

*Fair Pay to Play: Empowering Student-Athletes or a Violation
of the Dormant Commerce Clause?*

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I. Introduction

In 2019, the National Collegiate Athletic Association (NCAA) and its collegiate model became the target of state legislation when California passed the Fair Pay to Play Act.¹ Within one month of California Governor Gavin Newsome signing the bill into law, the NCAA Board of Governors voted unanimously to permit students participating in athletics the opportunity to benefit from the use of their name, image and likeness (NIL) in a manner consistent with the collegiate model.² Nevertheless, while the NCAA is considering implementing changes to its legislation, more than two dozen states have passed or are considering passing similar legislation.³ While these state laws regulating student-athletes' use of their own NIL may ultimately be preempted by Congressional action on the issue,⁴ the NCAA may amend its Constitution and Bylaws first, likely inconsistently with at least some of the state legislation. If the NCAA sought to challenge the Fair Pay to Play Act, and similar state laws, or the states sought to enforce their laws against the NCAA, the question would likely turn on whether the states have power to regulate the NCAA's actions under the dormant Commerce Clause.

II. The Dormant Commerce Clause

The Commerce Clause provides that Congress shall have the power to regulate commerce among the several States⁵ and “[t]hough phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.”⁶ The negative, or “dormant” Commerce Clause prohibits state regulation in certain areas, even when Congress has not legislated on the topic.⁷ The first step in analyzing any state law subject to judicial scrutiny under the dormant Commerce Clause is to determine whether it regulates interstate

¹ Alan Blinder, *N.C.A.A. Athletes Could Be Paid Under New California Law*, N.Y. TIMES (Sep. 30, 2019), <https://www.nytimes.com/2019/09/30/sports/college-athletes-paid-california.html>.

² *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities> (last visited Feb. 20, 2020).

³ Alan Blinder, *The N.C.A.A. Says It's Working to Change. Next Year, at the Soonest.*, N.Y. TIMES (Jan. 24, 2020), <https://www.nytimes.com/2020/01/24/sports/ncaa-athlete-pay.html>.

⁴ *Id.*

⁵ U.S. Const. Art. I, § 8, cl. 3.

⁶ *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality of State of Or.*, 511 U.S. 93, 98 (1994).

⁷ *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995).

commerce with only incidental effects or discriminates against interstate commerce.⁸ Discrimination means different treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.⁹

If a restriction on commerce is discriminatory, it is virtually per se invalid.¹⁰ Once a state law is shown to discriminate against interstate commerce either facially or in practical effect, the law is subject to the heightened scrutiny of the *Maine* test, and the burden falls on the State to demonstrate that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means.¹¹ To determine if a Statute is discriminatory, a court must consider whether the Statute: (1) directly regulates interstate commerce; (2) discriminates against interstate commerce; or (3) favors in-state economic interests over out-of-state interests.¹² “If the Statute does any of these things, it violates the Commerce Clause per se, and we must strike it down without further inquiry.”¹³ Contrarily, nondiscriminatory regulations that have only incidental effects on interstate commerce are subject to a lower level of scrutiny under the *Pike* balancing test, and are valid unless the challenger can show that the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.¹⁴

III. State Name, Image and Likeness Legislation

Courts have long held that the NCAA is engaged in interstate commerce.¹⁵ The national nature of the NCAA’s activities are sufficient to establish interstate involvement and thus, any state statute that regulates NCAA action could be subject to a dormant Commerce Clause analysis. Congress has not, as of yet, legislated on the topic of intercollegiate athletics’ restriction of student-athletes’ usage of their own NIL for commercial gain. There is thus, no preemption of states acting in this area, nor any authorization from Congress that states may act in this area, which would bring a court to analyze the state law under the dormant Commerce Clause.

⁸ *Oregon Waste Sys., Inc.* 511 U.S. at 99.

⁹ *Id.*

¹⁰ *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

¹¹ *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

¹² *Nat’l Collegiate Athletic Ass’n v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993).

¹³ *Id.*

¹⁴ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁵ *See e.g. Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101–02 (1984); *Miller*, 10 F.3d 633; *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010 (10th Cir. 1998).

A. Direct Discrimination

Direct Discrimination occurs when a statute has the practical effect of requiring out-of-state commerce to be conducted at the regulating state's direction, or alters the interstate flow of the goods in question.¹⁶ "Direct regulation occurs when a state law directly affects transactions that take place across state lines or entirely outside of the state's borders."¹⁷ The Supreme Court has not analyzed state regulations of intercollegiate athletics under the dormant Commerce Clause.¹⁸ Thus, the primary authority the NCAA would rely upon is *NCAA v. Miller*.¹⁹

In *Miller*, the statute in question required any national collegiate athletic association to provide a Nevada institution, employee, student-athlete, or booster accused of a rules infraction with certain procedural due process protections during an enforcement proceeding.²⁰ The *Miller* court held that the statute directly regulated interstate commerce because the sole organizations it would effect were engaged in interstate commerce and, thus, the law would practically regulate conduct occurring beyond its boundaries.²¹ The California law is analogous to the Nevada law in *Miller* in the sense that it would require the NCAA to change its Constitution and Bylaws in order to comply with the state law, thus impacting commerce beyond the state's borders.

One commentator distinguished the California law from the law in *Miller* by comparing the affirmative obligation required under the Nevada law with the prohibition prescribed in the California law.²² Under the analysis, the California law would only prohibit the NCAA from injuring California residents and "does not regulate how the NCAA does anything in other states."²³ This analysis fails to consider the practical effects of the legislation as well as how it would impact interstate transactions. As stated in *Miller*, the NCAA cannot implement legislation on a state-by-state basis. On its face, SB 206 would require the NCAA to change (at the very least) its legislation regarding benefits, eligibility, athlete-agents and amateurism. In order to have uniformity, the NCAA would have no choice but to change its Constitution and Bylaws in order

¹⁶ *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003).

¹⁷ *S.D. Myers, Inc. v. City and Cty. of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001).

¹⁸ See generally JAMES L. BUCHWALTER, CONSTRUCTION AND APPLICATION OF DORMANT COMMERCE CLAUSE, U.S. CONST. ART. I, § 8, CL. 3—SUPREME COURT CASES, 41 A.L.R. Fed. 2d 1 (2009).

¹⁹ See *Miller*, 10 F.3d 633 (9th Cir. 1993).

²⁰ *Id.* at 637.

²¹ *Id.* at 638.

²² See Letter from Chris Sagers, James A. Thomas Professor of Law, Cleveland State University, to Gavin Newsom, Governor of Cal. (Sep. 24, 2019) (on file at <https://ssrn.com/abstract=3460551>).

²³ *Id.*

to comply with the California law. A law obligating the NCAA to offer procedural due process compared with a law prohibiting the NCAA from declaring student-athletes ineligible would have the same ultimate effect. The NCAA would have to change its rules. The contrast drawn by Professor Sagers is a distinction without a practical difference. At the heart of a direct discrimination analysis is the practical effect of the law, and here, the practical effect of California SB 206 would have the same as the practical effect of the law in *Miller*. Professor Sagers analogized SB 206 to the law in the 9th Circuit’s “foie gras” case, where the statute prohibited sale of foie gras that was produced through force feeding.²⁴ The court held that the law did not have the practical effect of regulating how foie gras was produced outside of the state.²⁵ The “foie gras” case is distinguishable because SB 206 does not regulate the production of intercollegiate athletics, it practically regulates the transactions that occur between prospective student-athletes and NCAA member institutions.

Furthermore, the law benefits in-state colleges and universities and burdens out-of-state NCAA member institutions. Statutes are discriminatory when they seek in-state economic protectionism and are “designed to benefit in-state economic interests by burdening out-of-state competitors.”²⁶ It is not beyond the realm of possibility that a state NIL law could be challenged by an NCAA member institution from another state. While the primary goal of the California law is to promote opportunities for California student-athletes, it would certainly advantage California schools and burden schools in states without NIL laws. Top prospective student-athletes would unquestionably be drawn to California institutions and away from their competitors. If, for example, the University of Texas challenged the law, it would likely be able to prove that SB 206 would benefit California schools and directly discriminate against other schools who are at a recruiting disadvantage. A competing NCAA member institution would be able to show that SB 206 discriminates by altering the interstate “flow of goods” in question.

While the California law most likely directly discriminates against the NCAA as an interstate organization by regulating how it would practically have to legislate, the California law certainly discriminates against out-of-state NCAA member institutions by favoring in-state economic interests. With a showing of direct discrimination, the law would be virtually per se

²⁴ *Id.*

²⁵ *Assn. des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 949 (9th Cir. 2013).

²⁶ *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337 (2008).

invalid, and the burden would fall on California to demonstrate both that SB 206 serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means.

B. Incidental Effects

Because California SB 206 likely directly regulates interstate commerce, a court would not analyze the law under the *Pike* test. However, if it did, the challenger would first have to show that the statute imposes a substantial burden on interstate commerce.²⁷ Typically, laws that impose a substantial burden do so because they are discriminatory, however, less typically, statutes impose significant burdens on interstate commerce as a consequence of inconsistent regulation of activities that are inherently national or require a uniform system of regulation.²⁸ A uniform system of regulation is unquestionably necessary for a national governing body of intercollegiate athletics²⁹ and following a showing of a significant burden, a court would consider whether the burden on interstate commerce is “clearly excessive in relation to the putative local benefits.”³⁰ However, the *Pike* test is used somewhat infrequently, and it would be challenging to predict how a court would balance the burden on the NCAA and its member institutions with the local benefit derived from a law prohibiting the NCAA and its members from enforcing legislation against student-athletes who have accepted compensation for the commercial use of their NIL. As detailed above, the *Maine* test is more appropriate to analyze SB 206.

C. Extraterritoriality Doctrine

The extraterritoriality doctrine applies when a state regulates conduct that is wholly outside its own borders and does not depend on the law discriminating against out-of-staters.³¹ One explanation for the doctrine’s existence is that if more than one state were to regulate extraterritorially on the same topic, the result could be inconsistent laws and gridlock of interstate commerce.³² Regardless of whether the states’ NIL laws would be deemed to discriminate against

²⁷ *Eleveurs de Canards*, 729 F.3d at 951–52 (9th Cir. 2013).

²⁸ *Id.* at 952 (internal quotations omitted).

²⁹ *See Nat’l Collegiate Athletic Ass’n v. Miller* 10 F.3d 633 (9th Cir. 1993).

³⁰ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

³¹ Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497, 501 (2016).

³² *Id.*

out-of-state commerce, the laws would likely violate the Commerce Clause under the extraterritoriality doctrine.³³

In *Healy v. Beer Institute*, the Supreme Court stated that the extraterritorial effects doctrine stood for three principals: (1) the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders; (2) regardless of legislative intent, a statute that directly controls commerce occurring wholly outside the boundaries of a State is invalid, with the critical inquiry turning on the practical effect of the regulation; and (3) the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.³⁴ “Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.”³⁵ The statute in question in *Healy* required any out-of-state company that sold beer to in-state wholesalers to affirm to the state that it was not offering lower prices in any neighboring state for the following month.³⁶ The Supreme Court held that the price affirmation statute was unconstitutional because it had “the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State.”³⁷ The practical effect of the price affirmation statute at issue in *Healy*, if enacted in one, many or every state would have been “price gridlock” for wholesalers.

In *Miller*, similarly, three states other than Nevada had also adopted procedural requirements for NCAA enforcement and five more had introduced legislation.³⁸ The various statutes would have subjected the NCAA to conflicting requirements for its enforcement procedures.³⁹ “Given that the NCAA must have uniform enforcement procedures in order to accomplish its fundamental goals, its operation would be disrupted because it could not possibly comply with all three statutes.”⁴⁰ The court in *Miller* held that the statute ran “afoul of the

³³ See *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989).

³⁴ *Id.* at 336 (internal citations omitted).

³⁵ *Id.* at 336–37.

³⁶ *Id.* at 326–27.

³⁷ *Id.* at 337.

³⁸ *Miller*, 10 F.3d at 639–40 (9th Cir. 1993).

³⁹ *Id.* at 639.

⁴⁰ *Id.*

Commerce Clause” because it regulated a product in interstate commerce beyond the state boundaries and put the NCAA “in jeopardy of being subjected to inconsistent legislation arising from the injection of Nevada’s regulatory scheme into the jurisdiction of other states.”⁴¹

In addition to California SB 206, several states have passed, or are considering passing, legislation on the topic of student-athlete NIL.⁴² Proposed legislation in Florida could go into effect as early as July 1, 2020.⁴³ The proposed “New York collegiate athletic participation compensation act” would additionally require “colleges to take fifteen percent of revenue earned from athletics ticket sales and divide such revenue among student-athletes.”⁴⁴ If it went into effect, the law would also differ from California’s SB 206 in that it would require colleges to set aside funds to compensate student-athletes who suffer career ending or long-term injuries.⁴⁵ While many states have mirrored the California law, it would not be hard to imagine conflicting provisions in laws between states. Some states have included provisions for sports agent representation, while others may not. There are already conflicts between the dates that the various state laws would go into effect. Issues such as revenue sharing and funds for student-athlete injuries could conflict as well. Much like the various state laws in *Miller* that would have required the NCAA to ensure certain procedural rights to student-athletes, coaches and universities during infractions cases, the differing state NIL laws would also put the NCAA “in jeopardy of being subjected to inconsistent legislation.”⁴⁶

IV. Conclusion

The NCAA would likely need to spend years litigating against state NIL laws through dormant Commerce Clause challenges. Even if the NCAA can stand on solid legal ground, there is some uncertainty within the dormant Commerce Clause, especially the extraterritoriality doctrine. Furthermore, the NCAA cannot ignore the challenge courts often face in applying the law to its practices within the intercollegiate athletics context. Additionally, the NCAA has faced tremendous external pressure from a court that is bound by no precedent—the court of public

⁴¹ *Id.* at 640.

⁴² See Michael McCann, *Breaking Down How the NCAA, Mark Emmert Might Approach NIL Issue*, SPORTS ILLUSTRATED (December 15, 2019), <https://www.si.com/college/2019/12/15/ncaa-mark-emmert-name-image-likeness-aspen-institute>.

⁴³ Jim Turner, *Florida Senators Look To NCAA For Answers On Athlete Pay*, CBS MIAMI (February 26, 2020), <https://miami.cbslocal.com/2020/02/26/florida-senate-ncaa-athlete-pay/>.

⁴⁴ S.B. 6722A, 2020 Leg., Reg. Sess. (N.Y. 2020).

⁴⁵ *Id.*

⁴⁶ *Miller*, 10 F.3d at 640.

opinion. Engaging in litigation to overturn California's Fair Pay to Play Act and similar legislation will not be looked upon favorably by the public.

The most practical solution is Congressional action on NIL compensation for student-athletes. National uniformity is essential for the NCAA to effectively operate and govern intercollegiate athletics. Congressional legislation will benefit the NCAA in two ways. First, preemption of laws like California's Fair Pay to Play Act would save the NCAA the challenge of litigating against the states. Second, and perhaps more importantly, Congressional action would likely save the NCAA from antitrust litigation on NIL rules. If the NCAA were to enact changes on its own that would not provide the same freedom for student-athletes as under the various state laws, antitrust challenges would surely be on the horizon. Federal legislation would enable the NCAA to change its NIL rules without an "unreasonable restraint of trade."

Although California's Fair Pay to Play Act, and similar state laws around the country, likely violate the dormant Commerce Clause, the NCAA should not pursue litigation against the states. Alternatively, it should seek Congressional legislation that would provide national uniformity through the preemption doctrine and some level of protection for the NCAA against antitrust claims related to NIL legislation.