



## COLLEGE

# NIL has forever changed the game. 'The NCAA created this monster themselves.'



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*This is the first story of a five-part series taking a closer look at name, image and likeness. We'll look at how NIL has changed the game, who enforces what and what the future may hold and more.*

**BLOOMINGTON** – Last Friday, college sports turned the academic calendar to Year 2 of what has become the most-impactful policy change in modern NCAA history.

If we did not necessarily expect name, image and likeness (NIL) reforms to remake college athletics — and many of us did — we certainly know now the expansive and likely permanent impact NIL will have .

During the past year, we've watched as college athletes were compensated, above board, with millions and millions of dollars, beyond the scope of a scholarship for the first time. Institutions once considered sacrosanct in college sports, such as the NCAA, have been strained and frayed by the upheaval. Calls for a new form of governance more fit for modern purpose have intensified, coming from some of the industry's biggest power brokers.

Reform bordering on revolution is remaking American college sports before our eyes, with no end in sight. Proponents say most of these changes are not just welcome, but necessary. Critics wonder where the line will be drawn to declare what is too far, and whether a landscape now seen as too unregulated can ever be reined in.

**INSIDER:** Like it or not, this is the future of college athletics. Get used to it.

**DOYEL:** College football was more fun when we could hate ND. Now we need to appreciate Irish

## 'The NCAA created this monster themselves'

“I don’t know how it’s going to settle out,” said Kurt Zorn, who until recently served as IU’s faculty athletics representative and as a voting member of the NCAA’s Division I Council. “I have a better feel for what it’s not going to be than what it’s going to be. I don’t think it’s going to be anything very close to what we’re accustomed to.

“I just don’t think the current model is sustainable.”

How college athletics arrived at this point has answers steeped in decades of history, and triggered just in the past few years. The latter pushed the NCAA-defended amateurism concept to its breaking point, paving the way for NIL last summer.

First came state laws, beginning in California and spreading to the south and west, codifying athletes’ right to profit from their name, image and likeness. Government legislation preempted NCAA rules, paving the way toward NIL becoming accepted practice. Then came a successful legal challenge to governing authority, *NCAA v. Alston*, which saw an ideologically divided Supreme Court rule unanimously against the association in declining to uphold its claims of immunity on antitrust grounds.

Justice Neil Gorsuch wrote for the majority, but in a concurring opinion, Justice Brett Kavanaugh reserved pointed criticism for the NCAA’s most fundamental principle — that college athletes are amateurs, and thus should not be compensated in any way beyond their scholarship for their efforts.

“Nowhere else in America,” Kavanaugh wrote, “can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different.

“The NCAA is not above the law.”

Together, these forces sped NIL reform forward. The truth is, the NCAA ought to have seen it coming (and probably did). “The NCAA created this monster themselves,” one veteran grassroots basketball coach told IndyStar.

Challenges to amateurism are not new. Former UCLA star Ed O’Bannon’s lawsuit alleging former athletes should be compensated when their likeness continues to be used by the NCAA was filed in 2009. While unsuccessful, a push for athlete unionization just a few years later also generated substantial discussion over whether college athletes were being fairly compensated not just financially but also in areas such as mental wellness and lifetime healthcare.

The unanimity of the Supreme Court’s decision in Alston demonstrated a lack of political viability of arguments for the NCAA’s long-held view of amateurism.

“It would’ve been measurably better if the NCAA had gotten in front of this,” former IU Athletic Director Fred Glass told IndyStar. “Frankly, I think they had ample opportunity to do it.”

The NCAA did attempt to lobby the federal government for a solution to what it recognized as a growing problem. In its earliest appearances before Congress predating the COVID-19 pandemic, President Mark Emmert and other prominent leaders in Division I college athletics met with legislators to try to hash out a federal solution to NIL that would lift most enforcement responsibilities off of the association while creating a blanket policy for all 50 states and the institutions within them.

There appeared to be energy toward such a law before NIL became official policy last July, with the Senate Commerce Committee holding hearings as far back as February 2020 on the issue. But disagreements over the scope of various bills — whether they might cover more than simply name, image and likeness — coupled with the Supreme Court’s Alston decision — stonewalled the process at the federal level.

“It was really about preemption of state laws, exempting your associations, conferences and schools from any federal antitrust laws, potentially including safeguards for non-employment status for student-athletes,” one congressional aide familiar with NIL negotiations told IndyStar. “When the Alston decision came about, everything did get kind of turned on its head.”

Now, the patchwork of existing state laws (more than half the states in the country have one) and confusion over enforcement responsibilities would make any federal solution significantly more complex. There are wider philosophical questions around whether the federal government should get involved. And skepticism about the NCAA's appetite for enforcement, which could draw additional legal challenges, further muddies the picture.

**MORE:** 9 of 11 states in B1G working on laws to pay student-athletes. Here's why Indiana isn't.

## 'Schools effectively need the collectives now'

The association has tried in recent months to reassert authority, particularly around the rise of collectives.

Begun as a mechanism for centralizing NIL resources within individual fanbases, collectives have sprung up across the country in the past year. Most, if not all, Power Five athletic departments have at least one collective operating within their alumni/donor base. Some have two or more.

In theory, their function is straightforward: They act as a clearinghouse for fans and boosters wanting to contribute money that can be pooled to fund NIL deals between athletes representing a given school and third parties. In practice, critics fear they have become a workaround allowing boosters to pay players to sign with certain schools.

In either event, they have rapidly become indispensable to bigtime college athletic departments.

At a speaking engagement recently, Ohio State football coach Ryan Day reportedly told Columbus business leaders the Buckeyes estimated they would need \$13 million to keep their roster together annually. Collectives appear the most efficient way to fill that gap.

“Schools effectively need the collectives now,” said Bill Lawrence, a partner at the Birmingham-based law firm Burr & Forman, which deals extensively with sports law. “Without the collectives, I don’t see how a school’s athletic department can field competitive teams.”

Collectives have helped facilitate substantial deals between athletes and partners. And while a lot of the numbers thrown around in recruiting circles in particular are probably fishing stories, exaggerated for effect, there’s a growing list of athletes,

with confirmed seven-figure compensation packages across the country.

## **Uncertain future**

All of it — the numbers, the money, the shifting nature of the relationship between athletes and the sports they play — has conspired to create a climate of change within college sports.

A raft of prominent coaching retirements in men's basketball in the past two years could shake up the hierarchy in that sport. Emmert earlier this year announced his intention to step down by June 30, 2023. At the local level, athletic departments are seeing significant turnover (though the stress of the COVID-19 pandemic has also contributed to that).

Structurally, there appears an equal interest in change.

Questions over the NCAA's appetite for enforcing rules around NIL have prompted some to wonder whether a change in leadership structure might be worth exploring. Just in the past two months, Pac-12 Commissioner George Kliavkoff and Ohio State Athletics Director Gene Smith have both publicly suggested it might be time to move football completely under the auspices of the Playoff system, and out of the NCAA's hands entirely.

A year into NIL, though, it can sometimes feel as though hype and hysteria have distorted reality.

Most college athletes with a NIL deal are making just a few thousand dollars per year. They are enjoying the same earning opportunities as any other college student. And they can supplement scholarships with additional income to cover various monthly costs.

"It's been really helpful ... having a little bit more money in my pocket," IU men's basketball player Race Thompson said in an interview last spring.

There are myriad issues still to work through — regulation, marketplace stability, long-term viability, structural governance and more.

As NIL enters Year 2, it still presents more questions than answers. Perhaps far more. But it has addressed an important imbalance in college sports, one it was clear neither public sentiment nor legal function were prepared to allow to stand.

“The biggest thing is just opening up the doors to college athletes having the same rights as professional athletes, and really having the same rights as anyone else in the United States,” said Darren Heitner, an expert in sports business and law, and founder of Heitner Legal. “College sports is in a much better place than it was a year ago, primarily because student-athletes are able to enjoy these rights.”

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