imperative that Congress establish a uniform set of standards governing the NIL marketplace.”⁷¹

He added that an important aspect of potential legislation is the protection of college athletes’ right to enter into name, image, and likeness deals while still ensuring that the agreements are not being used as “pay-for-play schemes or incentives” to encourage “college commitments or transfers.”⁷²

The Collegiate Athlete Compensation Rights Act does many things for the benefit of both college athletics and college athletes. For example, the bill “[e]nshrine[s] in federal law the right of student athletes to earn compensation for the use of their name, image, and likeness.”⁷³ This is not a unique feature as it is typically a staple in most of the proposed legislation. The bill also aims to “[p]rotect student athletes and their families from deceptive business practices or exploitation” during the recruiting/NIL process.⁷⁴

Arguably most importantly, the bill also sets out to “[e]stablish a uniform, national framework for student athlete NIL compensation to ensure student athletes in every state are provided the same rights and opportunities.”⁷⁵ An intriguing proposal is to “[c]reate an Office of Sport at the Federal Trade Commission to provide the agency with the focus and expertise needed to combat unfair and deceptive practices related to NIL.”⁷⁶ This additional safeguard could prove to be very important when it comes to policing practices that are currently being utilized by schools and independent parties alike.⁷⁷

Both bills essentially provide little to no restrictions on how an athlete can profit off the use of their name, image, and likeness. The only real prohibition reserved for the schools and conferences is the ability to prohibit endorsement

⁷⁰ *Your Guide to Federal and State Laws on Name, Image and Likeness Rules for NCAA Athletes*, *supra* note 32; Collegiate Athlete Compensation Rights Act, S. 4855, 117th Cong. (2022).

⁷¹ *Wicker Reintroduces Bill Establishing a National Framework for Student Athlete NIL*, S. COMM. ON COM., SCI., & TRANSP. (Sept. 14, 2022) <https://www.commerce.senate.gov/2022/9/wicker-reintroduces-bill-establishing-a-national-framework-for-student-athlete-nil>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See Bruce Feldman & Max Olson, *Tampering Confidential: In College Football, it’s Inevitable and Impossible to Stop*, ATHLETIC (May 12, 2023), <https://theathletic.com/4512028/2023/05/12/college-football-transfer-portal-tampering/> (explaining player poaching in college football).

contracts with companies from certain industries, such as alcohol, tobacco, or drug companies.⁷⁸

Part of the reason there has yet to be official legislation—despite the time elapsed since the *Alston* ruling—is that college athlete rights and NIL have evolved into a partisan issue.⁷⁹ Typically, “Republicans have supported a more narrow bill that gives the NCAA protections,” while Democrats have supported a revenue-sharing provision.⁸⁰

Another point of contention between the two parties is long-term athlete healthcare.⁸¹ A big difference between the bills proposed by Senator Booker and Senator Wicker is “language regarding post-graduate healthcare benefits.”⁸² Both bills, however, serve the primary purpose of protecting the interest of college athletes, a group who has historically been under protected and unable to assert their rights.⁸³ As Senator Booker, a former tight end at Stanford University, said, “[t]he time has come for change—and this bill moves us closer to doing right by and for college athletes.”⁸⁴

The most recent attempt to draft legislation that has a fighting chance to get passed was spearheaded by former SEC coach Tommy Tuberville.⁸⁵ Tuberville, a former college football head coach at Auburn University, the University of Mississippi, Texas Tech University, and the University of Cincinnati, announced in August 2022 “his intent to draft a bipartisan NIL bill with [Senator Joe Manchin], a conservative Democrat from West Virginia.”⁸⁶ As a former head coach at multiple schools, Tuberville feels like a natural fit to champion a bill that solves many of the perceived problems raised by the current NIL landscape.

Tuberville himself even described the state of NIL in college athletics as a “mess” and a “free-for-all.”⁸⁷ As someone that has intimate knowledge of the college football recruiting landscape, Tuberville is concerned with the current

⁷⁸ Ross Dellenger, *Five Senators to Reintroduce Sweeping College Athlete Bill of Rights in Congress*, SPORTS ILLUSTRATED (Aug. 3, 2022), <https://www.si.com/college/2022/08/03/college-athlete-bill-of-rights-congress-transfers-nil>.

⁷⁹ *Id.*

⁸⁰ *See id.* (explaining the traditional Republican stance as opposing that of several modern Democrats—most notably Senator Cory Booker).

⁸¹ *Id.*

⁸² *Id.*

⁸³ Nathan Kalman-Lamb, et al., ‘Student Athlete’ Has Always Been a Lie, CHRONICLE HIGHER EDUC. (Dec. 6, 2021), <https://www.chronicle.com/article/student-athlete-has-always-been-a-lie>.

⁸⁴ Dellenger, *supra* note 78.

⁸⁵ Ross Dellenger, *Tommy Tuberville is Leading the Latest Congressional Push for NIL Regulation*, SPORTS ILLUSTRATED (Aug. 3, 2022), <https://www.si.com/college/2022/08/03/tommy-tuberville-leading-congressional-push-nil-regulation>.

⁸⁶ *Id.*

⁸⁷ *Id.*

direction of the sport. He stated, “I’ve talked to all my [coaching] buddies. They’ve never seen anything like it When you don’t have guidelines and direction, no matter what you are doing, you are lost. They are all lost right now.”⁸⁸ No stranger to college football himself, Manchin played quarterback for his home state West Virginia Mountaineers before suffering a knee injury.⁸⁹

A former coach and former player may seem like the perfect pair to sponsor a bill that has a chance of becoming law. Congress must create clear ground rules as a way to protect student athletes, ensure parity in the sport, and preserve “the time-honored tradition of college sports.”⁹⁰ As it currently stands, Tuberville plans to speak to former players, current players, and those who experienced the first true NIL recruiting cycle in order to get feedback to draft their bill.⁹¹ Both senators want to take their time and draft a bill that they “can sell to both sides of the aisle.”⁹²

IV. CONCLUSION

College athletics were established on the premise that the participants were amateurs, a status that is distinct from a professional athlete. This continued for decades, despite the NCAA never adopting a consistent definition of an “amateur collegiate athlete.” Over time, that already blurry distinction became even blurrier, especially following the exponential rise of college football revenues into the billions of dollars.⁹³ With seasons continuing to grow longer, and off-seasons quickly turning into mandatory workouts, there became essentially no difference between the time commitments of professional and “amateur” athletes.

After many challenges, the Supreme Court finally answered the question in the landmark case of *NCAA v. Alston*.⁹⁴ There, the Court’s ruling opened the door for college athletes to earn compensation for the use of their name, image, and likeness for the first time in decades, breaking a longstanding tradition of prohibiting the practice in the name of “amateurism.”

The NCAA, universities, conferences, coaches, players, and parents alike started to scramble for an understanding of the new rules and regulations that surround college athletes’ ability to be compensated while retaining their eligibility to play. Individual state laws have created a patchwork of NIL laws

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Afshar, *supra* note 2 at 121–122.

⁹⁴ Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141 (2021).

that can be confusing for players, coaches, and schools to follow. The NIL “wild west” has created concerns about unfair practices that may serve to harm competition in the realm of college sports, especially football.

The NCAA is rightly calling on Congress for help to preserve some fairness in the recruiting process for college athletes. The NCAA miscalculated its position before and during the *Alston* case, and its decisions have left a confusing landscape for all. To create a level playing field, Congress should step in and create bipartisan legislation to protect competition, protect athletes’ intellectual property, and promote competition among university athletic departments.