



## ESSAY

## Game Changer: Why and How Congress Should Preempt State Student-Athlete Compensation Regimes

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**Abstract.** In September 2019, California enacted the Fair Pay to Play Act, a groundbreaking piece of legislation that allows college athletes to profit off their name, image, and likeness. California’s legislature aimed to mitigate a “profoundly immoral” system in which young athletes are barred from receiving the fruits of their labor, despite putting their bodies on the line. Arising from noble intentions, California’s Act nonetheless threatens to ignite a state-by-state approach to the student-athlete compensation dilemma, undermining national uniformity in college sports. The NCAA’s Board of Governors, unwilling to allow states to wrest control, voted in October to update its relevant bylaws to permit name, image, and likeness compensation. Although the NCAA has traditionally established such rules for collegiate competition, there are three main reasons why even the NCAA should support federal legislation. First, because NCAA bylaws do not carry the force of law, they cannot prevent further state law experimentation. Second, the NCAA’s economic self-interest, and its associated legitimacy problem, cast doubt on its ability to voluntarily solve an admittedly messy issue. The democratic process of federal lawmaking, by contrast, ensures political accountability. Third, a federal law would circumvent the significant concern that an NCAA solution could not pass antitrust scrutiny. In light of these reasons, this Essay contends that congressional legislation should expressly preempt competing state regulations, thus restoring national uniformity in college sports. An express preemption provision would both avoid judicial uncertainty about the law’s preemptive scope and ensure a level playing field. Given the rising tide of bipartisan support for a federal solution, Congress should seize its opportunity to impose game-changing reform on a fractured system, preserving amateurism as it rectifies inequity.

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### Introduction

Imagine an industry in which the potential for injury is high,<sup>1</sup> the chance of remuneration slight,<sup>2</sup> and the participants number in the hundreds of thousands.<sup>3</sup> For college athletes, barred at present from profiting off their talents despite putting their bodies on the line, this thought experiment is a familiar reality. Governed by the National Collegiate Athletic Association (NCAA), some 480,000 student-athletes compete in the NCAA's various sports and divisions.<sup>4</sup> Many of these athletes are just teens, thrust from high schools into venues of national attention on the basis of their athletic prodigy.

Whatever might be said about the NCAA system, two things are certain. First, the NCAA's business model is lucrative. "[C]ollege athletics have become a \$14 billion a year industry"<sup>5</sup>—a "heavily commercialized, multibillion dollar endeavor."<sup>6</sup> The NCAA continues to generate record revenues—over \$1 billion in 2017<sup>7</sup>—and in thirty-nine states the highest-paid public sector employee is a college football or basketball coach.<sup>8</sup> Second, the chance that most student-athletes will ever share in the proceeds of their performance is exceedingly slim. Though many schools competing in the NCAA award scholarships to their recruited athletes, the NCAA's current bylaws render scholarships "the entirety of direct compensation student-athletes . . . receive for their effort."<sup>9</sup> Such

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1. In the five-year period between the 2009-10 and 2013-14 seasons, the NCAA reported over one million injuries suffered by college athletes, including over 50,000 concussions and around 9,500 "[i]njuries requiring emergency transport." Zachary Y. 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), <https://perma.cc/Q9ZB-PJWQ>.
  2. *Estimated Probability of Competing in Professional Athletics*, NCAA RES., <https://perma.cc/H9GQ-KRL7> (last updated Apr. 3, 2019); see also Nate Scott, *The NCAA Isn't Allowing Athletes to Get Paid. The NCAA Is Buying Time*, USA TODAY (Oct. 29, 2019, 2:17 PM), <https://perma.cc/W59F-93T9> (explaining that "the collegiate model doesn't allow athletes to get paid"). But see Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 78 n.29 (2006) ("Although athletes are not compensated in a form that permits them to support their families, they are commonly thought to receive a valuable degree or education in exchange for their athletic services.").
  3. See *Estimated Probability of Competing in Professional Athletics*, *supra* note 2.
  4. *Id.*
  5. Reid Wilson, *California Inspires Other States to Push to Pay College Athletes*, HILL (Oct. 4, 2019, 6:00 AM EDT), <https://perma.cc/GY9H-UW47>.
  6. Jay Bilas, *College Athletes Should Be Compensated*, N.Y. TIMES: ROOM FOR DEBATE (Mar. 14, 2012, 1:05 PM), <https://perma.cc/K97L-L6UC>.
  7. Wilson, *supra* note 5.
  8. Manie Robinson, *The Highest Paid Public Employee in 39 States is a Coach*, ATHLETIC BUSINESS (June 2018), <https://perma.cc/S8QT-2R2A>.
  9. *Madness, Inc.: How Everyone Is Getting Rich Off College Sports—Except the Players*, CHRIS MURPHY—U.S. SENATOR FOR CONN. 7 (2019), <https://perma.cc/ER5M-NJMX>;

scholarships are often insufficient; “[w]ithout an income, many athletes are unable to buy food, gas, and other essentials.”<sup>10</sup> Student-athletes’ rigorous training schedules often place them at an academic disadvantage relative to their non-athlete peers, as little time and energy remain for study.<sup>11</sup> And the prospect of joining the professional ranks is trivial for most—in 2017, for example, just 0.3% of the NCAA’s football and basketball players were drafted into the professional leagues.<sup>12</sup>

Through the medium of the press, student-athletes and critics of the NCAA have widely exposed such inequities in recent years, sparking a national debate about exploitation in college sports. Although there is rhetorical bite in labeling this system “profoundly immoral,”<sup>13</sup> given that everyone profits but the athletes themselves, the real question concerns what alternatives exist. One of the most significant, recent responses to this dilemma came from California’s legislature.

In late September 2019, California Governor Gavin Newsom signed California Senate Bill 206—commonly called the Fair Pay to Play Act (the Act)—into law. The Act makes it illegal for California universities to punish college athletes for profiting off their name, image, and likeness. When discussing the Act on LeBron James’s HBO show “The Shop,” Governor Newsom stated that the law would “initiate dozens of other states to introduce similar legislation.”<sup>14</sup> His prediction quickly proved true. As of this Essay’s publication, similar bills have been introduced or are being considered in a number of states, including South Carolina, Pennsylvania, Florida, Washington, Illinois, New York, Minnesota, and New Jersey.<sup>15</sup> This potential state-by-state balkanization may result in colleges from different states playing by different rules.<sup>16</sup> It comes as

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*see also* Christopher Davis, Jr. & Dylan Oliver Malagrino, *The Myth of the “Full Ride”: Cheating Our Collegiate Athletes and the Need for Additional NCAA Scholarship-Limit Reform*, 65 OKLA. L. REV. 605, 615 (2013) (“NCAA Bylaw 15.1 limits an individual student-athlete’s athletic scholarships and other financial aid based on athletic ability to the value of a full grant-in-aid.”).

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

11. *See id.*

12. *Id.* This number was calculated by summing NCAA men’s basketball and football players that were drafted into the pros in 2017 (295) divided by the overall number of NCAA men’s basketball and football players in 2017 (92,344).

13. Bilas, *supra* note 6.

14. Andy Wittry, *California Governor Gavin Newsom Signs Fair Pay to Play Act into Law*, STADIUM (Sept. 30, 2019), <https://perma.cc/LH4F-HFXM>.

15. Matt Norlander, *Fair Pay to Play Act: States Bucking NCAA to Let Athletes Be Paid for Name, Image, Likeness*, CBS SPORTS (Oct. 3, 2019, 5:43 PM ET), <https://perma.cc/PB72-CDJQ>; Carly Sitrin, *New Jersey Bill Would Allow College Athletes to Earn Endorsement Money*, POLITICO (Oct. 24, 2019, 2:48 PM), <https://perma.cc/3NHK-W9CQ>.

16. For example, a Stanford Cardinal eligible to play in California might be disqualified from competing in another state that has refused to legalize student-athlete

no surprise that in the wake of such legislation, the NCAA voted in October to “update[ its] relevant bylaws” to allow students “the opportunity to benefit from the use of their name, image and likeness in a matter consistent with the collegiate model.”<sup>17</sup> Notwithstanding the NCAA’s gesture toward reform, any change to its bylaws cannot supersede conflicting state laws. Cognizant of that fact, the NCAA is frantically searching for ways to sideline the Act and proposals like it.

Indeed, a month before Governor Newsom put his pen to paper, the NCAA voiced its opinion that the Act was unconstitutional.<sup>18</sup> The NCAA likely was conjuring *National Collegiate Athletic Ass’n v. Miller*, in which the Nevada state law at issue required the NCAA to provide student-athletes “accused of a rules infraction with certain procedural due process protections during an enforcement proceeding in which sanctions may be imposed.”<sup>19</sup> The Ninth Circuit held that the law violated the dormant Commerce Clause,<sup>20</sup> which prevents states from discriminating against or unduly burdening interstate commerce.<sup>21</sup> The NCAA, in theory, could mount a similar challenge to the Fair Pay to Play Act. Doing so, however, would only kick the NCAA’s problems down the road. A lower court decision that California’s law is unconstitutional does not prevent other states from enacting similar statutes, nor does it stop California from passing a watered-down version of the same bill. The NCAA could only stem the tide of such experimentation through protracted and costly litigation.

Besides judicial recourse, another option at the NCAA’s disposal is for its working group to modify NCAA bylaws to meet the floor established by the Fair Pay to Play Act. Ensuring the longevity of such modifications will be difficult, however, as the NCAA cannot anticipate today the scope of state experimentation tomorrow. Without a national solution, the NCAA may find itself constantly behind the curve set by innovative state legislatures. The other central issue is the NCAA’s legitimacy problem. Given the NCAA’s track record, it is unlikely that the organization alone can be trusted to craft a solution that appropriately balances athletes’ interests. Indeed, the driving motivation behind Governor Newsom’s decision to sign the California bill into law was to rebalance the power dynamic “between colleges and its student-athletes at a time when institutions have historically generated millions from students’

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compensation, because that athlete would be in violation of the NCAA’s current amateurism principle.

17. *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019, 1:08 PM), <https://perma.cc/WT7H-MKG2>.

18. Members of the NCAA Board of Governors, *NCAA Responds to California Senate Bill 206*, NCAA (Sept. 11, 2019, 10:08 AM), <https://perma.cc/3E27-ALVK>.

19. *Nat’l Collegiate Athletic Ass’n v. Miller*, 10 F.3d 633, 637 (9th Cir. 1993).

20. *See id.* at 639.

21. Sean R. Madden, *Out of Bounds: Commerce Clause Protection from State Antitrust Statutes for Regional Athletic Conferences*, 38 CAMPBELL L. REV. 109, 115 (2016).

talents.”<sup>22</sup> The NCAA’s lack of accountability undermines the idea that it will represent the financial interests of student-athletes. For example, the NCAA working group that is currently seeking solutions to the compensation dilemma consists of nineteen members, all of whom were appointed by the NCAA’s Board of Governors.<sup>23</sup> To put it bluntly, none of those members are “outspoken critics of the NCAA or its system of amateurism.”<sup>24</sup> One commentator, even more bluntly, suggested that this update was “forced upon the NCAA,” that it “doesn’t change anything,” and that the NCAA’s response is “a stall tactic, full stop.”<sup>25</sup>

As either judicial recourse or NCAA voluntary action would be akin to putting a band-aid on a season-ending injury, this Essay argues that the most sensible solution to the complications created by California’s Fair Pay to Play Act is for Congress to come off the bench and set a national agenda. Only federal legislation can establish national standards, thus eliminating the potential patchwork of protection for the nation’s student-athletes. In other words, a comprehensive federal law should preempt California’s Act and similar proposed state legislation. We advocate for this solution in three Parts. Part I explores why a federal law is the best solution to the problems of state experimentation, NCAA self-interest, and potential NCAA antitrust violations. Part II examines proposed federal legislation that would preempt California’s Act and quash proposals emanating from other state legislatures. It also focuses on proposed solutions to the student-athlete compensation dilemma. Finally, Part III discusses how federal preemption should work in this instance, and why it offers the best solution to an admittedly messy problem.

## I. California’s Fair Pay to Play Act and the Ensuing Reaction

When California state senator Nancy Skinner introduced Senate Bill 206 this past February, she was “bullish on California eventually passing the Fair Pay to Play Act.”<sup>26</sup> Her optimism stemmed from her faith that her fellow representatives would recognize that “[c]ollege athletes have been exploited by a deeply unfair system,” and that “[t]he NCAA, the universities, [and] the media

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22. *California to Let College Athletes Make Money, Defying NCAA*, CBS NEWS (Sept. 30, 2019, 9:55 PM), <https://perma.cc/XF9H-WA5D>.

23. Michael McCann, *What’s Next After California Signs Game Changer Fair Pay to Play Act into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://perma.cc/854H-8H2T>.

24. *Id.*

25. Nate Scott, *The NCAA Isn’t Allowing Athletes to Get Paid. The NCAA Is Buying Time*, USA TODAY (Oct. 29, 2019, 2:17 PM), <https://perma.cc/L29B-4S4Z>; see also Jemele Hill, *The NCAA Had to Cut Athletes a Better Deal*, ATLANTIC (Oct. 30, 2019), <https://perma.cc/TP3V-MJNR> (mentioning that the NCAA “was notably vague about how it plans to implement these changes”).

26. Jason Scott, *California Lawmaker Introduces “Fair Pay to Play Act,”* ATHLETIC BUSINESS (Feb. 2019), <https://perma.cc/E93J-KQVB>.

[have] made billions of dollars on the talent of athletes.”<sup>27</sup> Senator Skinner’s confidence was also buttressed by the fact that most of her colleagues “have college athlete constituents,” and thus needed to represent their interests against the “powerful” NCAA.<sup>28</sup> And her optimism was justified—seventy-two state assembly members voted for the Act, and not a single member opposed it.<sup>29</sup>

With the passage of the Fair Pay to Play Act,<sup>30</sup> California became the first state to press the issue of “major financial reforms in college athletics.”<sup>31</sup> Specifically, section 2(a)(1) of the Act bars universities from preventing student-athletes from earning compensation from the use of their name, image, or likeness.<sup>32</sup> The Act also permits “college athletes to hire agents who can help them negotiate and secure commercial opportunities,”<sup>33</sup> so long as those endorsement deals do not interfere with colleges’ existing contracts.<sup>34</sup> In addition, the Act applies to all sports, and therefore does not single out revenue-producing sports like basketball and football for differential treatment.<sup>35</sup> At the same time, though, the Act does not apply to community colleges.<sup>36</sup> Nor does it create “a right for college athletes to be paid by their schools.”<sup>37</sup> In other words, the Act does not require the NCAA or any of its fifty-eight California institutions to pay athletes.<sup>38</sup>

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27. *Id.* (quoting Bryan Anderson, *College Athletes Could Soon Get Paid in California, but Not from the NCAA*, SACRAMENTO BEE (Feb. 6, 2019, 3:00 AM), <https://perma.cc/GL37-YYYS>).

28. Scott, *supra* note 26 (quoting Marcus Thompson II, *Thompson: New Bill Seeks to Allow California Collegiate Athletes to Get Paid for Use of Their Name, Image and Likeness*, ATHLETIC (Feb. 4, 2019), <https://perma.cc/B984-34V7>).

29. Jeremy Bauer-Wolf, *California Passes Bill Allowing Athletes to Be Paid for Name, Image, and Likeness*, INSIDE HIGHER ED (Sept. 11, 2019), <https://perma.cc/7L37-TZAE>.

30. The Act becomes effective on January 1, 2023. Michael McCann, *California’s New Law Worries the NCAA, but a Federal Law Is What They Should Fear*, SPORTS ILLUSTRATED (Oct. 4, 2019), <https://perma.cc/JM7J-WP6G>.

31. Melody Gutierrez & Nathan Fenno, *California Will Allow College Athletes to Profit from Endorsements Under Bill Signed by Newsom*, L.A. TIMES (Sept. 30, 2019, 5:00 PM), <https://perma.cc/LQ9T-6K7Z>.

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

33. Jenna West, *Congressman Anthony Gonzalez to Propose Federal Fair Pay to Play Act*, SPORTS ILLUSTRATED (Oct. 2, 2019), <https://perma.cc/7YFT-J7PG>.

34. S.B. 206 § 2(e)(1).

35. S.B. 206 § 2(a)(1); see Cody J. McDavis, Comment, *The Value of Amateurism*, 29 MARQ. SPORTS L. REV. 275, 276 (2018) (describing NCAA football and basketball as the “Revenue Generating Sports”).

36. S.B. 206.

37. West, *supra* note 33.

38. Larry Stone, *California Law Allowing College Athletes to Profit Should Be Accepted, Then Possibly Modified, by NCAA*, SEATTLE TIMES (Oct. 6, 2019, 6:00 AM), <https://perma.cc/4KPW-38F8>.

Despite the relatively narrow scope of the Act, it directly conflicts with the NCAA's model of amateurism. As codified in article 12 of the NCAA's bylaws, the amateurism principle is designed to preserve "a clear line of demarcation between college athletics and professional sports."<sup>39</sup> To uphold this dividing line, the NCAA "prohibits student-athletes from receiving compensation."<sup>40</sup> Yet, NCAA bylaws are not the law. As one commentator has put it, whenever "a state government passes a law asserting jurisdiction over how college athletics works . . . the NCAA can do little else besides whine and hide."<sup>41</sup> Hence, California's Act takes precedence over the NCAA's amateurism bylaws.

Because such bylaws do not carry the force of law, they cannot prevent further state law experimentation. Nothing prevents a different state from passing its own law permitting student-athlete compensation above and beyond California's Act. No NCAA bylaw change can create a dispositive national solution. A bylaw update is thus unlikely to satisfy the NCAA's constituent universities, which have recognized the need for national uniformity. For instance, California universities such as Stanford, the University of Southern California, and the University of California, Berkeley have all suggested that "true progress can only be achieved when it is undertaken at the national level, with appropriate safeguards against unintended consequences."<sup>42</sup>

Even the NCAA itself recognizes the need for national change, agreeing that improvements must "happen on a national level."<sup>43</sup> That is so, the NCAA acknowledges, because "a patchwork of different laws from different states will make unattainable the goal of providing a fair and level playing field for 1,100 campuses and nearly half a million student-athletes nationwide."<sup>44</sup> Though the NCAA is correct to recognize the need for a national solution, attempts to achieve it through NCAA bylaws are misguided. Voluntary NCAA bylaw changes simply cannot override state experimentation. Given that a durable, national solution is required, this Essay now turns to possible congressional

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39. *2017-18 NCAA Division I Manual*, NCAA 61 (Aug. 1, 2017), <https://perma.cc/NN9M-862J>.

40. Audrey C. Sheetz, Note, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 871 (2016).

41. Rodger Sherman, *The Fair Pay to Play Act Has Been Signed. Now the NCAA Must Address a Question to Which It's Never Had a Good Answer*, RINGER (Oct. 1, 2019, 8:38 AM EDT), <https://perma.cc/K9JF-EBJ9>.

42. *Stanford University Statement on Senate Bill 206*, STANFORD NEWS (Sept. 30, 2019), <https://perma.cc/YF8P-4ND5>; see also Amanda Bradford, *CA Collegiate Athletes May Be Paid for Sponsorships, Endorsements as Senate Bill Passes*, DAILY CALIFORNIAN (Sept. 12, 2019), <https://perma.cc/P6M3-8CBU> (discussing Berkeley's statement); Gutierrez & Fenno, *supra* note 31 (describing the University of Southern California's position).

43. *NCAA Statement on Gov. Newsom Signing SB 206*, NCAA (Sept. 30, 2019, 10:44 AM), <https://perma.cc/HA8S-QNVC>.

44. *Id.*

responses to the patchwork problem created by California's passage of the Fair Pay to Play Act.

## II. The Federal Solution: Proposals and Their Benefits

A federal law preempting state experimentation would circumvent potential problems arising from the piecemeal state law approach.<sup>45</sup> The principal problem of the state-by-state approach is each state's ability to gain a competitive edge over its sister-states. For instance, a state with a premier sporting university could pass even more favorable compensation laws attracting the best athletes to its collegiate teams. Thus, the first benefit of preemption is that a "federal law would set the rules for *all* states."<sup>46</sup> Nationwide legislation solves the potentially chaotic state-by-state approach as it compels all states to "play by the same set of rules,"<sup>47</sup> preventing any one state from gaining a strategic advantage. Given that many states are ready to enact similar, albeit not identical, laws to California's Act,<sup>48</sup> federal preemption is likely critical to ensure national uniformity.

A second, crucial benefit of federal legislation is its ability to sidestep the purview of federal antitrust law. Section 1 of the Sherman Antitrust Act outlaws any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."<sup>49</sup> Unlike federal law, the NCAA's rules, including the prohibition on student-athlete compensation, are not immune from antitrust scrutiny.<sup>50</sup> As one commentator has aptly put it, the NCAA's "concerted effort to destroy the free market for recruiting student-athletes is subject to scrutiny under section 1 of the Sherman Act."<sup>51</sup> In fact, the NCAA has violated antitrust law a number of times—including one high-profile case before the Supreme Court.<sup>52</sup> And in

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45. See McCann, *supra* note 30 ("A federal law would avoid some of the potential pitfalls of state laws. Most notably, the NCAA could not credibly argue that multiple states are forcing it into a confused and conflicting set of rules.").

46. *Id.*

47. *Id.*

48. See Norlander, *supra* note 15.

49. Sherman Antitrust Act, 15 U.S.C. § 1 (2018).

50. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1063 (9th Cir. 2015) (noting that the NCAA rules are not "exempt from antitrust scrutiny").

51. Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 70 (2013).

52. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 88, 98, 120 (1984); see also *infra* note 53.



recent years, the Ninth Circuit has grappled with student-athlete litigation in the antitrust context as well.<sup>53</sup>

Indeed, some observers believe the NCAA rules that “fix” student-athletes’ compensation “at the cost of attendance . . . amount to a restraint on competition in violation of the Sherman Antitrust Act.”<sup>54</sup> One commentator has even claimed that “the NCAA’s principle of amateurism likely violates section 1 of the Sherman Act by artificially prohibiting student-athlete pay and by eliminating from the college sports marketplace those colleges that wish to recruit top student-athletes.”<sup>55</sup> From that perspective, “the NCAA has a choice—it can either proactively rewrite its rulebook in a manner that complies with the spirit of U.S. antitrust law, or it can wait until a court mandates such changes.”<sup>56</sup> Yet the most sensible solution may be a third option—for Congress to pass a federal law that addresses this messy issue.

Pending federal legislation promises to do just that. In March 2019, Congressman Mark Walter introduced H.R. 1804, entitled the “Student-Athlete Equity Act,” a terse bill that merely allows college athletes to profit off their “name, image, or likeness.”<sup>57</sup> Even in light of the NCAA’s announcement to consider a rule change, congressional sponsors of the Student Athlete-Equity Act plan to forge ahead. In the words of one sponsor, “[t]he NCAA is on the clock, and while they are, we’re going to keep working towards the passage of the Student-Athlete Equity Act to make sure their words are forced into action.”<sup>58</sup>

This perceived need for immediate reform has generated rare bipartisan support. Congressman Matt Gaetz, a Florida Republican, recently tweeted, “[t]he @NCAA has devised a system where predominantly young, black adult student-athletes create value at huge cost to their bodies. Then, predominantly old, white administrators see the benefit. BS!”<sup>59</sup> Likewise, Senator Chris Murphy, a Democrat from Connecticut, agreed that athletes should be able to

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53. See, e.g. *O’Bannon*, 802 F.3d at 1078-79 (holding that restricting scholarships to only grant-in-aid violated the Sherman Act); see also *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 988 (N.D. Cal. 2014) (noting that the NCAA’s limits on student-athlete compensation produce significant anticompetitive effects and that the NCAA restrains trade in the relevant market, affecting interstate commerce), *aff’d in part, vacated in part by O’Bannon*, 802 F.3d.

54. Bobby Chen, *Antitrust Law and the Future of the NCAA’s Amateurism Rules*, REG. REV. (Feb. 21, 2019), <https://perma.cc/E9MM-H7XY>.

55. Edelman, *supra* note 51, at 98.

56. *Id.* at 99.

57. Student-Athlete Equity Act, H.R. 1804, 116th Cong. § 2(a) (2019). H.R. 1804 is not as expansive as the Fair Pay to Play Act. Instead, H.R. 1804 simply proposes that qualified amateur sports organizations, as a condition of retaining qualified tax status, must allow their athletes to profit off name, image, or likeness. *Id.*

58. Justin Wise, *NCAA Begins Process to Allow College Athletes to Be Compensated*, HILL (Oct. 29, 2019, 2:31 PM EDT), <https://perma.cc/WQY6-YKBP>.

59. Matt Gaetz (@mattgaetz), TWITTER (Oct. 2, 2019, 7:46 AM), <https://perma.cc/5NXP-9LKT>.

commercialize their talents when he argued in a recent publication that 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.”<sup>60</sup> After a meeting with Senator Murphy, Senator Marco Rubio also threw his weight behind national reform. He opined that there is a need for “a standard across the country” because “50 individual state laws would make it a chaotic mess and endanger college athletics.”<sup>61</sup> Given the consensus that national reform is necessary, the remaining question is precisely *which* reforms are most sensible.

The solutions currently proposed by legal scholars, sports analysts, and the press are legion. They include (1) allowing student-athletes to sign endorsement deals,<sup>62</sup> (2) receiving payment for offseason play,<sup>63</sup> (3) permitting student-athletes to “hire an agent or business manager,”<sup>64</sup> (4) requiring that student athletes receive a “minimum salary” of “\$25,000 per player in each sport,”<sup>65</sup> and (5) providing a medicine-specific fund for student-athletes “to pay for health care after their careers in college athletics are over.”<sup>66</sup> Each proposal purports to balance the two key interests at stake—equity, on the one hand, and the preservation of amateurism, on the other. But in our view, most of these proposals miss the mark. Endorsement 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. A minimum salary would abandon the pretense of amateurism, and it is difficult to see how most athletes could generate significant funds by playing in the offseason. And funds accessible only years later would fail to satisfy student-athletes’ immediate financial needs.<sup>67</sup>

For our part, we would suggest—at minimum—a two-tiered system to protect the broadest base of athletes. First, athletes would be eligible for a tax-exempt,<sup>68</sup> means-tested cost-of-living stipend disbursed on a biweekly or

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60. *Madness, Inc.*, *supra* note 9, at 12.

61. Alex Daugherty & Brian Murphy, *Marco Rubio Leads Senate Effort to Compensate College Athletes*, TAMPA BAY TIMES (Nov. 8, 2019), <https://perma.cc/55YW-L4TQ>.

62. Steve Murphy & Jonathan Pace, *A Plan for Compensating Student-Athletes*, 1994 B.Y.U. EDUC. & L.J. 167, 181 (1994).

63. *Id.* at 183.

64. Bianca Quilantan, *How Cory Booker Would Help College Athletes Get Paid*, POLITICO (Oct. 10, 2019, 6:00 AM EDT), <https://perma.cc/9RNW-FMTL>.

65. Joe Nocera, *A Way to Start Paying College Athletes*, N.Y. TIMES (Jan. 8, 2016), <https://perma.cc/TYZ5-ZSRY>.

66. Dan Murphy, *Congressman to Propose Federal Legislation for Paying College Athletes*, ESPN (Oct. 2, 2019), <https://perma.cc/Q9F2-KAUD>.

67. *See* Thacker, *supra* note 10, at 184.

68. Both the stipend and revenue generated from athletes’ name, image, and likeness constitute income. Accordingly, Congress should specify that athletes may not be stripped of their eligibility for use of the proposed system. Though the NCAA’s bylaws

monthly basis, with the aim of ensuring that no athlete is unable to pay for basic essentials.<sup>69</sup> Such a stipend would be largely self-funding, derived from the overall revenues colleges and universities receive from their athletic programs. The more lucrative sports would subsidize the less lucrative ones, promoting a minimum social safety net for student-athletes across various sports.<sup>70</sup> Second, athletes would be entitled to establish a trust they could access after graduating or exhausting their eligibility, in which they could deposit the proceeds from what they might earn off their name, image, or likeness.<sup>71</sup> Though marquee players would be the primary beneficiaries of the trust system, a stipend would ensure minimum fairness, while the possibility of trusts would prevent the inequity of everyone but athletes profiting off their name, image, and likeness. And the trust system would better preserve the spirit of amateurism, preventing athletes from receiving compensation directly tied to their athletic performance as they completed their academic studies. This two-tiered system,

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must now recognize this floor created by Congressional legislation, the NCAA, in its discretion, should specify in amended bylaws whether the federal regime represents the *ceiling* of available student-athlete compensation. This compromise rectifies inequity by permitting some compensation, while also recognizing a continued role for the NCAA in upholding the amateurism principle. It is true that the trust system would delay athletes' receipt of earned income. But as participation is both voluntary and permits a new form of compensation, it is unlikely to raise Due Process Clause or Takings Clause objections from athletes. Finally, given the differing purposes of the stipend and the trust system, our proposal is that the stipend be tax-exempt. We take no position on whether name, image, and likeness income should be taxed. One senator has proposed new taxes on student-athletes in light of pending student-athlete compensation bills. See Marina Pitofsky, *Burr Promises to Tax Scholarships of Student Athletes Who Profit Off Their Likenesses*, HILL (Oct. 29, 2019, 5:01 PM EDT), <https://perma.cc/6KV4-84V7>.

69. Means testing is an important mechanism by which the overall scope of disbursements from athletics revenues would be limited. Means testing would 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. To clarify, both the stipend and trust proposals would create a safe harbor that universities could voluntarily utilize to attract student-athletes. Because their participation is optional, universities are similarly unlikely to bring Due Process Clause or Takings Clause-based challenges.
70. We recognize that the stipend would need to be tailored to ensure non-revenue producing sports are not abandoned in order to finance the stipends of more lucrative sports teams. That is why a means-testing mechanism may provide the most sensible solution—it helps avoid cost-inhibitive negative consequences, such as the abandonment of less popular sports programs.
71. Additionally, that a federal law would provide for the legality of such trusts would circumvent the issues identified by the Ninth Circuit in the *O'Bannon* litigation, see *supra* note 53, as the federal government can exempt private actors' anticompetitive combinations from antitrust scrutiny. See *Credit Suisse Sec., LLC v. Billing*, 551 U.S. 264, 270-71 (2007) (noting that statutes may either explicitly or impliedly “preclude application of the antitrust laws”). We recommend that Congress explicitly exempt the student-athlete compensation regime from the purview of antitrust law, thus allowing a stipend to be fixed at an athlete's cost-of-living and additional compensation limited to proceeds from an athlete's name, image, and likeness.

in our view, balances amateurism and equity, ensuring student-athletes' ability to afford minimum essentials while permitting marquee players to realize the rewards of their athletic gifts.

Though we are mindful that the specific content of a congressional solution will ultimately be determined by the deliberative give-and-take of the lawmaking process, one thing remains certain: For Congress's bill to create truly uniform, national standards, it must preempt competing state statutes. Our strong recommendation is that federal legislation contain an express preemption clause, clearly and "explicitly withdrawing . . . from the states"<sup>72</sup> the power to enact regulations on student-athlete compensation. Although Congress presumptively has the power to regulate such compensation under the Commerce Clause,<sup>73</sup> the tandem concern of preemption "remains a notorious doctrinal labyrinth."<sup>74</sup> Accordingly, Part III explains how Congress should communicate its preemptive intent.

### III. How Congress Should Preempt State Proposals

The Supreme Court's modern preemption doctrine recognizes three ways Congress may preempt state law: (1) the aforementioned express preemption, (2) implied field preemption, and (3) implied conflict preemption.<sup>75</sup> The latter two forms of preemption arise when a federal statute does not specify the extent to which it is meant to displace state law. Implied field preemption, in which Congress is said to have "left no room" for state regulations,<sup>76</sup> is presently a disfavored doctrine<sup>77</sup> given the Court's turn toward textualist modes of analysis.<sup>78</sup> Likewise, though implied conflict preemption remains

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72. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226 (2000). Some Justices are skeptical of express preemption clauses when those clauses purport to preempt "entire areas of traditional state concern." *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 948 (2016) (Thomas, J., concurring) (quoting *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring)). Such expansive preemption clauses are thought to offend the principle of federalism. This concern does not affect our proposal, however, as private associations such as the NCAA, rather than states, have traditionally regulated college athletics.

73. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 609 (2000) (quoting *Lopez*, 514 U.S. at 558-59) (recognizing as within the ambit of the Commerce Clause those activities with a "substantial relation to interstate commerce").

74. Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39, 40 (2005).

75. Nelson, *supra* note 72, at 226.

76. *Id.* at 227 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)).

77. *Id.* ("The Court has grown increasingly hesitant to read implicit field-preemption clauses into federal statutes.")

78. *See Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1006-09 (2019) (presenting a meticulous textual analysis of the relevant treaty and statutory language in a plurality opinion by Justice Breyer); *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016) (labeling "[t]he text of [the] express pre-emption clause" as "the

“ubiquitous,”<sup>79</sup> reliance on the doctrine would constitute an unforced error. Leaving the scope of the federal solution’s coverage unsaid would relegate the task of determining its breadth to the judiciary—inviting varied approaches across the circuits and resurrecting the very patchwork a comprehensive federal law was meant to avoid.

Regarding the specific text a federal bill’s preemption clause might employ, one of the most useful analogies is to the Employee Retirement Income Security Act of 1974 (ERISA).<sup>80</sup> ERISA “contains what may be the most expansive express pre-emption provision in any federal statute,”<sup>81</sup> purporting to preempt “any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan.”<sup>82</sup> Even though the Court has continually upheld this clause as a valid exercise of Congressional power<sup>83</sup> and, in so doing, protected the federal regime from state intermeddling, the clause’s chief vice has been its vagueness. The “indeterminacy” in its “relate to” language has led the Court, over time, to devise “workable standards” to assess its preemptive scope.<sup>84</sup> These court-made “workable standards” hold that state laws are preempted insofar as they (1) specifically refer to employee benefit plans, (2) govern matters central to their administration, or (3) interfere with plans’ “nationally uniform . . . administration.”<sup>85</sup> These standards have prevented the clause’s “limitless application” while providing sufficient preemptive breadth to protect benefit plans’ national uniformity.<sup>86</sup>

The ERISA preemption model provides a ready-made blueprint for preemption of state student-athlete compensation regimes. But Congress has the opportunity at present to codify the Court’s “workable standards” *into the statutory text* of a proposed bill’s express preemption clause. For example, the statute could provide for the supremacy of federal law insofar as a state statute (1) “specifically refers to student-athlete compensation,” (2) “governs a matter central to student-athlete compensation,” or (3) “interferes with the national uniformity of student athletics.” Congressional reliance on well-established language, backed up by significant case law in the ERISA context, would

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necessary starting point”); CALEB NELSON, STATUTORY INTERPRETATION 854 (2011) (noting that the Court has shifted from viewing preemption as a matter of constitutional law to, instead, “a matter of statutory interpretation”).

79. Nelson, *supra* note 72, at 227-28.

80. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a) (2018) (setting forth ERISA’s preemption clause).

81. *Gobeille*, 136 S. Ct. at 947 (Thomas, J., concurring).

82. 29 U.S.C. § 1144(a) (2018) (emphasis added).

83. *See, e.g., Gobeille*, 136 S. Ct. at 945, 947.

84. *Id.* at 943 (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56 (1995)).

85. *Id.* (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001)).

86. *Id.*

provide a solution “to prevent the States from imposing novel, inconsistent, and burdensome” regulations that might undermine national uniformity.<sup>87</sup>

This preemption analysis suggests that Congress not only *should* mend the patchwork, but that it is eminently capable of doing so. Express preemption would provide a clear instruction to courts to override state legislation interfering with nationally uniform standards in student-athlete compensation.

### Conclusion

College athletics, at present, represents an uncertain gambit for many thousands of participants across the nation. A select few student-athletes burst onto the national stage, securing for themselves the possibility of earning millions in professional leagues. Likewise, many thousands of less talented student-athletes still benefit greatly from college athletics, receiving scholarships, finding fulfillment and camaraderie on their teams, and earning degrees that lead to employment in other professions. Many, however, end up broke and broken—physically injured, their academic performance compromised by the rigors of their athletic training, and unable to afford basic essentials. The realities of the current student-athlete compensation system demand a solution. And fortunately, the increased exposure of exploitation in college athletics suggests that we might be on the verge of one. In this Essay, we have explained how a practical solution would work on a national level. Congressional intervention would circumvent difficult legal issues, such as antitrust law, and would preserve the promise of national uniformity by preempting competing state regimes. Congress, accordingly, should seize its opportunity to impose game-changing reform on a fractured system, preserving amateurism as it rectifies inequity.

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87. *Id.* at 945. Some scholars have criticized express preemption clauses for their inflexibility and inability to anticipate future problems. See Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 2 (1995). Our solution avoids these issues by recommending flexible language that would grant future judges some discretion in evaluating whether states impermissibly burdened the federal student-athlete compensation regime.