

U.S. Citizenship Supremacy: How Immigration Laws and NCAA Policies Exclude International College Athletes From Monetizing Their Name, Image, and Likeness

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On July 1, 2021, most NCAA college athletes could finally monetize their names, images, and likenesses (NIL). Although the change was both welcome and historic, international college athletes (ICAs) could not. This commentary situates NIL within the broader context of U.S. nationalism, anti-immigrant sentiment, and college sports. We find that U.S. immigration laws combined with NCAA amateur policies prevent ICAs from monetizing their NIL. We conclude with reform suggestions at the legal, policy, and practice levels that will benefit all international students and immigrant workers.

Keywords: NIL, international college athletes, nationalism, NCAA

Introduction

Pressured by state laws and a fresh Supreme Court loss, the National Collegiate Athletic Association (NCAA) lifted many restrictions on college athlete name, image, and likeness (NIL). On July 1, 2021, college athletes received economic freedoms denied to them since the 1950s (Byers, 1995). However, international

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college athletes (ICAs)¹—21,000 or 12% of college athletes—cannot adequately participate in NIL (NCAA, 2021). This commentary situates NIL within the broader context of U.S. nationalism, anti-immigrant sentiment, and college sports. We find that U.S. immigration laws combined with NCAA amateur policies prevent ICAs from monetizing their NIL. We conclude with reform suggestions at the legal, policy, and practice levels that will benefit all international students and immigrant workers.

Nationalism and Immigration Restrictions

Anderson’s (2006) *Imagined Communities* positions nationalism as a social, cultural, and material process that produces limited and sovereign national territories. In this sense, all nations—not just certain political systems—partake in nationalism (Anderson, 2006). Nation-building requires defining the state’s origin story, citizenship criteria, characteristics that unite citizens, and delineating how the state differs from other nations (Gems, 2000). Nation-building grants the state the power to define citizenship status (Gems, 2000). Despite pluralistic rhetoric, the US was founded through the enslavement of African peoples, colonialization of indigenous peoples, and subordination of all but property-owning White men (Harris, 1993; Mills, 2003). Shifting immigration patterns in the late 19th century brought immigration restrictions that elevated White, English-speaking immigrants (Skiba, 2012). A rise in immigrants from Asia led to the first restrictive immigration policy—the 1882 Chinese Exclusion Act (Gardner, 2009). Simultaneously, bureaucratic practices at Ellis Island expelled two-thirds of European immigrants between 1895-1915 because they were “likely to become a public charge” or utilize social services (Gardner, 2009).

While race-based immigration quotas were overturned in 1965, the impetus of Euro-centric, Anglo, and English-speaking nationalism underlie existing immigration laws, exemplified through student visa programs (Skiba, 2012). For instance, in 1993 after the World Trade Center bombing, President Bill Clinton introduced new mandates on international students in the name of national security (Ruiz, 2014). More recently, in 2017 President Donald Trump’s Executive Order 13769 temporarily banned foreign nationals from seven predominately Muslim countries (ACLU, 2020). Today, F-1 visa holders “must be proficient in English” (UCIS, 2020, para. 2) even though the US has no official language (Kaur, 2018).

¹ Following Sack and Staurowsky (1998), we use the term “college athlete” rather than “student athlete” because the NCAA invented and enforces the usage of the latter term to limit athlete compensation and workplace rights

Current U.S. immigration laws constrain immigrants from engaging in any forms of employment, advertisement, public appearance, contractual endorsement, or action that could lead to potential sources of income (Cole & Maldonado, 2021). U.S. Citizenship and Immigration Services (UCIS) requires international students to “have sufficient funds available for self-support” during their higher education career (para. 2). Once in the US, their employment is restricted. The law prohibits international students from active income streams—performing an action by investing time and effort on a consistent basis for a monetary gain (UCIS, 2020).

There are a few exceptions to active income prohibitions. F-1 visa holders can work 20 hours per week on campus during the academic year (UCIS, 2020). They can also participate in Curricular Practical Training (CPT) during their college degree and Optional Practical Training (OPT) after college. In both programs, international students can work off campus in alignment with their major. Each program is laden with bureaucracy, requiring layers of institutional approvals. Furthermore, CPT must be completed within 12 months or less. If they go beyond 12 months, they are ineligible for OPT (UCIS, 2020). ICAs cannot use CPT for NIL activities, as their athletic activities are extracurricular, not their academic major. CPT also requires an employer’s sponsorship and documentation of practical training—another stipulation misaligned with NIL. While U.S. law prohibits international students from earning *active* income (except for limited on-campus employment, OPT, and CPT), the law permits passive income streams—earnings that require no direct action like interest on savings accounts or stock market profits. Earning passive income presupposes the possession of capital—financial resources to invest while in the US. Restricting international students’ earning potential favors those with intergenerational wealth and those who can pay their own way to live and study in the US.

The distinction between active and passive incomes inhibits international students from pursuing off-campus employment including gig work. Immigration law, therefore, does not uniquely restrict ICAs’ earning potential. *All* international students are prohibited from certain active income streams. As will be discussed later in this article, the combination of NCAA restrictions on compensation and immigration laws distinctly limits ICAs’ financial earnings in ways not equivalent to their international student or domestic athlete counterparts.

Nation-Building Through College Sports

College sports are inextricably linked with expanding the U.S. nation and nationalist ideologies (Bale, 1991; Hextrum, 2021; Pope, 1997). A key facet

of U.S. nationalism, cultivated through sports, is an emphasis on winning (Pierce et al., 2010). Symbolic, competitive contests played on the field could unite disparate groups and telegraph a sense of supremacy more effectively than other government outreach initiatives (Gems, 2000; Holeman, 2007). As “foreign” athletes, ICAs’ athletic performance is packaged to telegraph institutional and American supremacy through sport victories (Bale, 1991; Pierce et al., 2010). Today’s college sports programs trace their origins to the 19th century “boosterism” (Bale, 1991). The aggressive 19th century U.S. westward colonialism often resulted in instability and failure for new towns. Establishing colleges, especially with spectacle athletic events, brought success and prestige to the school and community—ensuring both persisted in an era of “ghost” towns (Bale, 1991). Amateur athletic events, therefore, could “boost” a community and establish its longevity (Bale, 1991). Winning took on outsized importance, as dominating one’s competitors could prove vitality of the teams, school, and eventually the town (Pierce et al., 2010). As colleges and sports teams grew throughout the late 19th and early 20th centuries, programs began to look beyond their local communities and recruit nationally to find the best athletes (Pierce et al., 2010).

Post-WWII new recruitment opportunities arose for colleges. The growth of globalism transformed sport into a world system of international talent pipelines and competition (Maguire, 2004; Thibault, 2009). Simultaneously, changes to the NCAA’s governing structure—notably the allowance of athletic scholarships—permitted universities to look beyond U.S. borders for top talent (Bale, 1991; Holeman, 2007; Pierce et al., 2010). The first major wave of international athletic recruitment occurred in hockey, as many Canadian-born New England coaches returned to their hometowns to solicit players (Holeman, 2007). Canadian hockey players were often older and working-class, and brought a faster-paced, aggressive style to American teams (Holeman, 2007). International recruits helped elevate the American game and improved the status and prestige of programs from New England to the Midwest (Holeman, 2007).

The success of ICAs in hockey carried into other sports. Bale (1991) traced the rise of international recruiting pipelines across sports like track & field, golf, and tennis, and continents including Europe, South America, Africa, and Australia. He found that lesser-ranked schools had the most to gain from investing in ICAs. Unable to compete for top domestic talent due to undesirable location, low-academic ranking, and/or lack of status, smaller schools like the University of Texas, El Paso; Iowa State University; and the University of Richmond created recruiting networks to improve their track programs (Bale, 1991). These practices only increased in the 21st century. For instance, Oklahoma State University’s cross country team had not won an NCAA championship since 1954. As

a regional, agriculture school, OSU struggled to recruit domestically (Shannon, 2015). In 2006, the program began recruiting from Africa and later won three NCAA titles in four years from 2009 to 2012 (Shannon, 2015). Even established programs have begun recruiting internationally. Gonzaga’s men’s basketball team—a historic franchise—recruits from Europe to find the “big men” for their line up (Auerbach, 2014). American football, long seen as the sport to never recruit internationally, has begun turning to ICAs to improve their competitive advantage. In 2020, 11 ICAs competed on Power Five football teams—a marked increase as only two ICAs played football from 2010–2016 (AP, 2020).

Yet American nationalism is also expressed through protectionist discourse and regulations. The success of ICAs may threaten American athletes’ prominence. From the 1950s through the 1970s, colleges recruited so many Canadian hockey players a national crisis was declared (Holeman, 2007). Americans worried about the “Canadianization” of U.S. hockey, as most programs boasted half or more Canadians on their rosters (Holeman, 2007). In 1965, the NCAA addressed the “Canadian hockey problem” by creating new eligibility rules that penalized recruits older than 19 and that declared Canadian’s most competitive youth teams “professional” (Holeman, 2007). Together, these rules effectively “bann[ed] recruitment of Canada’s ablest players” (Holeman, 2007, p. 464). The rules were overturned in *Howard v. NCAA* in which the Supreme Court ruled it unconstitutional for the NCAA to pass arbitrary regulations specifically targeting “foreign students” (Kaburakis, 2007).

Even after this case, American entitlement to U.S. college rosters spots has persisted. International students, including ICAs, experience hateful and exclusionary discourse about their national identities (Bale, 1991). Anti-immigrant discourse states ICAs take away scholarships and opportunities from domestic college athletes. For instance, in 2012 a track & field athlete wrote an op-ed claiming European athletes “rob an American track star of his or her NCAA title” and that ICAs are “freaks-of-nature athletically” (Shannon, 2015, para. 8). Hextrum’s (2020) study of whiteness in track & field found similar rhetoric as White athletes spoke of Africans invading their sport; one participant even accused ICAs of creating fraudulent paperwork to compete in the NCAA.

Amateurism, Assimilation, and Exploitation of ICAs

Recruiting ICAs to boost American teams generates a *brawn drain* that extracts human capital (athleticism) from less-advantaged regions, furthering the supremacy of higher-developed nations (Bale, 1991). U.S. college coaches have an additional advantage—a monopoly on the intercollegiate model of competition—thereby exacerbating the brawn drain (Pierce et al., 2010). The uniquely American model of intercollegiate athletics allows coaches to offer prospective ICAs an

education and elite athletic competition, which is often an either/or in their home country (Bale, 1991). But U.S. amateur rules misalign with global youth athletic talent pipelines. It is common in Europe, Canada, and Australia for professional and national teams to sponsor competitive youth sports teams and therefore have some form of expenses paid for (Kaburakis & Solomon, 2005). This different standard of youth sport access can make virtually all ICAs ineligible per the NCAA's restrictive definitions (Kaburakis & Solomon, 2005). Even as the NCAA has moved to a student-first approach to enforcing amateur violations (i.e., greater lenience), thousands of ICAs never get a chance to prove their eligibility due to “fundamental differences in philosophy and culture between the world of NCAA DI and the world of international sport governance” (Kaburakis, 2007, p. 101). In general, domestic athletes who played for American teams that are amateur are granted the benefit of the doubt, whereas international teams are subject to greater scrutiny and often labeled as professional (Pierce et al., 2010). Some programs avoid recruiting ICAs altogether for fears that a recruited athlete would later be deemed ineligible (Kaburakis & Solomon, 2005; Pierce et al., 2010).

Expansive and contradictory definitions of athletic exploitation pervade research (see Van Rheenen, 2013). Most attention is paid to how the NCAA's amateur policy enables an exploitative Black labor relationship in which mostly White coaches, administrators, and media commentators profit (Byers, 1995; Tatos & Singer, 2021; Ternes, 2016; Van Rheenen, 2013). The NCAA's emphasis on amateurism is purportedly designed to protect college athletes, whether domestic or international, from the alleged harm of commercialization. Specifically, the “principle of amateurism” reads, in part:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises. (NCAA Division 1 Manual, 2021, p. 3)

The billions generated in U.S. college sports occurs within amateurism—preventing athletic labor from direct compensation. Even though college athletes can now monetize their NILs, amateurism still costs Black athletes \$250,000 individually, and collectively, billions of dollars per year (Tatos & Singer, 2021). Although the NIL marketplace recently opened to domestic athletes, NIL alone does not fix a system that does not pay athletes for the revenue they generate or protect them from physical and mental harm.

Bale (1991) argued that ICAs, even in non-revenue generating sports, face exploitation. He defined exploitation as occurring when athletic organizations use athletes for their own aims without properly providing for their educational,

health, and social needs. ICAs, are, therefore, exploited as they: are recruited to build the status and reputation of a coach, sport, program, and/or institution; are provided inadequate information to judge the U.S. school/sport team, resulting in ICAs attending lower status schools many domestic athletes of similar talent would avoid; face intense pressure to perform athletically to retain their scholarship and/or visa; are in majors that often do not align with their career opportunities in their home countries; and turn down lucrative professional opportunities in their home country to maintain their U.S. amateur status (Bale, 1991).

ICAs experience differs from domestic athletes in another way: U.S. nationalism encourages assimilation. Assimilation refers to dominant groups “impos[ing] ethnocentric and patronizing demands on minority peoples struggling to retain their cultural and ethnic integrity” (Alba & Nee, 1997, p. 827). In college sports, ICAs must assimilate to western, White, American cultures (Lee & Rice, 2007; Navarro & Malvaso, 2016; Newell, 2015). The NCAA and its member institutions impose assimilation standards onto ICAs from recruitment until graduation (Lee & Rice, 2007). Amateurism itself requires assimilation to a U.S. model of sports (Bale, 1991; Kaburakis & Solomon, 2005; Pierce et al., 2010). Additionally, all NCAA eligibility paperwork and applications must be completed in English, which is not the first language of many ICAs. Assimilation is so engrained in the NCAA, members often frame it as a positive. For instance, in providing advice as to how to recruit ICAs to avoid unintentional amateur violations, NACADA recommended targeting international secondary schools designed with “U.S.-centric curriculum and educational culture” where “English is a primary educational objective” (Zillmer et al., 2015, p. 57). ICAs from these programs were seen as the “right” ICAs to recruit as they were “better prepared, culturally and educationally to enter U.S. college and universities” (p. 57).

Upon arriving on campus, ICAs must assimilate to academic and athletic culture. Academically, many universities have general education requirements in American history, civics, or government but no such equivalent requirements to learn about specific nations, cultures, or global affairs. Athletically, ICAs encounter U.S.-specific rules and regulations that are often unfamiliar. For example, ICAs forgo possible professional opportunities to become NCAA eligible (Bale, 1991).

International recruitment benefits universities (e.g., small schools gaining status and prestige through ICAs’ talent) and ICAs (e.g., access to top coaching, facilities, and educational programs) (Bale, 1991; Pierce et al., 2010). Yet athletic labor migration also invokes nationalism and deskills developing nations (Holeman, 2007; Maguire, 2004; Thibault, 2009). ICAs are caught among competing global systems and can be disproportionately targeted during reform efforts (Holeman, 2007). NIL is one such example.

Nationalism in NIL

The NCAA's amateur restrictions on pay-for-play produce specific limitations for ICAs not experienced by international students. The combination of NCAA amateur regulations, new NIL policies, and immigration laws also distinctly regulate ICAs from domestic athletes. Here, we consider how pay-for-play rules and immigration restrictions on *active* income prohibit ICAs from participating in NIL.

While immigration law prohibits pay-for-play for all international students, the NCAA's bureaucracy is expressly focused on monitoring and restricting pay-for-play. No equivalent surveillance mechanisms exist in other parts of student life such as dance or music. If an international student pianist receives gifts for her performance, her transgressions would need to be caught by two agencies: designated school officials (DSOs) and U.S. Immigration and Customs Enforcement (ICE). International students face severe consequences for transgressing these laws, either knowingly or unknowingly. DSOs are mandatory reporters and are "required by law to terminate the student's SEVIS record with the Student and Exchange Visitor Program" (Cole & Maldonado, 2021, para. 9). If a DSO learns of a transgression, they must terminate the student's F1 status, leading to deportation. Yet it is difficult for ICE or DSOs to prove an international student receives improper gifts, as they have no formal, institutionalized tracking measures in place.

ICAs' pay-for-play actions are surveilled by DSOs, ICE, and the NCAA. The NCAA requires yearly eligibility checks that track athletes' housing, cars contracts, and media engagements to monitor possible infractions like improper payment and/or coordination with professional teams and agents (NCAA, 2021). According to NASFA (2021), "minimal scholarship aid is available to international students, and most of it is reserved for graduate study" (para. 3), which limits the amount of non-athletic financial aid ICAs can earn.

The NCAA's (2021) current policy allows college athletes to engage in NIL activities so long as their actions follow state, institutional, and/or conference laws/guidelines and follow NCAA's bylaws regarding pay-for-play and/or improper recruiting. Most college athletes can benefit from NIL through endorsements and professional contracts. Others may only receive minor NIL deals—such as autograph signing, Instagram promotions, and TikTok videos. Permissible NIL activities under NCAA regulations reflect *active* income because an athlete must perform above-and-beyond their regular athletic contributions to receive compensation (NCAA, 2021). Per immigration law, ICAs could lose their visa by engaging in active income. According to federal tax and immigration laws, unlike their domestic peers, international students can only earn passive income while residing in the US. Passive income includes but is not limited to forms of

monetary gain that do not require substantial action like investing in the stock market, buying a house, and investing in a startup. Permitting international students to earn passive incomes reflects the historic bias toward affluent immigrants (King, 2000). An immigrant must have their own capital—prior to arrival in the US—to invest in the stock market or a startup. Therefore, if an ICA attends an event and signs autographs—an action permissible by the NCAA’s NIL policy—they would violate immigration law for actively profiting from their image.

Federal agencies like UCIS, ICE and the Student Exchange Visitor Program (SEVP) have ignored the economic well-being of ICAs. As of publication, the only federal guidance, without any timeline for further communication, has been:

SEVP continues to coordinate with its government partners, including U.S. Citizenship and Immigration Services, to assess the number of impacted students and whether regulatory guidance is required to address this and related issues. SEVP will continue to monitor current and pending state and federal legislation on this issue and will provide additional updates through Broadcast Messages, Study in the States, social media and SEVP field representatives. (SEVIS SysAdmin, personal communication, July 19, 2021).

Without clear guidance, ICAs and their families miss out on NIL opportunities.

The NCAA has often called on federal agencies to help them craft NCAA policy and hasn’t included ICAs or visa laws in such appeals (Genthrop, 2022). Institutions and compliance officers suggest ICAs either refrain from NIL or hire private immigration attorneys to provide professional guidance (compliance officer, personal communication, October 26, 2021). Meanwhile, domestic athletes receive free guidance from compliance officers. Advising ICAs to pay for legal counsel exacerbates existing discrepancies and limitations on ICAs’ earning potential. Furthermore, this response places the onus on individual ICAs to navigate complex and conflicting state and federal bureaucracies. In turn, athletic departments, the NCAA, and federal agencies are relieved of responsibility for solving the conflicts. Thus, ICAs now face an untenable situation: follow the NCAA’s NIL guidelines, which supposedly allow all athletes to monetize NIL, and break immigration law or follow immigration laws and forgo NIL opportunities. The first scenario could lead to deportation, costing ICAs their academic and professional careers (Lever, 2021a) and the second restricts ICAs from building their personal brand and being treated as equals in the realm of college sports. ICAs are now a separate category of college athletes who cannot earn the same benefits as their domestic teammates. In this sense, the NCAA has broken its mission—providing an equal playing field for all participants.

Conclusion

U.S. immigration law has long-adopted restrictive policies that privilege White, English-speaking, and affluent immigrants (Gardner, 2009; King, 2000; Skiba, 2021). F-1 visas permit international students to study in the US but simultaneously restrict their earning potential. While at American universities, international students experience several challenges, such as discrimination, visa and immigration issues, cultural and social isolation, language barriers, and academic and athletic assimilation (Bale, 1991; Lee & Rice, 2007; Newell, 2015). ICAs occupy an even more tenuous position. Colleges and universities recruit ICAs to improve their athletic programs, thereby generating additional revenue and prestige (Bale, 1991). Yet ICAs' athletic contributions ignite U.S. nationalism and anti-immigrant sentiment (Shannon, 2014). Some domestic prospective and current domestic college athletes resent the presence of ICAs, claiming they take away opportunities for deserving (White) American citizens (Hextrum, 2020; Shannon, 2014).

NIL represents a small but important step to reallocate the balance of revenue and power within college sports. The combination of nationalism, immigration law, and NCAA amateurism policies has prevented ICAs from fully participating in NIL. NCAA amateurism policies prevent college athletes from engaging in 'pay for play' or earning revenue through their athletic talents—a form of passive income that would be permissible under immigration law. As a result, Bale's (1991) proposition that ICAs are uniquely exploited in college sports remains the case even today.

Addressing the unique conditions of ICAs could benefit all international students and immigrant workers. Mitigating the conflicts facing ICAs requires broad visa and immigration reform. Current visa restrictions require an immigrant to reside in the US on either a work or student visa. Splitting work from study prevents immigrant workers from continuing their education and/or international students from working. Allowing both groups to work and study could generate greater financial stability, innovation, and human capital. Such widespread visa reform would permit ICAs to participate in NIL or any future unionization or employment efforts that may arise from college athlete activism.

We recognize that no meaningful immigration reform has occurred since 1965 (South American Digital Archive, 2015). But recent events have shown higher education can pressure U.S. political institutions to alter immigration policy. Amid the COVID-19 pandemic, the US banned international students from entering the country. More than 200 higher education institutions and 70 higher education associations filed a lawsuit against federal immigration authorities and the Trump administration (ACE, 2020). The lawsuit claimed the ban cost institutions vast sums of revenue, as international students compromise a substantial

portion of enrollment and tuition dollars. With the ban reversed, institutions are no longer advocating for ICAs' NIL rights. Higher education's silence on NIL reflects interest convergence—a term coined by Bell (1980). Much like state-level NIL laws pressured the NCAA to change its policies, putting ICAs on the radar of U.S. Department of Homeland Security (DHS) and federal lawmakers may pave the way to broadening their rights (Lever, 2021b).

While working toward immigration reform, we suggest the following. First, ICAs must remain in constant communication with their athletic compliance officers and DSOs and international student services. New NCAA or federal guidance could arise at any moment, and it's important to stay informed. Second, based upon our research, discussions with compliance officers, and counsel with immigration attorneys, ICAs may want to avoid any NIL opportunities, for the time being, to protect their visa status. Third, if an ICA does proceed with NIL—despite the risks—we recommend athletic departments provide free legal advice to determine how their actions can adhere to both immigration law and NCAA policy. Requiring ICAs to bare this cost themselves is exclusionary, financially burdensome, and further privileges affluent students. Fourth, some immigration attorneys have stated publicly what they believe could be permissible NIL actions for ICAs (Lever, 2021b). It is important to note that there is no right answer to this problem until DHS states what is and is not permissible. As of publication, DHS has yet to issue guidance on NIL. Lastly, education and training about ICAs' tenuous situation should be offered to athletic practitioners and college athlete advocates. It is vital for those supporting ICAs to know the intricacies of immigration law, U.S. amateurism, and NIL to avoid inadvertent eligibility violations.

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