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PAY TO PLAY: LOOKING BEYOND DIRECT COMPENSATION AND TOWARDS PAYING COLLEGE ATHLETES FOR THEMSELVES

Luke Tepen*

INTRODUCTION

Priding itself on the amateurism present in its sports, the National Collegiate Athletic Association (NCAA) has long disallowed its athletes from making money from their athletic abilities while in school. This prohibition includes direct pay,¹ pay for an athlete's name, image, or likeness,² a split in surplus,³ educational expenses in excess of those allowed by Bylaw 15,⁴ excessive expenses and awards,⁵ payments based on performance,⁶ preferential treatment,⁷ or prizes for participation in a school's promotional activity.⁸ Most of these prohibitions are subject to certain exceptions, as provided in their respective rules.

Several court decisions have supported the NCAA's amateurism policy throughout the decades.⁹ The general public has also historically supported

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1. NAT'L COLLEGIATE ATHLETIC ASS'N, 2019–2020 DIVISION I MANUAL, art. 12.1.2.1.1 (2019) [hereinafter NCAA MANUAL] While I use the Division I Manual throughout, the Bylaws are mostly consistent in the NCAA's Division II and Division III Manuals. *See generally* NAT'L COLLEGIATE ATHLETIC ASS'N, 2019–2020 DIVISION II MANUAL (2019); NAT'L COLLEGIATE ATHLETIC ASS'N, 2019–2020 DIVISION III MANUAL (2019).

2. While no specific rule forbids use of name, image, and likeness to generate revenue, various parts of Bylaw 12 make clear that such use is prohibited. *See* NCAA MANUAL, *supra* note 1 arts.12.4.2.1(e) (forbidding use of an athlete's name, picture, or appearance in advertisements for an employer), 12.4.1.1 (forbidding use of athletic reputation in determining compensation rate), 12.4.2.3 (forbidding use to advertise athletic equipment), 12.5.1.1(g) (forbidding use for "commercial ventures").

3. NCAA MANUAL, *supra* note 1, art. 12.1.2.1.2.

4. NCAA MANUAL, *supra* note 1, art. 12.1.2.1.3.

5. NCAA MANUAL, *supra* note 1, art. 12.1.2.1.4.

6. NCAA MANUAL, *supra* note 1, art. 12.1.2.1.5.

7. NCAA MANUAL, *supra* note 1, art. 12.1.2.1.6.

8. NCAA MANUAL, *supra* note 1, art. 12.1.2.1.7.

9. *See, e.g.*, NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100–01 (1984) ("This decision is not based on . . . our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics."); NCAA v. Tarkanian, 488 U.S. 179, 197 n.18

the policy, with 71% of those polled in a 2013 Seton Hall survey saying that scholarships provided sufficient compensation for NCAA athletes.¹⁰ However, that support has dwindled. A March 2019 Seton Hall survey found 49% of those polled support compensating NCAA athletes who participate in revenue-generating sports, versus 46% who said they did not.¹¹ Meanwhile, a 2019 national survey from ScottRasmussen.com found that 52% of responders support paying those participating in revenue-generating sports.¹² As public support has increased, stakeholders in the decision have taken steps to further the desires of the general population.

As the attitude towards the NCAA's amateurism policy shifts, the policy needs to change with it. That change is coming—with or without the NCAA's help. Several states have introduced legislation prohibiting the NCAA from punishing athletes who market their names, images, and likenesses, with California's version passing in September 2019. Legislators have also begun planning federal change to collegiate name, image, and likeness rights. If the NCAA wants to control the situation, they need to act quickly and adequately, as inadequate action will result in disparate governmental action that results in uneven standards for collegiate athletes across the nation.

Part I of this Note examines the history of the debate over NCAA athlete compensation and analyzes the potential constitutional challenge of the California law by the NCAA. Part II will discuss possible consequences of the California law and related bills in other states, and will examine potential alternative methods of compensation for NCAA athletes as well as potential practical effects of all considered alternatives.

(1988) (The Court valued “. . . the NCAA's overriding function of fostering amateur athletics at the college level. . . . describ[ing] that function as ‘critical.’”); Bobby Chen, *Antitrust Law and the Future of the NCAA's Amateurism Rules*, REG. REV. (Feb. 21, 2019), <https://www.theregreview.org/2019/02/21/chen-antitrust-future-ncaa-amateurism-rules/> [<https://perma.cc/AN2N-JTZE>] (“Federal antitrust law has historically okayed [amateurism rules].”).

10. Daniel Roberts, *Poll: More People Than Ever Believe College Athletes Should be Paid*, YAHOO FIN. (Mar. 24, 2017), <https://finance.yahoo.com/news/poll-more-people-than-ever-believe-college-athletes-should-be-paid-172810243.html> [<https://perma.cc/2D93-7ZWQ>].

11. *Majority Feels Student Athletes Should be Compensated by Sneaker Companies for Wearing Their Brands: Less Support for Receiving Pay for Playing Revenue Producing Sports*, SETON HALL U. (Mar. 1, 2019), <https://www.shu.edu/sports-poll/upload/Did-Sneaker-Explosion-Hurt-Nike-Brand.pdf> [<https://perma.cc/25G6-SHYK>].

12. Scott Rasmussen, *52% Believe Big Time College Athletes Should be Paid*, SCOTTRASMUSSEN.COM (Mar. 27, 2019), <https://scottrasmussen.com/52-believe-big-time-college-athletes-should-be-paid/> [<https://perma.cc/36MN-SXVT>].

I. THE AMATEURISM POLICY: PAST AND PRESENT

As the public's view on collegiate amateurism has shifted, stakeholders have taken note and shifted, or tried to shift, the policy. This, for a short time, included the NCAA itself, which in October of 2011 authorized a \$2,000 stipend, above tuition, room, board, books, and fees for Division I athletes.¹³ This stipend would be paid by the school the athlete attends.¹⁴ However, amid challenges from member institutions about amateurism, budgets, and Title IX concerns, the NCAA delayed the stipend program until December of that year.¹⁵ The NCAA eventually expanded the stipend program to a range of \$2,000 to \$5,000¹⁶ to help cover the full, institution-calculated cost-of-attendance.¹⁷

Government actors have recently thrown their hats into the ring, with most action coming from California. In 2014, Judge Claudia Wilken of the Northern District of California, ruled that Division I football¹⁸ and men's basketball players were entitled to make money from their names, images, and likenesses.¹⁹ While this decision was quickly overruled,²⁰ it would prove to not be Judge Wilken's last say on the matter, as she explained in a later decision that *O'Bannon* does not foreclose the possibility of other compensation methods, such as grant-in-aid awards.²¹ In 2019, Judge Wilken ruled again on the matter, saying schools were welcome to offer educational-related aides and accessories not included in NCAA's cost-of-

13. *NCAA Shelves \$2,000 Athlete Stipend*, ESPN (Dec. 15, 2011), https://www.espn.com/college-sports/story/_/id/7357868/ncaa-puts-2000-stipend-athletes-hold [<https://perma.cc/KS9G-9YUU>].

14. *Id.*

15. *Id.*

16. Chris Isidore, *College Athletes Finally Getting Some Cash*, CNN (Sept. 4, 2015, 1:43 PM), <https://money.cnn.com/2015/09/04/news/companies/extra-cash-college-athletes/index.html> [<https://perma.cc/2EK9-X4Z8>].

17. John Charles Bradbury & Joshua D. Pitts, *Full Cost-of-Attendance Scholarships and College Choice: Evidence from NCAA Football*, 19 YALE J. OF SPORTS ECON. 977, 978 (2018).

18. This ruling only applies to Football Bowl Subdivision (FBS) member schools, not Football Championship Subdivision (FCS) schools, as the plaintiff class belonged to FBS member schools only. *O'Bannon v. NCAA (O'Bannon I)*, 7 F. Supp. 3d 955, 965 (N.D. Cal. 2014) *aff'd in part, vacated in part*, 802 F.3d 1049, 1076 (9th Cir. 2015). FBS schools are the top level of Division I college football, competing in post-season bowl games. FCS schools are the lower-level Division I football programs, playing for eligibility in a post-season, bracketed tournament.

19. *O'Bannon I*, 7 F. Supp. 3d at 1007–08.

20. *O'Bannon v. NCAA (O'Bannon II)*, 802 F.3d 1049 (9th Cir. 2015).

21. *In re: National Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-MD-2541 CW, 2016 WL 4154855 (N.D. Cal. Aug. 5, 2016).

attendance calculation formula,²² but could not pay actual or effectual salaries to their athletes.²³

On September 30, 2019, California Governor Gavin Newsom signed the Fair Pay to Play Act.²⁴ This law purports to prohibit California colleges and universities, even those that are NCAA members, from punishing college athletes who choose to make money from their names, images, or likenesses.²⁵ Other States, including Florida, Colorado,²⁶ and Nebraska,²⁷ have enacted their own versions of the law. Initially, the NCAA suggested it might challenge the California law on Commerce Clause grounds.²⁸ However, on October 29, 2019 the NCAA announced its board of governors “voted unanimously to permit students participating in athletics the opportunity to benefit from the use of their name, image and likeness in a manner consistent with the collegiate model.”²⁹ While the NCAA does not define the “collegiate model,” the phrase seems to refer to the amateurism policy of the NCAA and the fact that collegiate athletes must be students of the university first, athletes second.³⁰

22. These expenses include computers, science equipment, musical instruments, post-eligibility scholarships, tutoring expenses, and study abroad opportunities. *In re: Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1088 (N.D. Cal. 2019), *aff'd* 958 F.3d 1239, *cert. granted* 2020 WL 7366281.

23. *Id.* at 1087.

24. Jack Kelly, *Newly Passed California Fair Pay to Play Act Will Allow Student Athletes to Receive Compensation*, FORBES (Oct. 1, 2019, 13:36 PM), <https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-receive-compensation/#1804c03357d0> [<https://perma.cc/U9AG-6GRJ>].

25. Fair Pay to Play Act, Cal. S.B. 206 § 2(a)(1), 2019–20 Leg. (Ca. 2019).

26. Justin Casey, *Florida Says “Show Me the Money” Intercollegiate Athlete Name, Image and Likeness (NIL) Bill is Now Law*, JD SUPRA (June 30, 2020), <https://www.jdsupra.com/legalnews/florida-says-show-me-the-money-85725/> [<https://perma.cc/3823-4NSG>] (stating that Florida and Colorado have passed bills similar to the Fair Pay to Play Act).

27. Nebraska Fair Pay to Play Act, Legis. B. 962, 106th Leg., 2d Sess. (Neb. 2020).

28. Chris Bumbaca & Steve Berkowitz, *NCAA Sends California Governor Letter Calling Name, Likeness Bill ‘Unconstitutional’*, USA TODAY (Sept. 11, 2019, 10:51 AM), <https://www.usatoday.com/story/sports/ncaaf/2019/09/11/ncaa-sends-letter-calling-california-likeness-bill-unconstitutional/2284789001/> [<https://perma.cc/B5G8-B47Q>].

29. Matt Brown, *What the NCAA just said — and didn't say — about players getting paid*, SBINATION (Oct. 30, 2019), <https://www.sbnation.com/college-basketball/2019/10/30/20938975/ncaa-players-likeness-payment-rights-announcement>.

30. See Josephine R. Potuto et al., *What's in a Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student-Athletes*, 92 OR. L. REV. 879, 882 (2014).

A. The NCAA's Introduction of Amateurism

The amateurism debate is often focused around what may be one of the greatest marketing terms of modern time: “student-athlete.” The NCAA created this simple, yet brilliant term to help maintain its amateurism policy.³¹ However, deeper inside the term, is a much less pure meaning.

While current conversations surrounding football focus on the violence of the sport, it used to be much more violent, causing several injuries and deaths at the collegiate level.³² Football was so violent that several colleges and universities discontinued it, and the public demanded abolishment or sweeping change to the sport.³³ As public outcry grew, these complaints reached the Oval Office, prompting President Theodore Roosevelt to call college leaders to Washington, DC.³⁴ In late 1905, New York University's Chancellor gathered 13 colleges to make changes and, in late December 1905, 62 colleges and universities chartered the Intercollegiate Athletic Association of the United States (the IAAUS).³⁵ In 1910, the IAAUS changed its name to the National Collegiate Athletic Association.³⁶

The NCAA coined the term “student-athlete” in reaction to the Colorado Supreme Court's ruling that an injured football player was an employee of the University of Denver and therefore entitled to workman's compensation.³⁷ According to then-NCAA Executive Director Walter Byers, a driving force behind the “student-athlete” terminology: “The student-athlete was a term used to try to offset these tendencies for state agencies or other governmental departments to consider a grant-in-aid holder' to be an employee.”³⁸ The term was created to justify denying paying college athletes for the work they perform. By design, it is meant to

31. Mary Grace Miller, Comment, *The NCAA and the Student-Athlete: Reform is on the Horizon*, 46 U. RICH. L. REV. 1141, 1142 (2012).

32. *History*, NCAA (last updated Nov. 8, 2010), <https://web.archive.org/web/20110807060521/http://www.ncaa.org/wps/wcm/connect/public/ncaa/about%2Bthe%2Bncaa/who%2Bwe%2Bare/about%2Bthe%2Bncaa%2Bhistory>.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 83–84 (2006).

38. Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/> [https://perma.cc/AMW4-3URS].

be open to interpretation, as the word student implies they are similar to students at play and the term athlete is meant to give leeway to their classroom performance.³⁹

The NCAA pushed hard for the “student-athlete” moniker and, with it, its policy of amateurism. Before long, the term and the idea of amateurism were plastered all over the NCAA’s rules.⁴⁰ The Association began to fear having scholarship funds be deemed consideration for a playing contract.⁴¹ In response to its fears, the NCAA began requiring specific amateurism language in acceptances of athletic scholarships.⁴²

However, the NCAA itself has moved away from its strict amateurism policy and is inching ever closer to selective amateurism. College athletes who are also Olympic participants are allowed to keep any Olympic awards from their nations while maintaining their amateur status.⁴³ Tennis players may also accept prize money up to \$10,000 per year prior to their collegiate career⁴⁴ or up to “actual and necessary expenses” after enrolling full-time.⁴⁵ The NCAA’s amateurism policy also only extends to each sport individually.⁴⁶ For example, if an athlete is a professional baseball player but wants to play NCAA football, the athlete may receive financial assistance and maintain football eligibility, but could not play NCAA baseball.⁴⁷

39. Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/X8UD-GGC3>].

40. McCormick & McCormick, *supra* note 37, at 84.

41. See *Van Horn v. Indus. Accident Comm’n*, 33 Cal. Rptr. 169, 174 (Cal. Dist. Ct. App. 1963).

42. McCormick & McCormick, *supra* note 37, at 5 (citing WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 75 (1995)).

43. NCAA MANUAL, *supra* note 1, art. 12.1.2.1.4.2, 12.1.2.1.4.3.

44. NCAA MANUAL, *supra* note 1 art. 12.1.2.4.2.1

45. NCAA MANUAL, *supra* note 1 art. 12.1.2.4.2.2.

46. NCAA MANUAL, *supra* note 1 art. 12.1.3.

47. See *Garrison Lassiter*, UNIV. OF MIAMI FOOTBALL (last visited Jan. 16, 2020), <https://hurricanesports.com/sports/football/roster/garrison-lassiter/5181> [<https://perma.cc/LGS2-XJ5K>] (showing that a former professional baseball player was still eligible for an NCAA football roster).

B. The Marble Court

Throughout the years, the NCAA has received favorable rulings and decisions related—either directly or indirectly—to its amateurism policy. One of its most important victories came when it did not even know it was looking for one.⁴⁸ But before these victories, the NCAA faced losses as courts found that NCAA athletes enjoyed certain employment benefits.

1. College Athletes as Employees – The Nemeth and Van Horn Decisions

The NCAA devised its “student-athlete” moniker in response to a Colorado Supreme Court decision.⁴⁹ In *University of Denver v. Nemeth*⁵⁰ a college football player, who also was employed to work around the tennis courts,⁵¹ sustained a back injury during a football game.⁵² Nemeth maintained he was also employed to play football, and with his injury arising from his employment activity, he was entitled to workmen’s compensation.⁵³ The court found that, even if Nemeth was not employed to play football, his playing was a required part of his employment around the tennis courts, and because of that requirement, he was entitled to workmen’s compensation.⁵⁴

Despite the NCAA’s efforts to clearly establish that its athletes were students choosing to participate in intercollegiate sports and not employees while participating in their chosen sport(s) for workmen’s compensation purposes,⁵⁵ another court disagreed. In *Van Horn v. Industrial Accident Comm’n*,⁵⁶ Van Horn had stopped playing football but returned to the sport because he was offered a “pretty good deal to play football.”⁵⁷ Van Horn

48. Despite the underlying case being an antitrust decision, *NCAA v. Bd. of Regents of Univ. of Okla.* included language suggesting the amateurism policy was favored and would be upheld. 468 U.S. 85, 120 (1984).

49. McCormick & McCormick, *supra* note 37, at 83–84.

50. 127 Colo. 385 (1953).

51. *Id.* at 387.

52. *Id.*

53. *Id.* at 387–88.

54. *Id.* at 398–99.

55. See McCormick & McCormick, *supra* note 37, at 157.

56. 33 Cal. Rptr. 169 (Cal. Dist. Ct. App. 1963).

57. *Id.* at 170.

would receive at minimum \$50 for three of the four quarters of the school year as well as additional funds drawn out of an account marked for athletics throughout the school year.⁵⁸ His scholarship also required him to be a “potential athlete” and be recommended by his coach to the scholarship committee.⁵⁹ Those requirements effectively made playing football a requirement. Unfortunately, Van Horn died in a plane crash returning from a football game in Ohio.⁶⁰ On these facts, the court found Van Horn to be an employee and therefore eligible for death benefits.⁶¹

2. *The Supreme Court Supports Amateurism in the College World*

The NCAA’s first win for amateurism came at a time they did not know they were looking for one. At the time where the television industry was exploding, the NCAA controlled television rights for all their conferences and member institutions.⁶² When the College Football Association (CFA) negotiated a television deal outside of the NCAA’s plan, the NCAA threatened sanctions on any member institution that chose to follow the CFA’s television deal, and in turn, violate the NCAA television plan.⁶³ The NCAA further made it clear that despite violations relating specifically to these universities’ football programs, any sanctions imposed would not be so limited.⁶⁴ All-in-all, *Board of Regents* is an antitrust case about television rights, but this did not stop Justice Stevens from discussing amateurism in the opinion. While dicta, Justice Stevens made sure to mention the Court’s “respect for the NCAA’s historic role in the preservation and encouragement of intercollegiate *amateur* athletics,”⁶⁵ and that “[i]n order to preserve the character and quality of the ‘product,’ athletes must not be paid.”⁶⁶ The NCAA touted these words for years,⁶⁷ propping up what one

58. *Id.* at 171.

59. *Id.*

60. *Id.* at 170.

61. *Id.* at 175.

62. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 90 (1984) (“During those years the NCAA continued to exercise complete control over the number of games that could be televised.”).

63. *Id.* at 94–95.

64. *Id.* at 95.

65. *Id.* at 100–01 (emphasis added).

66. *Id.* at 102.

67. *See* Metro. Intercollegiate Basketball Ass’n v. NCAA, 339 F. Supp. 2d 545, 550 (S.D.N.Y. 2004); Marucci Sports, LLC v. NCAA, 751 F.3d 368, 374 (5th Cir. 2014).

commentator has called an “Oz-like façade” of amateurism and control.⁶⁸

3. Judge Wilken’s Role in the Debate

Judge Wilken of the Northern District of California has made quite a name for herself in the world of collegiate sports compensation. It started in *O’Bannon I*,⁶⁹ a case brought in 2009. Edward O’Bannon and co-plaintiffs challenged the rules that disallow players from receiving a share of the revenues the NCAA and schools earn from licensing the players’ “names, images, and likenesses in videogames, live game telecasts, and other footage.”⁷⁰ All plaintiffs involved played Division I men’s basketball or FBS football.⁷¹ In this antitrust case, Judge Wilken identified two distinct markets: the college education market and the group licensing market.⁷² The college education market is the market in which schools compete with each other to recruit the talent needed to fill a competitive roster.⁷³ The group licensing market is a robust one for professional athletes, but college athletes have been unable to tap into it. In this market space, athletes are able to group up and sell licenses to their names, images, and likenesses for purposes such as game broadcasts and video games.⁷⁴

Specifically, Judge Wilken addressed three separate potential channels Division I football and men’s basketball players could pursue: (1) live game broadcasts; (2) video games; and (3) game re-broadcasts, advertisements, and other archival footage.⁷⁵ Current contracts for broadcasting rights of live games already include name and image provisions, allowing broadcasters to utilize college athletes’ names, images, and likenesses (so long as they do not imply a commercial sponsorship).⁷⁶ The NCAA’s own expert witness said that these rights create value for the NCAA and broadcasters, leading

68. Branch, *supra* note 39.

69. *O’Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

70. *Id.* at 963.

71. *Id.* at 965.

72. *Id.*

73. *Id.* at 966. From 2007 to 2011, nearly all of the top-level high school football recruits went on to play FBS football, with a small percentage of 4-star recruits choosing FCS. *Id.* For basketball recruits in the same time-frame, no 4-or-5-star recruits went to a non-Division I school and less than 1% of 2-and-3-star recruits went to a non-Division I school. *Id.*

74. *Id.* at 968.

75. *Id.* at 968–71.

76. *See id.* at 968–69.

Judge Wilken to conclude that athletes could also derive value if allowed to negotiate for themselves.⁷⁷

The judge also found reason to believe a value-driven market could exist for NCAA video games.⁷⁸ A market had previously existed for EA-published video games before the NCAA pulled its intellectual property rights, supporting Judge Wilken's finding,⁷⁹ as the NCAA Football games alone had been generating approximately \$80 million per year in revenue before being discontinued in 2014.⁸⁰ Similarly, Judge Wilken found value in re-broadcasting games and events, partially because of the names and images of the athletes of those games.⁸¹ Overall, Judge Wilken clearly found a market exists for the names, images, and likenesses of the top-level athletes in the most popular NCAA sports. However, the Ninth Circuit overruled the name, image, and likeness portion of the district court's findings.⁸² For now, the issue of name, image, and likeness rights are at a judicial stand-still.⁸³

4. *The NCAA's Burden on Interstate Commerce*

In 1991, Nevada enacted a law which required any 40-state intercollegiate athletic association to provide certain procedural due process rights to any member institution and their associated individuals.⁸⁴ The NCAA challenged the constitutionality of the statute, claiming it violated the Commerce and Contracts clauses of the United States Constitution.⁸⁵ The Ninth Circuit laid out a test for whether an accused state statute violates the Commerce Clause *per se* and therefore must be struck down. The test is whether the statute: "1) directly regulates interstate commerce; 2)

77. *Id.* at 969.

78. *Id.* at 970.

79. *Id.*; see also Steve Berkowitz, *How EA Sports's NCAA Football video game could make a comeback*, USA TODAY (May 20, 2019), <https://www.usatoday.com/story/sports/2019/05/20/how-ea-sportss-ncaa-football-video-game-could-make-comeback/3704876002/> [<https://perma.cc/6QZT-EDSF>].

80. Berkowitz, *supra* note 79.

81. *O'Bannon I*, F. Supp. 3d at 971.

82. *O'Bannon v. NCAA (O'Bannon II)*, 802 F.3d 1049, 1079 (9th Cir. 2015).

83. Despite being about education-related benefits, a case being decided by the Supreme Court during the October 2020 Term could have implications on name, image, and likeness compensation. See *NCAA v. Alston*, No. 20-512 (U.S.).

84. *NCAA v. Miller*, 10 F.3d 633, 637 (9th Cir. 1993).

85. *Id.* at 638.

discriminates against interstate commerce; or 3) favors in-state economic interests over out-of-state interests.”⁸⁶ The court found that the Nevada statute regulates interstate commerce directly because it only affects interstate collegiate athletic associations.⁸⁷ Beyond the face of the statute, the Ninth Circuit acknowledged that the NCAA had long been held to affect interstate commerce by its very nature as an organization which markets and schedules events involving travel between states.⁸⁸

The Court also examined the practical effects of enforcement of the statute. Effectively, the NCAA would have two options: (1) enact a special set of rules for Nevada schools; or (2) use the rules prescribed by Nevada for all its member schools. The Court proclaimed that option one was a non-starter and that, to accomplish its mission, the NCAA would have to utilize option two.⁸⁹ As the Supreme Court has instructed, the critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state.⁹⁰ Nevada’s statute, the Ninth Circuit said, would force the NCAA to act outside of Nevada, going against this “critical inquiry.”⁹¹ The statute also violated the Commerce Clause because of a desire to protect “against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.”⁹² Because several other states had enacted or were proposing similar laws, the risk of inconsistent obligations between states constituted a Commerce Clause violation.⁹³

It has become clear that the federal courts prefer keeping amateurism alive in the NCAA, albeit with some exceptions. Further, the Ninth Circuit has made it obvious that, within its Circuit, the NCAA is protected from individual state action by the Commerce Clause. With these factors combined, it seems that, barring a massive shift in Commerce Clause jurisprudence, any changes to the amateurism policy would have to come from within the NCAA.

86. *Id.*

87. *Id.*

88. *Id.* (citing *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101–02, 104 (1984)).

89. *Miller*, 10 F.3d at 638–39.

90. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

91. *Miller*, 10 F.3d at 639.

92. *Id.* (citing *Healy*, 491 U.S. at 336–37).

93. *Id.* at 639–40.

C. Modern State Attempts at Change

Despite the Commerce Clause issues, states have still been attempting to force change themselves. The most notable of these came from California where, in February 2019, State Senator Nancy Skinner introduced the Fair Pay to Play Act.⁹⁴ On September 9, 2019 the California Assembly overwhelmingly passed the bill 72-0.⁹⁵ The California Senate soon followed, passing the bill 39-0 on September 11, 2019.⁹⁶ Governor Newsom then completed the process, signing the bill on September 30.⁹⁷

The Fair Pay to Play Act⁹⁸ contains several provisions, all relating to allowing specific college athletes to market their names, images, and likenesses. The class of athletes is broad, as it includes all college athletes that play for any non-community college team.⁹⁹ The statute also prohibits punishment of athletes by their respective institutions, conferences, or overarching intercollegiate association if the athlete chooses to market and accept payment for their name, image, or likeness.¹⁰⁰ It also prohibits punishments of schools for which those athletes play.¹⁰¹ The statute puts only a few specific limits on the marketability and earning capacity of the athletes. There are specific provisions for who may act as a student's agent and legal representative.¹⁰² There is also a prohibition on a student marketing themselves with a competitor of a company the school is already associated with.¹⁰³ The statute itself does not take effect until January 1,

94. Jason Scott, *California Lawmaker Introduces 'Fair Pay to Play Act'*, ATHLETIC BUS. (Feb. 2019), <https://www.athleticbusiness.com/college/california-lawmaker-introduces-fair-pay-to-play-act.html> [https://perma.cc/4SEP-6ACZ].

95. Steve Berkowitz, *California Assembly passes bill that brings state to verge of rules showdown with NCAA*, USA TODAY (Sept. 9, 2019), <https://www.usatoday.com/story/sports/2019/09/09/california-assembly-bill-allows-college-athletes-use-likeness/2269869001/> [https://perma.cc/HQH2-ETXG].

96. Bumbaca & Berkowitz, *supra* note 28.

97. Dan Murphy, *What California bill means for NCAA image and likeness debate*, ESPN (Oct. 1, 2019), https://www.espn.com/college-football/story/_/id/27585301/what-california-bill-means-ncaa-image-likeness-debate [https://perma.cc/PLL6-SDNS].

98. CAL. EDUC. CODE § 67456 (West 2019). The Nebraska Fair Pay to Play Act contains provisions that provide largely the same substantive rights. Nebraska Fair Pay to Play Act, NEB. REV. STAT. § 48-3601, *et seq.* (2020).

99. EDUC. § 67456(a)(2); Fair Pay to Play Act, Cal. S.B. 206 § 1(c) (2019).

100. EDUC. § 67456(a)(2).

101. *Id.* § 67456(a)(3).

102. *Id.* § 67456(c)(2)–(3).

103. For example, it seems unlikely that a student could enter into a deal with Nike if their school already has a contract with Adidas. *Id.* § 67456(c)(1).

2023¹⁰⁴ to allow the NCAA time to come up with its full response.¹⁰⁵

Since the California bill's introduction, several other states have introduced similar bills. A New York state senator proposed a bill in September 2020 which would not only give the same name, image, and likeness rights to college athletes, but also would require a 15% share of athletics revenues to be distributed to the athletes directly.¹⁰⁶ Meanwhile, one South Carolina legislator pre-filed a bill in December 2020.¹⁰⁷ The proposed law would add name, image, and likeness payments to the NCAA's allowance for an hourly wage as well as an annual amount of \$5,000 per sport played put in a trust to be disbursed after graduation.¹⁰⁸ By January 2020, there were at least 35 states considering similar legislation.¹⁰⁹

Various federal legislators also hopped on the pile. In 2019, Republican Congressman Anthony Gonzalez from Ohio announced his intention to introduce a bill that would allow college athletes to make money from endorsements.¹¹⁰ Also in 2019, North Carolina Congressman Mark Walker introduced the Student-Athlete Equity Act, which would have amended the tax code, removing certain tax exemptions from the NCAA or any school if they did not allow name, image, and likeness payments to athletes.¹¹¹ In 2020, Marco Rubio introduced the "Fairness in Collegiate Athletics Act."¹¹²

104. *Id.* § 67456(h).

105. Murphy, *supra* note 97.

106. Dan Murphy, *N.Y. senator proposes bill to pay college athletes*, ESPN (Sept. 18, 2018), https://www.espn.com/college-sports/story/_/id/27644345/ny-senator-proposes-bill-pay-college-athletes [<https://perma.cc/T4TZ-6TMP>].

107. Emily Bohatch, *Should College Athletes Be Paid A Stipend? SC Bill Could Give Them Up To \$25,000*, THE STATE (Dec. 15, 2020 5:00 AM), <https://www.thestate.com/news/politics-government/article247837735.html>.

108. *Id.*

109. Ross Dellenger, *Iowa Becomes Latest State to Introduce Athlete NIL Bill; Targeting July 1 Effective Date*, SPORTS ILLUSTRATED (Feb. 3, 2021), <https://www.si.com/college/2021/02/03/iowa-name-image-likeness-bill-ncaa>.

110. Dan Murphy, *Congressman to Propose Federal Legislation for Paying College Athletes*, ESPN (Oct. 2, 2019), https://www.espn.com/college-sports/story/_/id/27751454/congressman-propose-federal-legislation-paying-college-athletes [<https://perma.cc/QYM3-NJQ3>]. This bill attracted bipartisan support from Republican Florida Senator Marco Rubio Democratic Missouri Congressman Emanuel Cleaver. Joshua Nelson, *Former NFL player-turned-congressman plans bill on college athletes making money*, FOX NEWS (Oct. 31, 2019), <https://www.foxnews.com/media/anthony-gonzalez-college-athletes-paid-bill> [<https://perma.cc/6MFD-RDP9>].

111. See Jeremy Sheff, *The Well-Intended But Misguided Student-Athlete Equity Act*, HARVARD L. REV. BLOG (Sept. 11, 2019), <https://blog.harvardlawreview.org/the-well-intended-but-misguided-student-athlete-equity-act/> [<https://perma.cc/EHF4-UWN5>].

112. Marc Edelman, *Marco Rubio's Fairness In Collegiate Athletics Act Is Anything But What Its Name Implies*, FORBES (June 22, 2020, 10:00 AM),

None of these bills made it far before the end of the session.

Republican Senator Mitt Romney came out in support of a free market system for name, image, and likeness payments for college athletes.¹¹³ Partnering with Connecticut Democrat Chris Murphy, the two formed a working group to discuss potential federal action.¹¹⁴ Murphy eventually introduced the College Athlete Economic Freedom Act in February 2021.¹¹⁵ This Act goes further than the California law by not forbidding competing sponsorships.

1. The NCAA's Response

The NCAA gave conflicting responses to the Fair Pay to Play Act's movement through the California legislative process. Before Governor Newsom signed the bill, the NCAA sent a letter to his office claiming its passing "would result in [schools] being unable to compete in NCAA competitions" as well as saying that the law itself would be unconstitutional.

Yet, on October 29, 2019, the NCAA governing board released a statement alluding to a potential change in policy. In the release, the NCAA said that its Board of Governors had "voted unanimously to permit students participating in athletics the opportunity to benefit from the use of their name, image and likeness in a manner consistent with the collegiate model."¹¹⁶ Despite this seeming willingness to consider name, image, and likeness payments to its athletes, the NCAA has suggested it may still bring its constitutional claim against the California law and others like it.¹¹⁷ While

<https://www.forbes.com/sites/marcedelman/2020/06/22/marco-rubios-fairness-in-collegiate-athletics-act-is-anything-but-what-its-name-implies/> [<https://perma.cc/ELJ3-LARL>].

113. Steven Silver & Hera S. Arsen, *Is "Fair Pay to Play" Fair in College Sports? What California's New Law Means for the Future of Amateur Athletics*, NAT'L L. REV. (Nov. 9, 2019), <https://www.natlawreview.com/article/fair-pay-to-play-fair-college-sports-what-california-s-new-law-means-future-amateur?amp> [<https://perma.cc/93WN-M32E>].

114. Thomas Barrabi, *NCAA athlete pay debate: Why a political showdown is coming in 2020*, FOX BUSINESS (Jan. 3, 2020), <https://www.foxbusiness.com/sports/ncaa-athlete-pay-debate-2020-expert-predictions> [<https://perma.cc/RL8Z-5SV6>].

115. Murphy, *Trahan Introduce Legislation To Allow College Athletes To Make Money Off Their Name, Image And Likeness*, CHRIS MURPHY (Feb. 4, 2021), <https://www.murphy.senate.gov/newsroom/press-releases/murphy-trahan-introduce-legislation-to-allow-college-athletes-to-make-money-off-their-name-image-and-likeness> [<https://perma.cc/N7EN-MM7C>].

116. Brown, *supra* note 29.

117. *Questions and Answers on Name, Image and Likeness*, NCAA (Oct. 29, 2019), <http://www.ncaa.org/questions-and-answers-name-image-and-likeness> [<https://perma.cc/LN5Y->

the NCAA had originally planned to vote on name, image, and likeness reform in January 2021, it delayed the vote indefinitely, citing external factors.¹¹⁸

The NCAA also used troubling language in its announcement about name, image, and likeness rights. Such wording included: “[p]rotect the recruiting environment and prohibit inducements to select, remain at, or transfer to a specific institution” and “[m]aintain the priorities of education and the collegiate experience to provide opportunities for student-athlete success.”¹¹⁹ The quote about recruiting effects could suggest the NCAA will not adopt a policy which may affect recruiting. Similarly, the NCAA may claim that allowing such payments would necessarily interfere with athletes’ education as they focus on brand deals more than their studies. However, given the care and attention college athletes already must give to their sport, and to an extent ensuring they do not violate the current amateurism rules, any extra time and work, likely done by an agent and not the player themselves, is likely to have little true effect on an athlete’s classroom performance.

These sticking points on the constitutionality of the state laws and the NCAA’s own wording in its press release suggest that the Association may still be planning on limiting the amount or method of compensation a college athlete may receive for their name, image, and likeness.

AR2X].

118. Dan Murphy & Adam Rittenburg, *NCAA Delays Vote to Change College Athlete Compensation Rules*, ESPN (Jan. 11, 2021), https://www.espn.com/college-sports/story/_/id/30694073/sources-ncaa-delays-vote-change-college-athlete-compensation-rules [https://perma.cc/8UJW-M9C6]. External factors likely include antitrust concerns arising from a DOJ letter, *id.*, and a pending US Supreme Court case, Brief for Respondents at 11, *NCAA v. Alston*, Nos. 20-512, 20-520 (U.S. Nov. 9, 2020).

119. Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities, NCAA (Oct. 29, 2019), <http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities> [https://perma.cc/2SWA-5EGN] [hereinafter *Process to Enhance NIL*].

II. THE CONSTITUTIONALITY OF STATE ACTIONS AND THE ROUTES THE NCAA COULD – AND SHOULD – RUN

Despite the NCAA's policy shift, slight as it may prove to be, California's law is still on the books and no other states nor the federal government have suggested they will be halting their own efforts. As explained in Part I.C.i, *supra*, the NCAA has also suggested it may still challenge individual state laws. Because of the nature of the NCAA in relation to the Commerce Clause, the Association may be successful in any state statute challenge. However, the Commerce Clause may not protect the NCAA from federal action. The constitutionality of the laws, proposed and enacted, will be discussed in subpart A.

Beyond the potential effects of existing and new laws, a question about what the NCAA *should* do with allowances of name, image, and likeness payments arises. The California Fair Pay to Play Act has a delayed effective date, allowing the NCAA to develop its strategy. In the NCAA's October 2019 announcement about considering allowing name, image, and likeness payments, the Association gave its three divisions a January 2021 deadline to craft the rules they plan on using for name, image, and likeness payments.¹²⁰ The NCAA formed a working group until April 2020 whose mission was to gather feedback regarding how it should act.¹²¹ Alternatives for integration of name, image, and likeness payments into the collegiate model and my recommendation will be discussed in subpart B.

The choice of how to act goes beyond just a decision of allowing name, image, and likeness payments to college athletes into the method used to compensate (should that decision be made) and the practical effects of allowing any payments. While these practical effects will be discussed throughout subpart B, a large bulk of the discussion, specifically surrounding my preferred alternative, will be discussed in subpart C.

120. *Process to Enhance NIL*, *supra* note 119.

121. *Process to Enhance NIL*, *supra* note 119. If the NCAA reads this Note, please consider it to be feedback.

A. The Dormant Commerce Clause and State Name, Image, and Likeness Laws

The dormant Commerce Clause is a doctrine stating that only the United States Congress has authority to regulate interstate commerce.¹²² While the Constitution does not specifically mention a “dormant Commerce Clause,” it has long been a part of the understanding of Article I § 8 cl. 3.¹²³ In 1970, the Supreme Court established a balancing test to determine the validity of state action on interstate commerce.¹²⁴ Specifically, the dormant Commerce Clause applies “when a state law directly affects transactions that take place across state lines or entirely outside of the state’s borders.”¹²⁵ However the mere potential of a state law to control actions wholly outside the state’s borders gives rise to a dormant Commerce Clause violation.¹²⁶

The test for the dormant Commerce Clause begins with a question. Does the state statute: (1) regulate or discriminate against interstate commerce or is its effect to favor in-state economic interests; or (2) merely indirectly affect interstate commerce, despite an evenhanded state law?¹²⁷ If a state statute satisfies option one of the *Brown-Forman* question, then it violates the Commerce Clause *per se* and must be stricken down.¹²⁸ If the state statute satisfies option two, the *Pike* balancing test is used.¹²⁹

122. *Commerce Clause*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/commerce_clause [<https://perma.cc/UV5F-RVWX>].

123. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. 1, 71 (1824) (“[P]ower [to regulate commerce] can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.”).

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

125. *Daniels Sharpmart, Inc. v. Smith*, 889 F.3d 608, 614 (9th Cir. 2018) (quoting *S.D. Myers, Inc. v. City & Cty. of S.F.*, 253 F.3d 461, 467 (9th Cir. 2001)).

126. *NCAA v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993) (saying the potential for a Nevada law to affect commerce in other states is a violation).

127. *See Healy v. Beer Inst. Inc.*, 491 U.S. 324, 337 n.14 (1989) (quoting *Brown-Forman Distillers Corp. v. New Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

128. *Miller*, 10 F.3d at 639–40.

129. *Id.* at 638.

1. Most of the Fair Pay to Play Act Violates the Dormant Commerce Clause Per Se

The Ninth Circuit has made it clear that state regulation of a nationally uniform business is unconstitutional.¹³⁰ It has also made clear that the NCAA, by its very nature, is a nationally uniform business.¹³¹ California, being in the Ninth Circuit, will be subject to this precedent if the NCAA chooses to challenge its law. The Ninth Circuit is not alone in considering the NCAA an interstate actor—the Fifth Circuit and United States Supreme Court have both come to the same conclusion.¹³²

The Fair Pay to Play Act has eight sub-sections. Sub-section (a) allows name, image, and likeness payments and prevents punishment.¹³³ Sub-section (b) prohibits a school from directly paying an athlete for the student's name, image, and likeness.¹³⁴ Sub-section (c) allows athletes to retain the services of an agent.¹³⁵ Sub-section (d) makes clear that scholarships are not name, image, and likeness payments and that receiving said payments cannot lead to revocation of an athlete's scholarship.¹³⁶ Sub-section (e) prohibits collegiate athletes from entering into contracts with competitors of official school sponsors.¹³⁷ Sub-section (f) prohibits a school from preventing collegiate athletes' marketing of their own names, images, and likenesses via a team contract.¹³⁸ Sub-section (g) defines what schools are covered by the Fair Pay to Play Act.¹³⁹ Finally, sub-section (h) delays the effectiveness of the Act until January 1, 2023.¹⁴⁰

Of those sub-sections, (a)(2), (a)(3), (b), and (c) all make specific mention of a "group or organization with authority over intercollegiate

130. See *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 950 (9th Cir. 2013).

131. *Miller*, 10 F.3d at 639.

132. *Hennessey v. NCAA*, 564 F.2d 1136, 1150 (5th Cir. 1977); *NCAA v. Bd. of Regents of Univ. Okla.*, 468 U.S. 85, 102, 104 (1984) (finding that the NCAA was engaged in interstate commerce and thus subject to federal antitrust law).

133. CAL. EDUC. CODE § 67456(a) (West 2019).

134. *Id.* § 67456(b).

135. *Id.* § 67456(c).

136. *Id.* § 67456(d).

137. *Id.* § 67456(e).

138. *Id.* § 67456(f).

139. *Id.* § 67456(g).

140. *Id.* § 67456(h).

athletics.”¹⁴¹ Sub-section (a)(2) makes it clear that this phrase is meant to apply to the NCAA by adding “including, but not limited to, the National Collegiate Athletic Association” to the end of the general line.¹⁴² By making rules which intercollegiate athletic authorities—including the NCAA—must follow, California is attempting to regulate an interstate actor and interstate commerce. This attempted regulation makes the California law unconstitutional under Ninth Circuit precedent.¹⁴³

Sub-section (a)(1) violates this same rule. While it does not specifically mention the NCAA or an organization with authority over intercollegiate athletics, it does prohibit any California college from enforcing rules that prevent its athletes from earning name, image, and likeness compensation.¹⁴⁴ The rules for which enforcement is prevented would be promulgated by either the NCAA or NAIA¹⁴⁵ which require uniformity throughout the country. Therefore, with (a)(1) affecting a rule which needs to be uniform throughout the United States for it to be given proper effect, it would also satisfy option one of the *Brown-Forman* question, leading to it being unconstitutional.

Similarly, sub-section (d) affects the rules set forth by the NCAA. College athletes are deemed ineligible for play if they receive money for their name, image, or likeness.¹⁴⁶ Additionally, the NCAA specifically forbids the use of agents by college athletes.¹⁴⁷ Because the athlete, when ineligible, is no longer a “student-athlete,” the athlete also loses their athletic scholarship.¹⁴⁸ Sub-section (d) prevents nationally uniform

141. *Id.* § 67456(a)(2)–(c)(1).

142. *Id.* § 67456(a)(2).

143. *NCAA v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993); *c.f.* *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 950 (9th Cir. 2013).

144. EDUC. § 67456(a)(1).

145. The NAIA (National Association for Intercollegiate Athletics) is a governing body similar to the NCAA but composed primarily of smaller schools. While it would also be regulated by the California law, the NAIA is clearly not the focus of the Act.

146. *See supra* text accompanying note 2. “An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport; (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation” NCAA MANUAL, *supra* note 1, art. 12.1.2(a), (b).

147. NCAA MANUAL, *supra* note 1, art. 12.3.

148. NCAA MANUAL, *supra* note 1 art. 15.3.1.1; *see also* Eric Boehm, *A College Football Player Lost His Scholarship Because of YouTube Videos. Now He's Fighting Back.*, REASON (Dec. 2, 2017, 9:20 AM), <https://reason.com/2017/12/02/a-college-football-player-lost-his-schol/> [<https://perma.cc/49SR-GB6Y>] (describing how a college football player lost his scholarship for making

enforcement of the NCAA's rules, making it unconstitutional.

While sub-sections (e) through (h) do not violate the dormant Commerce Clause *per se*, they would still be stricken for other reasons. Namely, the remaining provisions, now holding no weight without the provisions allowing for name, image, and likeness payments without punishment, would be inseparable from the already stricken provisions. Therefore, with no provision being unobjectionable, the entire statute would have to be stricken if the NCAA challenges the law.¹⁴⁹

2. California's Potential Rebuttals

California may try to distinguish its statute from the Nevada law in question in *NCAA v. Miller* by stating that the Nevada law regulated the NCAA's ability to punish coaches and players while the Fair Pay to Play Act pertains only to actions between athletes and the third parties that would pay them.¹⁵⁰ However, this argument is likely miss the net. The California law clearly affects the NCAA's ability to punish the athletes and member schools. The law has provisions which prevent punishment of athletes and schools.¹⁵¹ For this argument, California has no leg to stand on.

The state may also mount a counter-attack by drawing comparison to other Commerce Clause cases which provide more antitrust protections than federal law does.¹⁵² Specifically, Professor Chris Sagers points to *Association des Eleveurs de Canards et D'oies du Quebec v. Harris*, a Ninth Circuit case in which the court decided that regulation of production in-state does not affect production in other states.¹⁵³ However, despite Sager's claim, the fight over name, image, and likeness still fits more in-line with *Miller* because of the unique status given to the NCAA in comparison to

monetized YouTube videos).

149. *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993).

150. Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12> [<https://perma.cc/VLY8-3DS8>].

151. *See, e.g.*, EDUC. §67456(a).

152. Chris Sagers, *Letter to Gavin Newsom in Reply to the NCAA: Constitutionality of California SB 206, the "Fair Pay to Play Act,"* CLEVELAND-MARSHALL C. OF L., CLEVELAND ST. U. 5 (Sept. 27, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3460551 [<https://perma.cc/9AUS-GAFJ>] (a letter written upon request of the sponsoring California state senator to Governor Newsom).

153. *Id.* at 4-5.

other private businesses and regulators.

California could also attempt to move its law out of a *per se* violation and into the *Pike* balancing framework. Getting out of the *per se* violation will be a high hurdle for California, as the statute specifically mentions the NCAA.¹⁵⁴ The state could argue that the law does not target the NCAA, but merely mentions it by way of example. In doing so, it would be trying to argue that the law does not regulate or discriminate against interstate commerce because the law itself only applies to California institutions. Further, if given time, California could try to argue that the law does not favor in-state economic interests. It would do so by showing that no recruits were swayed by the prospects of selling their name, image, or likeness while playing for a California school. This would, most likely, be a near-impossible showing unless some sort of national rule allows for the same name, image, and likeness payments the Fair Pay to Play Act does, which would make the entire argument moot.

If California is able to avoid a *per se* violation and use the *Pike* balancing test, it could have an interesting argument. In 1981 the Supreme Court, analyzing under the *Pike* balancing test, declared an Iowa law unconstitutional for violating the Commerce Clause.¹⁵⁵ The Iowa law generally prohibited the use of 65-foot trucks in the state.¹⁵⁶ In finding that Iowa's law substantially burdened interstate commerce, the Court took issue with the law being "out of step with the laws of all other Midwestern and Western States."¹⁵⁷

If other states, preferably all states, follow California's lead and pass similar laws, using the *Pike* balancing test, California may be able to argue that by being in step with other states, there is no burden on interstate commerce. Even with few other states enacting similar laws, California may have an argument to make. The Court likely chose to use the "Midwestern and Western" designations because the statute in question regulated something inherently geographic—driving and interstate travel. The question in a challenge to the Fair Pay to Play Act is less geographic in nature, instead having more to do with where potential recruits go. If states with colleges that already attract athletic recruits pass a law substantially

154. EDUC. § 67456(a)(2).

155. *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 678–79 (1981).

156. *Id.* at 665.

157. *Id.* at 671.

similar, or identical to, the California law, California could argue there is no substantial burden on interstate commerce. This same argument would also help to rebut the Ninth Circuit's concern in *NCAA v. Miller* regarding the risk of inconsistent obligations between states.¹⁵⁸ The *Kassel* theory is seemingly untested, and the *Miller* argument may require identical laws to be passed in the states.

Overall, even with California's best argument, it would be relying on an untested theory that would require rebutting a strong presumption of a law affecting the regulations of the NCAA being a *per se* violation of the Commerce Clause. *Miller* would certainly control.

3. Nebraska's Law May Produce a Different Result

The Eighth Circuit has not heard a dormant Commerce Clause case in which the NCAA is a party. Instead, to examine Nebraska's law, the general dormant Commerce Clause test must be used. Like the Ninth Circuit, the Eighth Circuit uses a two-tier test.¹⁵⁹ Because the Nebraska law only applies to schools within its borders, it does not facially discriminate against interstate commerce. Therefore, the analysis moves to whether the law discriminates on its effect or purpose. In *IESI*, an out-of-state corporation claimed Arkansas had no legitimate purpose in enacting a regulation.¹⁶⁰ The corporation pointed to a negative comment about the out-of-state company from a District board member.¹⁶¹ However, the District was able to point to a "wholly legitimate interest" of regulating waste in-and-out of the state.¹⁶²

The Eighth Circuit has said a regulation on intrastate transmission of electricity did not violate the Commerce Clause in part because states, not a federal agency, retain authority over location and construction of electric lines.¹⁶³ The right of publicity flows from the states, not the federal government.¹⁶⁴ Analogizing to *LSP Transmission*, a pathway to validating

158. *NCAA v. Miller*, 10 F.3d 633, 639–40 (9th Cir. 1993).

159. *IESI AR Corp. v. Nw. Ark. Reg'l Solid Waste Mgmt. Dist.*, 433 F.3d 600, 604 (8th Cir. 2006).

160. *Id.*

161. *Id.* The board member expressed the opinion that IESI was "a big company from out of state." *Id.*

162. *Id.* at 604–05.

163. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1031 (8th Cir. 2020) (citing *Ill. Com. Comm'n v. FERC*, 721 F.3d 764, 773 (7th Cir. 2013)).

164. Andrea Stein Fuelleman, *Right of Publicity: Is Behavioral Targeting Violating the Right*

the Nebraska Fair Pay to Play Act shows itself—states retain authority over name, image, and likeness rights, thus making this a legitimate state interest.¹⁶⁵ The Eighth Circuit also seems hesitant to use the *Pike* balancing test to invalidate a state law in general, noting that the Supreme Court has rarely done so.¹⁶⁶ Of course, with existing Ninth Circuit precedent in its favor, the NCAA will almost certainly ask the Eighth Circuit to adopt the Ninth Circuit’s understanding of the NCAA’s role in interstate commerce as a *de facto* regulator. The NCAA may be facing a circuit split.

B. The NCAA Should Support Its Athletes

While the NCAA may not have to follow the California law, it should still take action to support its athletes. While athletics scholarships certainly help those who receive them, not every college athlete gets an athletic scholarship. As of March 2018, only 59% of Division I athletes and 62% of Division II athletes received some form of athletic scholarship.¹⁶⁷ While Division III athletes are not eligible for athletic scholarships, 80% of those athletes received some form of scholarship.¹⁶⁸ Of the Division I and II athletes receiving athletic scholarships, likely only a small percentage were for the full cost of attendance.¹⁶⁹ This is because the NCAA limits the number of scholarships each school can give out. For Division I, these rules are set forth in bylaw 15.5.¹⁷⁰ However, in general, there are fewer scholarships available than members of the team.¹⁷¹

Athletes still must pay for tuition, books, fees, dinner with friends, going out, and every other expense of college. While the NCAA technically permits athletes to have a job, that job may be realistically unobtainable.

to Control Your Identity Online, 10 J. MARSHALL REV. INTEL. PROP. L. 811, 819 (2011).

165. The Eighth Circuit made this ruling based on a regulation which would uphold the status quo. *LSP Transmission*, 954 F.3d at 1031. Here, the court would be reversing the status quo.

166. *Id.* (quoting *S. Union Co. v. Mo. Pub. Serv. Comm’n*, 289 F.3d 503, 508 (8th Cir. 2002)).

167. *NCAA Recruiting Facts*, NCAA, <https://collegiatewaterpolo.org/wp-content/uploads/2020/07/NCAARECRUITING-FACT-SHEET-WEBSITE.pdf> [<https://perma.cc/93UA-LF3M>].

168. *Id.*

169. *Athletic Scholarships: Everything You Need to Know*, NCSA, <https://www.ncsasports.org/recruiting/how-to-get-recruited/scholarship-facts#>.

170. NCAA MANUAL, *supra* note 1, art. 15.5.1.10.1.

171. For example, Division I baseball is limited to 11.7 total scholarships to be divided among an average of 36 players. *Baseball 2020*, SCHOLARSHIP STATS.COM, <http://scholarshipstats.com/baseball.html> [<https://perma.cc/29HT-RLKN>].

Athletes are not permitted to use their name, image, and likeness in connection with any outside employment.¹⁷² Further, many athletes are already spending 30–50 hours per week working on their sport, despite the NCAA’s claim that athletes are limited to 20 hours per week.¹⁷³ With that amount of time spent devoted just to their sport, plus any time devoted to academics, getting a job is an unrealistic possibility for many college athletes.

But some “athletes” already affiliated with universities on a varsity level are already permitted to earn compensation for their names, images, and likenesses—gamers. Varsity collegiate e-sports started in 2014 at Robert Morris University in Illinois with a League of Legends team.¹⁷⁴ Since then, at least 100 other schools have started programs.¹⁷⁵

These e-athletes are not governed by the NCAA.¹⁷⁶ Therefore, there is nothing preventing these varsity athletes from making money from their names, images, and likenesses. In fact, collegiate League of Legends player Julien¹⁷⁷ has a Twitch page, on which advertisements run and he solicits donations. In contrast, if an NCAA athlete attempted to monetize videos of their sport, it would result in a sanction.¹⁷⁸ If the NCAA truly wants to “[a]ssure student-athletes are treated similarly to non-athlete students”¹⁷⁹ it would have to say that playing a sport sanctioned by them is compensation comparable to what they would earn otherwise or, preferably, should start treating their athletes like other collegiate athletes.

172. NCAA MANUAL, *supra* note 1, art. 12.4–12.5.

173. Andrew Zimbalist, *The NCAA Sports Model Is Broken, And It's Time For Congress To Step In*, FORBES (Dec. 20, 2019, 8:00 AM), <https://www.forbes.com/sites/andrewzimbalist/2019/12/20/the-ncaa-sports-model-is-broken-and-its-time-for-congress-to-step-in/#4888baeb3d09> [<https://perma.cc/GS5H-FJS8>].

174. Sean Morrison, *List of varsity esports programs spans North America*, ESPN https://www.espn.com/esports/story/_/id/21152905/college-esports-list-varsity-esports-programs-north-america [<https://perma.cc/KA6M-7TUE>].

175. *Id.*

176. Twitter Direct Message from David Kirk, Esports Program Dir., Illinois State Univ. to author (Jan. 25, 2020) (on file with author).

177. Julien, GAMEPEDIA, <https://lol.gamepedia.com/Julien> [<https://perma.cc/EUL6-YBAB>].

178. See Inside the NCAA (@InsidetheNCAA), TWITTER (July 31, 2017, 3:40 PM), <https://twitter.com/InsidetheNCAA/status/892122868355657728>.

179. *Process to Enhance NIL*, *supra* note 119.

1. The NCAA Has Options

The NCAA needs to act now by allowing its athletes, who help the Association generate revenue in the ballpark of one billion dollars,¹⁸⁰ to make money off of themselves.¹⁸¹ The NCAA has several options to help accomplish this goal ranging from severely stunted name, image, and likeness rights to allowing full-blown salary payments. There are a wide array of options just within the name, image, and likeness sphere of possibility. Each option follows a basic checklist of items: (1) receive payment now or deferred payment; (2) individual or collective payment; and (3) individual or collective bargaining.¹⁸²

a. Let the NCAA Rule

The most restrictive option is to have the NCAA itself negotiate name, image, and likeness rights on behalf of all its athletes for, example, a video game. The money received would then be put into a separately earmarked account and distributed equally to each athlete at such a time where all athletes for that year are no longer eligible for NCAA competition. In this case, the NCAA would effectively be acting as the athletes' agent. Further, because the money is deferred and controlled by the NCAA, the athletes would all still essentially be amateurs. By keeping the athletes "amateurs," this plan would fall into the "collegiate model" the NCAA hopes to maintain

180. Steve Cameron, *The NCAA brings in \$1 billion a year—here's why it refuses to pay its college athletes*, BUS. INSIDER (Mar. 26, 2019, 9:14 AM), <https://www.businessinsider.com/ncaa-college-athletes-march-madness-basketball-football-sports-not-paid-2019-3> [<https://perma.cc/YPY4-TPGC>].

181. This need has only been intensified by the COVID-19 pandemic, as various conferences canceled or postponed their 2020 football seasons, the 2020 NCAA basketball tournament was canceled, and spring 2020 sports were barely started or not played at all, potentially affecting athletes' draft prospects and professional earning potentials. See Adam Epstein, *Coronavirus is forcing the biggest global sports shutdown since World War II*, QUARTZ (Mar. 11, 2020), <https://qz.com/1816538/coronavirus-is-shutting-down-sports-from-soccer-to-ncaa-basketball/> [<https://perma.cc/F2XE-Y56N>].

182. Collective bargaining for college athletes is a separate topic too wide for the scope of this Note. Northwestern Football players have tried in the past to unionize, but were ultimately denied. *Northwestern Football Union Timeline*, ESPN (Aug. 17, 2015), https://www.espn.com/college-football/story/_/id/13456482/northwestern-football-union-line [<https://perma.cc/3J5R-HCKF>]. Name, image, and likeness rights for college athletes may re-open the path, whether it be through a union or trade association. See generally Maureen A. Weston, *Gamechanger: NCAA Student-Athlete Name & Likeness Licensing Litigation And The Future Of College Sports*, 3 MISS. SPORTS L. REV. 77, 108 (2014).

in whatever plan it announces by 2021.¹⁸³ This option also has a certain level of financial benefit to the athletes. Because the NCAA would be pooling that money together, they could put it in investment vehicles, increasing the amount of payout.

However, this plan is not without issues. First and foremost, this option would equalize every athlete. Each athlete would not make money off themselves, but off the strength of the NCAA as a brand. Therefore, it is a near certainty that a player like Joe Burrow¹⁸⁴ would receive less money than if he got to negotiate on his own while someone like Toby Clark¹⁸⁵ would likely make much more than if he were to negotiate on his own. Due to the deferment, this option also fails to help college athletes financially while they're still in college. Additionally, the NCAA may not be as inclined to fully maximize value in any deal it negotiates, cutting into the amount an athlete would receive.

While this restrictive option certainly has its benefits, the drawback of not allowing athletes to capture their own respective values and not allowing athletes to use the money they generate while still in school outweigh the benefits. To get to a better solution, the means will need to be less restrictive.

b. Division by Division

There are a few options to lessen restrictions. One way is to get more specific with who the payments will go to, and therefore the value the payments will be based off. For example, instead of negotiating for the whole NCAA, each division could separately negotiate. Assuming the same deferment and all-athlete restrictions apply, this would only slightly alter the situation for the top Division I players, as their received value would be diminished by players at smaller Division I schools who would likely not receive the same amount on their own. Greater change would be felt by Division II and III athletes, as their values would not be inflated by the brand

183. *Process to Enhance NIL*, *supra* note 119.

184. Joe Burrow was the starting quarterback for the 2020 FBS National Champion Louisiana State University football team. *Joe Burrow*, LSU SPORTS, <https://lsusports.net/sports/football/roster/joe-burrow/20215> [<https://perma.cc/G4PJ-Q932>].

185. Toby Clark was a freshman football player at Washington University in St. Louis who appeared in 3 Division III football games during the 2019-2020 season. *Toby Clark*, WASHU, https://www.washubears.com/sports/fball/2019-20/bios/clark_toby_86v8 [<https://perma.cc/8DR9-Y2XX>].

values of the top Division I programs.

This option would help maintain true value. This helps maintain another aspect of the NCAA's stated mission in looking into allowing for name, image, and likeness payments. In its press release, the NCAA said any change should "[a]ssure student-athletes are treated similarly to non-athlete students unless a compelling reason exists to differentiate."¹⁸⁶ The average student with a market for their name, image, and likeness (for example, a member of the band) is likely to have a smaller, less valuable market at a Division II or III school compared to one at a Division I school purely because of the value of the school name.¹⁸⁷

c. Let the Conferences, Schools, or Teams Decide

Getting more specific, instead of having an NCAA body negotiate, each conference could negotiate for its players. This plan would get closer to the true value derived from athletes. Every conference is different, and generates different levels of revenue due, mostly, to athletic prestige of the member schools. For example, the Southeastern Conference (SEC), home of athletic powerhouses like Alabama, Louisiana State, and Kentucky, generates around \$660 million each year in revenue.¹⁸⁸ Meanwhile, the Missouri Valley Conference (MVC), home of Loyola-Chicago and North Dakota State,¹⁸⁹ brings in around \$11 million per year.¹⁹⁰ Athletes in the

186. *Process to Enhance NIL*, *supra* note 119.

187. See Potuto, *et al.*, *supra* note 30, at 971 (suggesting that part of an athlete's derived value comes from the institution they play for). At times, of course, a particular player can break that trend. For example, Jacob Tucker, a Division III athlete, won the 2011 Dunk Contest at the NCAA Division I Final Four, creating a much larger potential name, image, and likeness market for him compared to most other Division III basketball players. Brian Floyd, *Jacob Tucker, Of Illinois College, Wins 2011 NCAA Dunk Contest At Final Four*, SBNATION (Apr. 1, 2011, 9:15 AM), <https://www.sbnation.com/2011-ncaa-tournament/2011/4/1/2084207/jacob-tucker-2011-ncaa-dunk-contest-video-final-four-illinois-college> [<https://perma.cc/GY6K-QPV2>].

188. Steve Berkowitz, *The SEC has record revenue in 2018, but Big Ten schools rake in more per-school distribution*, USA TODAY (Feb. 1, 2019), <https://www.usatoday.com/story/sports/ncaaf/2019/02/01/sec-passed-big-ten-per-school-distribution-after-record-revenue/2743885002/> [<https://perma.cc/48MX-ZG3B>].

189. North Dakota State University is a member of the MVC for football only. MO. VALLEY FOOTBALL CONF., <https://valley-football.org> [<https://perma.cc/X7PU-3SB8>].

190. Jay Rigdon, *Loyola's Final Four run means years of increased revenue for Missouri Valley Conference members*, AWFUL ANNOUNCING (Mar. 29, 2018), <https://awfulannouncing.com/ncaa/loyolas-final-four-run-means-years-of-increased-revenue-for-missouri-valley-conference-members.html> [<https://perma.cc/B2FP-JAB6>].

SEC are typically better recruits¹⁹¹ and better professional prospects¹⁹² than those in the MVC. The greater historic prestige also leads to larger probable markets for players' names, images, and likenesses at schools that play in the SEC (or other large, historically successful conferences).

This option would be largely similar to having the NCAA negotiate deals but would better capture value of each athlete because it is more tied to the value they produce. Further, with fewer schools, and therefore athletes, to spread the payout to, each athlete's value would be better captured since it would not be affected by athletes in different conferences.

An even more specific version of this is letting the schools themselves decide. In fact, the California law may implicitly cause just this. Because athletes' personal deals cannot violate their school's sponsorship deals,¹⁹³ it is entirely possible for a school to simply negotiate away the athletes' ability to negotiate for themselves by making every imaginable partnership themselves.¹⁹⁴ Then, athletes could only talk to the school's official sponsors, cutting their market to one source and limiting potential earnings. This option would also help keep school spirit and unity intact, as all athletes would receive the same amount of money. It would also align with the NCAA's stated goal of "[e]nhanc[ing] principles of diversity, inclusion[,] and gender equity."¹⁹⁵ Just because your chosen sport may not be as popular as others would not mean you make less. However, a complication may arise when athletes who drive revenue to the school earn the same amount

191. *SEC Commitments – 2019*, ESPN http://www.espn.com/college-sports/football/recruiting/conference/_class/2019/id/8 [<https://perma.cc/QA9S-P7FQ>] (showing the grades, and number of, football recruits at SEC schools); *Missouri Valley Commitments – 2019*, ESPN, http://www.espn.com/college-sports/football/recruiting/conference/_class/2019/id/21 [<https://perma.cc/T2XP-D777>].

192. Spencer Parlier, *Colleges most represented on 2019 NFL rosters*, NCAA (Jan. 1, 2020), <https://www.ncaa.com/news/football/article/2019-09-03/colleges-most-represented-2019-nfl-rosters> [<https://perma.cc/24CR-VGN4>]; *28 From Valley Schools on NFL Rosters*, MO. VALLEY FOOTBALL CONF., <https://valley-football.org/news/2018/9/2/football-28-from-valley-schools-on-nfl-rosters.aspx> [<https://perma.cc/5KAM-5HWS>].

193. CAL. EDUC. CODE § 67456(e) (West 2019).

194. I have greater concern over just this possibility in the wake of Michigan State's men's basketball team being presented by Rocket Mortgage. Greta Anderson, *Michigan State Men's Basketball Will Be 'Presented by Rocket Mortgage'*, INSIDE HIGHER ED (Mar. 15, 2021), <https://www.insidehighered.com/quicktakes/2021/03/15/michigan-state-men%E2%80%99s-basketball-will-be-%E2%80%98presented-rocket-mortgage%E2%80%99> [<https://perma.cc/FHQ5-VFPC>].

195. *Process to Enhance NIL*, *supra* note 119.

as those who do not come close to the same revenue levels.¹⁹⁶

More specific yet, each individual sports team could negotiate as a unit. This option would allow players that may contribute from a less prominent position, like an offensive lineman, to reap the reward for some of the benefit he provides his quarterback and running back derive by blocking for them. This plan would also help keep team unity up while earning more money, as all players would receive the same amount and could inspire the whole team to perform better to help with negotiations for the next year.

The options discussed above have gotten increasingly individualized, each better capturing an individual athlete's value than the one before. However, there still is a better option which best captures individual value.

d. Athletes Should Make Their Own Decisions

The best way to guarantee athlete value is fully captured would be to allow each individual athlete to negotiate their own name, image, and likeness deals. Even assuming a deferred payment system, the athlete would be able to collect the money quicker (but still not during their time as an NCAA athlete). However, at this point especially, the "collegiate model" seems to be thrown by the wayside. At the same time, this option gets college athletes closer to being able to do what every other student at their school can do—sell their own name, image, and likeness however and whenever they want.

This purely-athlete system is not without its issues. Athletes could sign with competitors of their school's official partner, leading to smaller markets for school-company partnerships and generating less revenue for schools' athletics programs to put towards scholarships for athletes. Beyond that, negotiating and performing these deals may take more time away from athletes. Eventually, the athletes will have to decide how to split time between their health, their sport, their studies, and their money-making method. Likely, health and school will be the ones to suffer.

This option still does not help athletes afford to live during college. For that, the financial deferment needs to be eliminated. While doing this would

196. For example, at FBS schools the average football team generates more revenue than the next 25 sports combined. Cork Gaines, *The average college football team makes more money than the next 25 college sports combined*, BUS. INSIDER (Oct. 20, 2016, 11:08 AM), <https://www.businessinsider.com/college-sports-revenue-2016-10> [https://perma.cc/6V7M-2EMA].

move college athletes further from amateurism, it would help ensure they are treated more like their non-athlete peers. It gives athletes more power over themselves, and for those elite athletes that are more likely to go to their respective professional league, it could help them develop their budgeting skills and money-consciousness before being given thousands or millions as soon as they step off campus.

But none of that happened. Instead, in a bitterly ironic turn, Kent State corresponds almost perfectly with the Supreme Court's lurch away from its formative First Amendment ideals and toward a new, utterly different set of priorities that would come to define First Amendment law's second half century.

2. What the NCAA Should Do

The NCAA has several options beyond those laid out above. And the best one, for the NCAA, its member institutions, and athletes, is to adopt the California Fair Pay to Play Act as the official NCAA rule. The California law does a great job of allowing each athlete to fully capture their own independent value by allowing them to negotiate for themselves. Without a deferred payment provision, the Act also allows all athletes, regardless of whether they have a full scholarship, the opportunity to lessen their debt burden and better enjoy their time in college. However, by its subsection (e) prohibitions, the California law also removes the competing-sponsors problem seen in Part II.B.i.d, *supra*. Full adoption of the California law may result in some other, unique consequences, however.

C. Potential Practical Effects of Adoption of the Fair Pay to Play Act

Fully adopting the Fair Pay to Play Act would have real-world effects beyond allowing athletes to make money off themselves. And while some of these effects likely have no effect on its adoption, others may be stumbling blocks.

1. Will It Play in Peoria?

One such effect would be a likely change in the way college athletics recruiting occurs. Notably, this is an effect the NCAA wants to avoid.¹⁹⁷ This section's title was chosen for a reason. The titular saying is about the mid-size city Peoria, Illinois. Peoria is not home to a lot, but it does house MVC member Bradley University and Fortune 100 company Caterpillar.¹⁹⁸ It is certainly not hard to imagine Caterpillar, given the opportunity, wanting to help its hometown university recruit better talent. And a potential partnership with athletes is not hard to imagine: "Just like our trucks, Darrell Brown¹⁹⁹ doesn't stop."²⁰⁰

The underlying feeling holds true for other teams. For example, Bradley's MVC peer and nearby neighbor, Illinois State University is in Normal, Illinois. Normal's twin city, Bloomington, Illinois, is home to two large insurance providers, Country Financial and State Farm. State Farm is no stranger to sports-related advertising, as they already have commercials with NFL star Aaron Rodgers and NBA star Chris Paul.²⁰¹ At a school where the business school building's name is the "State Farm Hall of Business,"²⁰²

197. *Process to Enhance NIL*, *supra* note 119.

198. While Caterpillar's executives left Peoria in 2018, Caterpillar still considers Peoria "home." Steve Tarter, *Caterpillar's Move Left Behind 12,000 Workers*, DAILY HERALD (Oct. 27, 2018, 7:43 AM), <https://www.dailyherald.com/news/20181027/caterpillars-move-left-behind-12000-workers> [<https://perma.cc/PE2P-U8XY>].

199. Darrell Brown was a starting guard for the Bradley Braves' basketball team, leading the team in minutes. *2019-20 Men's Basketball Cumulative Statistics*, BRADLEY UNIV. <https://bradleybraves.com/sports/mens-basketball/stats> [<https://perma.cc/7EQS-52X4>].

200. I apologize for a terrible marketing campaign. I am a law student, not a sports marketing expert.

201. State Farm Insurance, *Rodgers Rate (:30) | State Farm® Commercial*, YOUTUBE (Sept. 10, 2019), <https://www.youtube.com/watch?v=dt9rfHBmTuw> [<https://perma.cc/WAK3-BC3B>]; Merritt Productions, *Deer State Farm® Commercial featuring Chris Paul and Oscar Nuñez*, YOUTUBE (Feb. 5, 2019), <https://www.youtube.com/watch?v=yiYGxlr74mw> [<https://perma.cc/44MJ-R8VA>].

202. *State Farm Hall of Business*, ILLINOIS STATE UNIVERSE (last visited Apr. 4, 2021),

it is not unimaginable that State Farm would want to help its local school recruit better talent if the NCAA allowed it.

State Farm could help by pre-approving talent for a potentially lucrative sponsorship deal that would allow players to appear in commercials with the aforementioned sports stars. It is hard to imagine that an 18-year-old recruit would not jump at the chance to be able to meet a legend in the sport they play or even are just a fan of. This idea is applicable outside of central Illinois as well. Any college in a larger metropolitan area or a smaller metro area with a large corporate presence could see similar benefits due to the newly existent college athlete name, image, and likeness market in the local market.

However, the plan likely will not have a huge effect on recruiting. College sports are largely a self-feeding loop. The schools that are already athletic powerhouses get the best recruits and therefore have the best chance of competing in the near future. Recruits want to compete soon as well, so they choose to go to an already impressive program. Couple near-guaranteed success with incredible facilities²⁰³ and better professional prospects²⁰⁴ and you start to see the top-recruit cycle develop. Any real change in the current recruiting landscape will be slow and systematic, not something that happens overnight.

<https://maps.illinoisstate.edu/locations/business/> [<https://perma.cc/CT8A-2F8P>].

203. Bud Elliott, *How teams like Alabama convince 5-star recruits to commit and sit on the bench*, SBNATION (Jan. 15, 2016, 9:39 AM), <https://www.sbnation.com/college-football-recruiting/2016/1/15/10774592/alabama-recruiting-playing-time-elite-star-signing-day> [<https://perma.cc/WV8X-TSAF>].

204. See *SEC Commitments*, *supra* note 191.

2. *It's in the Game*

The EA-published NCAA football games were massively popular when they were still being sold as late as 2014.²⁰⁵ Production of the video game stopped in 2013 with fears of legal issues surrounding potentially unauthorized use of college athletes names, images, and likenesses surfacing.²⁰⁶ As evidenced by social media users throughout the process of the passing of the Fair Pay to Play Act, fans miss the football game and want it back.²⁰⁷

In January 2021, EA announced it would be returning to the college game.²⁰⁸ While it partnered with Collegiate Licensing Company to ensure access to FBS school names, traditions, uniforms and playbooks, EA plans to forego use of player names, images, and likenesses.²⁰⁹ EA plans to monitor the the name, image, and likeness “discussion,” but any eventual decision will not impact the game’s release.²¹⁰ Multiple schools, including powerhouse Notre Dame, announced they will not be part of the video game until rules surrounding name, image, and likeness are settled.²¹¹ While the video game may not directly impact the NCAA, having top programs like Notre Dame not be part of the game could hurt the NCAA’s image.

205. See Bryan Lawver, *NCAA Football's Return has Overwhelming Player Support on Twitter*, SCREEN RANT (July 21, 2020), <https://screenrant.com/ncaa-football-return-overwhelming-player-support-electronic-arts/> [<https://perma.cc/J7N6-9BGH>].

206. *Id.*

207. See, e.g., Kév (@KJS407), TWITTER (July, 9, 2019, 11:26 AM), <https://twitter.com/KJS407/status/1148629633300144128> [<https://perma.cc/GE59-AV3Q>] (a fan asking EA to bring back the series); Barstool Sports (@barstoolsports), TWITTER (Oct. 29, 2019, 2:16 PM), <https://twitter.com/barstoolsports/status/1189259770013933568?s=20> (reacting to news the video game is coming back).

208. Michael Rothstein, *EA Sports to Do College Football Video Game*, ESPN (Feb. 2, 2021), https://www.espn.com/college-football/story/_/id/30821045/school-plan-ea-sports-do-college-football [<https://perma.cc/F5BN-B7FS>].

209. *Id.*

210. *Id.*

211. Zach Koons, *Another School Is Pulling Out Of EA Sports' College Football Game*, COLL. SPUN (Feb. 28, 2021), <https://thespun.com/aac/tulane/tulane-pulls-out-of-ea-sports-college-football-game-citing-nil-debate> [<https://perma.cc/LQX6-U49W>].

III. THE LAST OUT

It is time for college sports to modernize. The NCAA has an opportunity in front of them to improve their public relations by making a change themselves before every state forms a patch-work regulatory framework. If that were to happen, the NCAA would have to sue in every state to invalidate the laws. Even if every state does not act, the NCAA may want to act before the federal government does, because a federal action would not be subject to Commerce Clause invalidation.

The NCAA needs to adopt a fully modern proposal now, one that serves the interests of the athletes that need it and that helps the schools maintain a level of control. The Fair Pay to Play Act does just that. Adopting the Act into its own rules, before a government actor forces them to, would allow the NCAA to gain control and some much-needed good news in light of recent suspensions for similar payments.

Adoption of the Act may also help increase parity, allowing more fans to experience the joys of winning, keeping them as fans for life. It may also keep some otherwise-bubble professional prospects in the college system, keeping star power up in the NCAA, increasing fan experience and retention. It would also give people a piece of their childhood back in the form of the NCAA football video games.

This Note is written to encourage the NCAA to adopt the Fair Pay to Play Act. It has gone in depth into the reasons the NCAA adopted an amateurism policy, why it has persisted, and why the policy is eroding. It has examined current efforts by states, particularly California, to do away with the policy and the unconstitutionality of those state-level efforts. In the wake of the state efforts, the NCAA swiftly announced that it was considering a change and would be allowing, somehow, name, image, and likeness payments to college athletes. But it did not clarify how it would institute this new policy. Several options are present, and one stands out above the rest as the best option—California's Fair Pay to Play Act.

