Brooklyn Journal of Corporate, Financial & Commercial Law

Volume 15
Issue 1 *SYMPOSIUM Consumer Structure, Market Structure, and Political Power*

Article 12

12-30-2020

THE MODERN PAY FOR PLAY MODEL: LAWS THAT PROTECT STUDENT-ATHLETES' FUNDAMENTAL RIGHT TO COMMERCIALZE THEIR NAMES, IMAGES, AND LIKENESS

Paul A. Schwabe Jr.

THE MODERN PAY FOR PLAY MODEL: LAWS THAT PROTECT STUDENT-ATHLETES' FUNDAMENTAL RIGHT TO COMMERCIALIZE THEIR NAMES, IMAGES, AND LIKENESSES

ABSTRACT

In O'Bannon v. NCAA, the United States District Court for the Northern District of California entered a permanent injunction against the National Collegiate Athletic Association enjoining the collegiate sports governing body from enforcing limits on student-athlete compensation derived from the use of their name, images, and likenesses rights. The court concluded that NCAA rules unreasonably restrained trade in violation of the Sherman Anti-Trust Act, however, neither the court nor the NCAA laid out a framework for lawfully implementing these new economic rights to student-athletes. Since that ruling, only one state's legislature, California, has attempted to pass legislation to prevent the NCAA from infringing on student-athletes' rights to profit from their name, image, and likeness, but whether that effort bears fruit remains unclear. This Note analyzes the California legislation and the O'Bannon decision in order to outline potential strategies that state and federal legislatures may adopt to protect student-athletes' fundamental economic rights.

INTRODUCTION

The debate over whether student-athletes [1] should receive fairer compensation from American universities—who reap considerable profits from student-athletes' full-time dedication to sports in exchange for providing tuition-free college education—may have finally reached an inflection point. The Black Lives Matter movement along with the Coronavirus Disease of 2019 (known as COVID-19) has exposed gross economic inequities many student-athletes face when they agree to participate in collegiate sports, and demands for reform have been gaining momentum unlike ever before.[2] At the end of 2019, the total revenue among

1. In the 1950s, Walter Byers, the NCAA's first executive director, was credited with creation of the term "student-athlete," a term intended to help the NCAA fight against workers' compensation claims for injured football players. The NCAA is the overarching governing body of all-American collegiate sports. Byers later claimed in court testimony in the 1990s that "[t]he 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. However, this term soon became ingrained in all NCAA rules and interpretations, which was highly scrutinized because of its perceived deliberate ambiguity. *See* 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/.

2. Anya van Wagtendonk, *Covid-19 is exposing inequalities in college sports. Now athletes are demanding change.*, VOX (Aug. 2, 2020, 5:30pm), https://www.vox.com/2020/8/2/21351799/

all National Collegiate Athletic Association (NCAA) athletic departments was reported to be over $18.9 billion, up from $18.2 billion in 2018 and $17.3 billion in 2017.[3] History shows that as college sports became more profitable, the NCAA worked to prevent student-athletes from realizing any type of profit of their own in fear of the threat they presented to the universities' bottom lines.[4] The NCAA developed bylaws that placed outright restrictions on student-athletes' general compensation and licensing of publicity rights, also referred to as name, image, and likeness rights (NIL rights).[5] Student-athletes continue to agree to these restrictions by signing binding standard entry forms, unsupervised by counsel, that serve as a prerequisite to participation in college sports.[6] When these restrictions encountered judicial review, U.S. Courts deemed them lawful by finding the NCAA's policy of "amateurism" allowed for an exception to otherwise well-established antitrust law.[7] However, as outlined below, these policies inherently violate antitrust law as "anti-competitive" restraints of trade. Additionally, they undermine public policy interests derived from capitalism principles and common law rights of publicity.

This Note primarily analyzes California statute SB 206 (Fair Pay to Play Act or the Act), a law signed into effect by Governor Gavin Newsom on September 30, 2019.[8] The Fair Pay to Play Act purports to protect student-athletes seeking to profit off their NIL rights from potential eligibility sanctions handed down by the NCAA.[9] Specifically, the Act provides student-athletes enrolled at universities in California with semi-restricted ability to profit from licensing their NIL rights, while also protecting intercollegiate athletic associations and universities in California from NCAA discipline should they have such student-athletes enrolled at

college-football-pac-12-coronavirus-demands; *see also* Michael T. Nietzel, *Black Athletes Are Leading The New College Protest Movement*, FORBES (Jun. 28, 2020, 6:00am), https://www.forbes.com/sites/michaeltnietzel/2020/06/28/black-athletes-lead-the-new-college-protest-movement/#6c4b5e3562fa.

3. *Interactive Report*, NCAA, http://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics-database (last visited Oct. 14, 2020).

4. *See* Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements And Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 118 (2008).

5. *See* Greg Lush, *Reclaiming Student Athletes' Rights To Their Names, Images, And Likenesses, Post O'Bannon v. NCAA; Analyzing NCAA Forms For Unconscionability*, 24 S. CAL. INTERDIS. L.J. 767, 768 (2015).

6. *See* Mitten & Davis, *supra* note 4, at 118.

7. *See* Michael Steele, *O'Bannon v. NCAA: The Beginning of the End of the Amateurism Justification for the NCAA in Antitrust Litigation*, 99 MARQ. L. REV. 511, 519 (2015).

8. Uninterrupted, *Gavin Newsom signs California's 'Fair Pay to Play Act' with LeBron James & Mav Carter*, YOUTUBE (Sept. 30, 2019), https://www.youtube.com/watch?v=7bfBgjxVgTw&feature=youtu.be (Governor Newsom signed into law California's 'Fair Pay to Play Act' (SB206) [September 27th, 2019] on the set of HBO's The Shop).

9. *See* S.B. 206, Cal. State Assemb., 2019-20 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB206.

their universities.[10] The Act has substantial potential to serve as a template for other state legislatures and, in an ideal world, should form the basis for federal legislation (it's notable that Congress has thus far failed to seriously consider *any* legislation on this subject!). And yet, while the Act has the right ideas for what legislation in this area should look like, it leaves room to be interpreted over-broadly or too narrowly by those who will be charged with its enforcement.[11] Consequently, this Note proposes precise language for legislatures to adopt in a manner consistent with the Act and shows why this model would overcome potential legal challenges. This Note does not address what total compensation of student-athletes is nor does it attempt to address what fair total compensation may look like; it addresses only the illegality of restricting student-athletes from profiting from their own NIL rights.

This Note intends to paint a picture of how American collegiate sports arrived to its current state and what legislatures can do to remedy the inequities that have developed as a result. Part I of this Note explores a brief history of the NCAA, how the concepts of amateurism were born, and how amateurism principles developed over time. Part II examines the Sherman Antitrust Act and how it was applied in *O'Bannon v. NCAA*, a key case that challenged the NCAA's power to restrict student-athletes from profiting off their NIL rights. Finally, Part III offers an analysis of the Fair Pay to Play Act, how a revised version of this law should be adopted by other legislatures, and suggests a plan to implement these fundamental economic rights consistent with the court's holdings in *O'Bannon*.

I. AN OVERVIEW OF THE NCAA AND THE PRINCIPLES OF AMATEURISM

A. A BRIEF HISTORY OF THE NCAA

The need for a governing body in college sports first received attention in the late 19th century when the Harvard University regatta team sought to gain an undue advantage over its rival Yale by obtaining the services of a coxswain[12] who was not a student of the university.[13] This impropriety led to shared concerns among university administrators regarding issues like

10. *See id.*

11. *See* Huntyr Schwegman, *Not compensating collegiate athletes for likeness is exploitation — let's change that*, UNIV. DAILY KANSAN (Oct. 3, 2019), http://www.kansan.com/sports/not-compensating-collegiate-athletes-for-likeness-is-exploitation-let-s/article_27881b7e-e527-11e9-9c16-0ff84578d053.html.

12. A coxswain is the member of a rowing team responsible for steering, and at times, general race plans of the crew. Molly Seuqin, *The college rowing coxswain, explained*, NCAA (Sept. 27, 2018), https://www.ncaa.com/news/rowing/article/2018-09-26/college-rowing-coxswain-explained.

13. *See* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 11 (2000).

cheating, competitive fairness, and the management of expenses that laid the foundation for the creation of an intercollegiate athletic regulatory body.[14] In 1905, President Roosevelt called a White House conference to review and reform intercollegiate football rules after intercollegiate football produced 18 deaths and 100 major injuries in a single season.[15] Because of that conference, student safety was added to the growing list of shared concerns that would require regulatory solutions in collegiate sports.[16] To address these concerns, 62 colleges formed together to establish the Intercollegiate Athletic Association (IAA) and tasked itself with developing a set of uniform regulations for intercollegiate football.[17] In 1910, the IAA changed its name to the National Collegiate Athletic Association and developed a requirement that all participants in its collegiate sports programs be "amateurs."[18]

The NCAA did not play a major role in governing intercollegiate athletics until the 1920s.[19] Instead, the NCAA focused principally on creating championship events for its collegiate sports while being run solely by student volunteers with limited faculty oversight.[20] That changed in 1929 when the Carnegie Foundation released a report acknowledging the increasing popularity of intercollegiate athletics.[21] The report primarily raised concerns for student-athlete welfare by criticizing an increasing number of abuses in collegiate sports, such as over-commercialization, cheating, academic fraud, and gambling.[22] The report concluded that college presidents themselves could reclaim the integrity of sports by changing the policies permitting commercialized and professionalized athletics.[23] Yet, despite the Carnegie Foundation's scathing review, commercialization and popularity of intercollegiate sports continued to grow at a rapid pace during the 1930s, further intensified by the ability of televisions and radios to broadcast major sporting events directly into the growing number of homes in the United States.[24]

Between the 1930s and 1970s, the NCAA embarked on a crusade to improve the integrity of governance in intercollegiate athletics and to level

14. *See id.* at 11–12.
15. *Id.* at 12.
16. *Id.*
17. *See* Audrey C. Sheetz, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 869–70 (2016).
18. *Id*. at 869–70.
19. *See* Smith, *supra* note 13, at 13.
20. *Id.* at 12.
21. *See* Robert Scott Lemons, *Amateurism and College Athletics* (Apr. 28, 2014) (unpublished B.A. thesis, Stanford University), https://economics.sites.stanford.edu/sites/g/files/sbiybj9386/f/publications/robertlemonshonorsthesis-may2014.pdf.
22. *Id.* at 19.
23. *See* Smith, *supra* note 13, at 13–14.
24. *Id*. at 14.

the playing field for universities in student-athlete recruitment.[25] University presidents' involvement with their athletics programs continued to expand in the 1980s, partly due to widespread economic hardship across many higher education institutions at the time.[26] During this time, university presidents made efforts to contain the costs of their athletic programs, but then realized there would be far greater potential for reward by combining their economic interests in the governing body[27] of the NCAA.[28]

Later, in the 1980s and early 1990s, the NCAA was heavily criticized for its lack of due process procedures in rule enforcement proceedings, which led to battles over whether the NCAA would have to defend itself from due process claims in judicial settings.[29] The 1990s marked a period of increased public focus on race and gender issues in the NCAA.[30] The fact that the governance costs of the NCAA were (and still are) covered predominantly by student-athletes of color highlighted racial inequities that had been continuously proliferating in intercollegiate athletics.[31]

By the end of 2019, the NCAA grew to be made up of 1,117 colleges and universities, 100 athletic conferences, and 40 sports-affiliated organizations.[32] The colleges and universities are split into three divisions: Division I, which has 351 member-institutions, Division II, which has 308 member-institutions, and Division III, which has 443 member-institutions.[33] All three divisions are subject to the NCAA's rules regarding amateurism.[34]

B. AMATEURISM

The idea of amateurism stems from the NCAA's long maintained goal of initiating intercollegiate athletics programs for student-athletes, promoting athletic excellence, and encouraging participation in sports as a recreational pursuit.[35] Yet, it is difficult to identify a precise definition of amateurism within NCAA-produced materials.[36] This lack of clarity is often

25. *Id*.
26. *Id*. at 16.
27. The appeal of a governance body is the ability to centralize the interests of all university presidents, i.e. the NCAA, and to then use those interests to make rules controlling what goes on in college sports universally.
28. *See* Smith, *supra* note 13, at 16.
29. *See id.* at 17–19.
30. *See id.* at 20.
31. *See id.*
32. *See WHAT IS THE NCAA?*, NCAA, http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa (last visited Oct. 11, 2019).
33. *See OUR THREE DIVISIONS*, NCAA, http://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions (last visited Oct. 11, 2019).
34. *See id.*
35. *See* NCAA, 2019-2020 NCAA DIVISION I MANUAL 1 (2019), https://web3.ncaa.org/lsdbi/reports/getReport/90008.
36. The most descriptive definition in the bylaws for amateurism can be found in Bylaw 2.9. "The Principle of Amateurism" which states: "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the

examined in judicial opinions critical of amateurism as a justification for restricting student-athlete compensation, but much of the confusion has been attributed to inconsistent explanations offered by the NCAA.[37]

The initial NCAA bylaws of 1906 did not permit student-athletes to receive any type of compensation—like money, emoluments, or financial concessions—as consideration for inducement to play in or enter into an athletic contest.[38] This included prohibiting what is known today as athletic scholarships.[39] It is no secret that, despite these prohibitions, such rules were largely disregarded and the payment of star athletes became highly prevalent as an effect of the rapid commercialization of intercollegiate sports.[40]

In 1956, the NCAA enacted its first rule allowing schools to award athletic scholarships to student-athletes, now referred to as "grant-in-aid" scholarships.[41] Grant-in-aid scholarships gave NCAA member-institutions a way to target athletes in recruitment with promises of financial consideration.[42] These scholarships permitted schools to cover student-athletes' regular expenses relating to college education, including tuition, fees, room and board, books, and incidental expenses.[43] The new scholarship rules helped the NCAA balance notions of commercialization and amateurism while opening the door for the NCAA to gain greater control over its member-institutions through rule enforcement.[44] However, the allowances for these scholarships have markedly shifted over time through amendments made to NCAA bylaws. For example, in 2013, new amendments permitted differing levels of scholarship compensation based on the type of sport for which a student-athlete was recruited.[45]

Recently, the NCAA enacted new bylaws to ease some restrictions on compensation received outside of student-athletes' participation in

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." *See id.* at 3.

37. *See* Steele, *supra* note 7, at 513–14; *see also In re* NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1070 (2019) (Judge Wilkens criticizes the NCAA's definition of amateurism in a recent opinion: "Defendants nowhere define the nature of the amateurism they claim consumers insist upon. Defendants offer no stand-alone definition of amateurism either in the NCAA rules or in argument.").

38. *See* Steele, *supra* note 7 at 513–14.

39. *See id.*

40. *See* Smith, *supra* note 13, at 11, n. 7; *see also* Dylan Lathrop, *Meet The Bag Man: 10 Rules For Paying College Football Players*, BANNER SOC'Y, https://www.bannersociety.com /2014/4/10/20703758/bag-man-paying-college-football-players (last visited Nov. 22, 2019).

41. *See* Steele, *supra* note 7 at 514; *See also* Sheetz, *supra* note 14, at 870.

42. *See* Sheetz, *supra* note 17, at 870.

43. *See* Steele, *supra* note 7, at 514.

44. *See* Sheetz, *supra* note 17, at 870.

45. *See* Steele, *supra* note 7, at 515.

collegiate sports, but heavy restrictions still remain.[46] These bylaws include permissions to accept compensation for participation in a competition while not representing a member-institution, but the compensation may not include cash or cash equivalents that exceed the actual value of necessary expenses to participate.[47] There are also new rules describing student-athletes' involvements with professional teams.[48] As part of those bylaws, the NCAA restricts prospective student-athletes from participation in collegiate sports if they sign a contract to play for a professional team,[49] even if the contract takes effect after completion of their collegiate career.[50] An exception is made for potential student-athletes before full-time collegiate enrollment, unless they are men's ice hockey or skiing participants.[51]

It is readily apparent that the NCAA does not want student-athletes to earn any type of net income (or be cash positive at all) from their participation in collegiate sports as a student-athlete.[52] Previously, the NCAA required student-athletes in Division I to sign a waiver releasing their commercial right to license their [student-athlete] NIL rights in perpetuity.[53] In 2014, the NCAA eliminated the in perpetuity name-and-likeness release from its Division I forms, however, this had no effective benefit while student-athletes remained enrolled.[54]

---

46. *See* NCAA, 2019-2020 NCAA DIVISION I MANUAL 1, 234 (2019), https://web3.ncaa.org/lsdbi/reports/getReport/90008.

47. Bylaw 16.1.1.1. "Awards Received for Participation While not Representing the Institution" states: "Awards received by an individual for participation in competition while not representing the institution shall conform to the rules of the amateur sports organization that governs the competition, but may not include cash (or cash equivalents) that exceeds actual and necessary expenses (see Bylaw 12.1.2.4)." *Id.* at 234.

48. *See generally id.* at 68–71.

49. Bylaw 12.2.5. "Contracts and Compensation" states: "An individual shall be ineligible for participation in an intercollegiate sport if he or she has entered into any kind of agreement to compete in professional athletics, either orally or in writing, regardless of the legal enforceability of that agreement." (Revised: 1/10/92). *Id.*

50. Bylaw 12.2.5.2 "Nonbinding Agreement" states: "An individual who signs a contract or commitment that does not become binding until the professional organization's representative or agent also signs the document is ineligible, even if the contract remains unsigned by the other parties until after the student-athlete's eligibility is exhausted." *Id.*

51. Bylaw 12.2.5.1 "Before Initial Full-Time Collegiate Enrollment—Sports Other Than Men's Ice Hockey and Skiing" states: "In sports other than men's ice hockey and skiing, before initial full-time collegiate enrollment, an individual may enter into an agreement to compete on a professional team (per Bylaw 12.02.12), provided the agreement does not guarantee or promise payment (at any time) in excess of actual and necessary expenses to participate on the team." (Adopted:4/29/10 effective 8/1/10 applicable to student-athletes who initially enroll full time in a collegiate institution on or after 8/1/10). *Id.*

52. *See generally id.*

53. *See* Sheetz, *supra* note 17, at 873.

54. *See* Marc Edelman, *Removing The NCAA Name-And-Likeness Release Is Just 'Smoke And Mirrors' In The Fight For College Athlete Rights*, FORBES (Jul. 25, 2014, 9:51am), https://www.forbes.com/sites/marcedelman/2014/07/25/ncaa-name-and-likeness-release-is-just-smoke-and-mirrors/#1899b9443b82.

The NCAA continues to maintain its power over NIL rights through bylaws that describe situations of non-permissible use of a student-athletes' NIL rights.[55] An NCAA member-institution that does not take action against a student-athlete found to be in violation of NCAA bylaws can be penalized with loss of scholarships, team eligibility in postseason activities, and monetary fines.[56] In sum, these bylaws enable the NCAA to prevent student-athletes from selling their NIL rights to third parties while creating harsh penalties for member-institutions should they decline to report infractions.[57]

II. ANTI-TRUST LAW AND ITS APPLICATION IN *O'BANNON*

A. THE SHERMAN ANTITRUST ACT

Over a century ago, the federal government enacted the Sherman Antitrust Act of 1890 (Sherman Act) in order to outlaw monopolistic business practices.[58] The Sherman Act initially authorized the federal government to institute proceedings against massive trusts as a mechanism to dissolve them;[59] these trusts were arrangements by which stockholders in several companies transferred their shares to a single set of trustees, allowing the newly formed trust to dominate major industries and destroy competition.[60] The Sherman Act's objective was to prohibit any combination "in the form of trust or otherwise that was in restraint of trade or commerce among the several states, or with foreign nations."[61] The Sherman Act outlawed "every contract, combination, or conspiracy in restraint of trade" and any "monopolization, attempted monopolization, or

55. Bylaw 12.5.2.1 "Advertisements and Promotions After Becoming a Student-Athlete" states: "After becoming a student-athlete an individual shall not be eligible for participation in intercollegiate athletics if the individual: (a) [a]ccepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service." NCAA, 2019-2020 NCAA DIVISION I MANUAL 1, 77 (2019), https://web3.ncaa.org/lsdbi/reports/getReport/90008; *See also* Edelman, *supra* note 54.

56. Bylaw 19.9.11 "Obligation of Institution to Take Appropriate Action" states: "If a violation has been found that affects the eligibility of one or more student-athletes, the institution and its conference, if any, shall be notified of the violation and the name(s) of the student-athlete(s) involved. If the institution fails to take appropriate action by declaring the student-athlete(s) ineligible, the institution shall be required to show cause to the Committee on Infractions or Independent Resolution Panel why additional penalties should not be prescribed for a failure to abide by the conditions and obligations of membership if it permits the student-athlete(s) to compete in intercollegiate athletics." NCAA, 2019-2020 NCAA DIVISION I MANUAL 1, 378 (2019), https://web3.ncaa.org/lsdbi/reports/getReport/90008.

57. *See* Edelman, *supra* note 54.

58. *See* 15 U.S.C. §§ 1–38; *see also* U.S. Nat'l Archives & Rec. Admin., *Sherman Antitrust Act (1890)*, https://www.ourdocuments.gov/doc.php?flash=false&doc=51#.

59. *See id.*

60. *See id.*

61. *See id.*

conspiracy or combination to monopolize."[62] However, in *Standard Oil v. U.S.*, the Supreme Court narrowed the operation of the Sherman Act by articulating the Rule of Reason test, which asks whether a given restraint's harm to competition outweighs its procompetitive effects, and thereafter, prohibiting restraints of trade deemed too harmful to an industry.[63]

Many commentators argue the Sherman Act should apply to the NCAA because, among other reasons, the NCAA is organized to maximize revenues for its member-intuitions while it restricts student-athletes' economic gain inside and outside of their roles as student-athletes.[64] It is ironic how closely analogous the NCAA is to the massive trusts that the Sherman Act was created to dissolve—like those trusts, the NCAA is an arrangement by several universities to transfer governance power of collegiate sports from their individual universities to a single set of decision makers, allowing those decision makers to dominate the collegiate sports industry and stifle any potential competition. And at one point, it appeared as though the NCAA was on the verge of receiving similar treatment as those trusts. In *NCAA v. Board of Regents*, the Supreme Court utilized the Rule of Reason to hold that the NCAA's television plan violated Section 1 of the Sherman Act because it constituted illegal per se price fixing of television contracts, however, the Court declined to extend the protections of the Sherman Act to student-athletes regulated by the NCAA.[65] The Court indicated that NCAA rules regarding amateurism, academic integrity, and competitive fairness did not violate antitrust laws because, consistent with the Sherman Act, the NCAA must have ample latitude to preserve a revered tradition that might otherwise die, and their rules are already tailored to that critical role.[66] This ruling laid the groundwork for federal courts to reject subsequent antitrust challenges to NCAA rules by granting unprecedented deference to the NCAA.[67] But the proverbial tide began to turn against the NCAA when the district court in *O'Bannon* examined amateurism principles under a more contemporary lens.[68]

62. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Oct. 11, 2019).

63. *See* Standard Oil Co. v. United States, 221 U.S. 1, 66–67 (1911).

64. *See* Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of" Big Time" College Athletics: The Need to Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1, 3 (2000); *See also* Asim S. Raza, *Should the NCAA's Eligibility Rules Be Subjected to the Sherman Antitrust Act?*, 4 DEPAUL J. ART, TECH. & INTELL. PROP. L.113, 123–24 (1993); Erin Cronk, *Unlawful Encroachment: Why the NCAA Must Compensate Student-Athletes for the Use of Their Names, Images, And Likenesses*, 34 U. LA VERNE L. REV. 135, 137 (2013).

65. Nat'l. Coll. Athletic Assn. v. Bd. of Regents, 468 U.S. 85, 101–02 (1984).

66. *See id.* at 120.

67. *See* Mitten, *supra* note 64, at 4.

68. *See generally* O'Bannon v. Nat'l Coll. Athletic Assn., 7 F. Supp. 3d 955 (N.D. Cal. 2014).

B. O'BANNON V. NCAA

The *O'Bannon* lawsuit began after Ed O'Bannon, a former college athlete, noticed an avatar in a video game that both physically resembled him and wore a University of California Los Angeles basketball jersey with the same number he wore when he played for the university.[69] The lawsuit was brought in 2009 as a class-action lawsuit comprising of then-current and former college athlete plaintiffs challenging the NCAA's rules restricting compensation for elite men's football and basketball players.[70] The plaintiffs claimed that the set of rules barring student-athletes from receiving a share of revenue from the NCAA for the sale of licenses to use student-athletes' names, images, and likenesses in video games, live game telecasts, and other footage constituted an unreasonable restraint of trade that violated the Sherman Act.[71] The NCAA denied the allegations and asserted that the challenged restrictions on student-athlete compensation were reasonable as procompetitive justifications because they were necessary to maintain the tradition of amateurism, maintain the competitive balance among member-institutions, promote integration of academics and athletics, and increase the total output of its product (i.e. sporting events).[72] These were the same arguments the NCAA relied on in *Board of Regents*.[73]

In forming its opinion, the court first considered the Rule of Reason as the presumptive standard under which it would decide whether the NCAA's rules and bylaws operated as an unreasonable restraint of trade, and therefore, be in violation of the Sherman Act.[74] The court explained that "[a] restraint violates the rule of reason if the restraint's *harm to competition* outweighs its *procompetitive effects*."[75] In order to make that determination, courts in the Ninth Circuit rely on a burden shifting framework that begins with the plaintiff bearing the initial burden of proving that the restraint poses "significant anticompetitive effects" within a "relevant market."[76] If this initial burden is satisfied, the burden then shifts to the defendant to come forward with evidence of the restraint's procompetitive effects.[77] Finally, if the defendant satisfies its burden, the plaintiff must show that the legitimate procompetitive objectives outlined by the defendant can be achieved in a substantially less restrictive manner.[78] Under this backdrop, the plaintiffs pointed to two relevant markets where

69. *See* Sheetz, *supra* note 17 , at 866.
70. *O'Bannon*, 7 F. Supp. 3d at 962–63.
71. *Id.* at 963.
72. *Id.* at 973.
73. *See* Steele, *supra* note 7, at 521.
74. *O'Bannon*, 7 F. Supp. 3d at 985.
75. *Id.* at 985. (citing Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001) (emphasis added).
76. *Id.*
77. *Id.*
78. *Id.*

they claimed the challenged restraint caused anticompetitive effects: (1) the "college education market," in which colleges and universities compete to recruit student-athletes; and (2) the "group licensing market," in which media entities, like television networks and videogame developers, compete for group licenses to use the NIL rights of student-athletes in their commercialized content.[79]

In considering the market for college education, the court concluded that colleges and universities are the only suppliers of the bundle of college education and athletic opportunities in the relevant market.[80] Additionally, the court noted colleges and universities have exercised power, through the NCAA and its conferences, to fix the price of their product by forming an agreement to charge every prospective student-athlete the same price for the bundle of educational and athletic opportunities they offer in exchange for the student-athletes' athletic services and rights while they are enrolled.[81] If a school sought to lower its price by offering further forms of compensation, that school may be subject to sanctions by the NCAA.[82] For these reasons, the court held that this price-fixing agreement constituted a restraint of trade.[83] The court pointed out that agreements among universities not to offer student-athletes a share of their licensing revenue indirectly eliminated a form of price competition.[84] In past cases involving anti-trust suits, the Supreme Court has held similar agreements to be inherently unlawful.[85]

In its group licensing market analysis, the court identified three submarkets for group licensing of student-athletes' NIL rights: (1) live game telecasts, (2) videogames, and (3) game re-broadcasts, highlight clips, and other archival footage.[86] The court discerned that student-athletes could serve as hypothetical sellers of their NIL rights while media companies could serve as hypothetical buyers in each potential market.[87]

79. *Id.* at 986.

80. O'Bannon v. Nat'l Coll. Athletic Assn., 7 F. Supp. 3d 955, 988 (N.D. Cal. 2014).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 990.

85. *See* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 650 (1980) (holding that an agreement among competing wholesalers to refuse to sell to a retailer unless the retailer made payment in advance or upon delivery was a form of price fixing that lacked any potential redeeming value and declared unlawful per se); *see also* Nat'l Soc'y of Prof. Eng'rs v. U.S., 435 U.S. 679, 692 (1978) (holding the society of engineers could not require its members to adhere to a code of professional ethics that disallowed competitive bidding because it was an indirect form of price-fixing which operated to restrain trade within the meaning of the Sherman Act); *see also* Cont'l Television, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977) (noting that per se rules of illegality on trade-restrictive practices are appropriate because of their pernicious effect on competition and lack of redeeming virtue).

86. O'Bannon v. Nat'l Coll. Athletic Assn., 7 F. Supp. 3d 955, 993 (N.D. Cal. 2014).

87. *Id.* at 994–99.

With regards to the live game telecast submarket, the court found that the plaintiffs failed to show that the NCAA's rules would harm competition because they could not show, even absent NCAA rules, any situation where student-athletes would compete against each other to sell group licenses or that buyers of group licenses might compete against each other.[88] The court reasoned that if a network or media company sought a group license for a specific event, it would have to obtain a group license from each university participating in that event.[89] Furthermore, the court suggested that none of the universities would compete against each other as sellers of group licenses because each group license would have to be sold in order for any single group to have value;[90] since buyers already competed against each other for these group licenses, allowing student-athletes to seek compensation for group licenses would not increase the number of television networks nor enhance competition in this submarket.[91]

The court used the same reasoning to conclude that the challenged rules do not suppress competition in the videogame submarket.[92] The fact that every team or student-athlete would be included in the videogame infers that competition is highly unlikely, and thus, unharmed.[93] Similarly, because videogame developers would need to acquire group licenses from all teams or a set of teams, those teams would not compete against each other because they have a shared interest in ensuring the developer acquired each group license required to create a marketable product.[94]

In considering the submarket for game re-broadcasts, highlight clips, and other archival footage, the court recognized that the NCAA employed a third-party agent to manage all licensing related to the submarket.[95] Since the third-party agent was expressly prohibited from licensing any footage featuring then-current student-athletes and had to obtain permission from former student-athletes, the court held no current or former student-athletes were actually deprived of any compensation they would otherwise receive in the absence of the challenged NCAA rules.[96]

Although the plaintiffs could not show the NCAA's rules imposed a restraint on competition in the overall group licensing market, they satisfied their burden of showing that the NCAA's rules imposed a restraint on competition in the college education market.[97] As a result, the burden shifted to the NCAA to assert procompetitive justifications for its rules

88. *Id.* at 994–98.
89. *Id.* at 995.
90. *Id.*
91. *Id.* at 996.
92. O'Bannon v. Nat'l Coll. Athletic Assn., 7 F. Supp. 3d 955, 998 (N.D. Cal. 2014).
93. *Id.* at 997.
94. *Id.* at 998.
95. *Id.*
96. *Id.*
97. *Id.* at 999.

barring student-athletes from receiving compensation for use of their NIL rights.[98] The NCAA, as it did in *Board of Regents*, set forth four procompetitive justifications: (1) the preservation of amateurism in college sports; (2) promoting competitive balance among college sports teams; (3) the integration of academics and athletics; and (4) the ability to generate greater output in relevant markets.[99]

The court gave its greatest scrutiny to the "preservation of amateurism" justification.[100] The court pointed out that *Board of Regents* "does not stand for the sweeping proposition that student-athletes must be barred, both during their college years and forever thereafter, from receiving any monetary compensation for the commercial use of their names, images, and likenesses."[101] The court reexamined the Supreme Court's suggestion that in order to preserve the quality of the NCAA's product, student-athletes must not be paid.[102] It reasoned that such a suggestion was not based on any factual findings from the record and does not establish that the NCAA's current restraints are procompetitive or without less restrictive alternatives.[103] Additionally, the plaintiffs had shown that the college sports industry has changed substantially in the thirty years since *Board of Regents* was decided.[104] Lastly, the court scrutinized the ambiguity of amateurism by citing the historical practice of the NCAA to frequently revise its rules governing student-athlete compensation, sometimes in contradiction to its core set of principles.[105]

Although the court ultimately found the NCAA's amateurism principles were weak procompetitive justifications for restrictions on student-athlete compensation, it did not go as far as to render amateurism a non-justification.[106] It opined that "[a]lthough [NCAA rules] might justify a restriction on large payments to student-athletes while in school, they do not justify the rigid prohibition on compensating student-athletes, in the present or in the future, with any share of licensing revenue generated from the use of their names, images, and likenesses."[107] From the court's perspective, the NCAA had provided sufficient evidence showing that by preventing student-athletes from being paid *large* sums of money and facilitating integration of student-athletes into academic communities, one

98. O'Bannon v. Nat'l Coll. Athletic Assn., 7 F. Supp. 3d 955, 999 (N.D. Cal. 2014).
99. *Id.*
100. *Id.* at 999–1002.
101. *Id.* at 999.
102. *Id.*
103. *Id.* at 999–1000.
104. O'Bannon v. Nat'l Coll. Athletic Assn., 7 F. Supp. 3d 955, 999–1000 (N.D. Cal. 2014).
105. *Id.* at 1000.
106. *Id.* at 1001.
107. *Id.*

could infer that some NCAA restraints on student-athlete compensation yielded procompetitive benefits.[108]

Since the NCAA met its burden under the Rule of Reason, the burden made a final shift to the plaintiffs to show the existence of less restrictive alternatives to the challenged restraint.[109] Plaintiffs identified two less restrictive alternatives: (1) the NCAA could permit schools to award stipends to student-athletes up to the full cost of attendance to make up for any shortfall in its grants-in-aid, and (2) the NCAA could permit its schools to hold limited and equal shares of its licensing revenue in trust to be distributed to student-athletes after they leave college or after their athletic eligibility expires.[110] The court suggested the NCAA could prohibit schools from funding stipends or payments held in trust with anything other than revenue generated from the use of student-athletes' NIL rights.[111] Furthermore, permitting schools to award these stipends would increase price competition among schools in the college education market without undermining the NCAA's stated procompetitive objectives.[112] Lastly, the court concluded that a narrowly-tailored trust payment system—allowing schools to offer student-athletes a limited and equal share of licensing revenue generated from student-athletes' NIL rights—constituted a less restrictive means of achieving the NCAA's stated procompetitive goals.[113]

On appeal, a majority of the Ninth Circuit affirmed that NCAA restrictions on student-athlete compensation are subject to antitrust scrutiny and, therefore, must be tested under the Rule of Reason.[114] Reapplying the Rule of Reason, the appeals court affirmed the holding that compensation rules have a significant anticompetitive effect on the college education market and the NCAA's rules serve two legitimate procompetitive purposes identified by the district court, but the appeals court departed from the reasoning of the district court when considering less restrictive alternatives.[115] According to the appeals court, requiring the NCAA to provide compensation up to the full cost of attendance, replacing the grant-in-aid scholarship, was proper.[116] However, the appeals court found that the district court clearly erred in finding it a viable alternative to allow students to receive NIL rights cash payments directly from universities untethered to their academic expenses.[117] The court explained that "in finding that paying students cash compensation would promote amateurism as effectively as

108. *Id.* at 1004.
109. *Id.*
110. O'Bannon v. Nat'l Coll. Athletic Assn., 7 F. Supp. 3d 955, 1005 (N.D. Cal. 2014).
111. *Id.*
112. *Id.* at 1006.
113. *Id.* at 1006–07.
114. O' Bannon v. Nat'l Coll. Athletic Assn., 802 F.3d 1049, 1066 (9th Cir. 2015).
115. *Id.* at 1074.
116. *Id.* at 1074–75.
117. *Id.* at 1076.

not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs*."[118] Following this ruling, each party's request for appeal was denied by the Supreme Court, thereby giving full effect to the Ninth Circuit's ruling.[119]

III. STATE LEGISLATIVE SOLUTIONS AND IMPLEMENTATION

A. CALIFORNIA'S "FAIR PAY TO PLAY"

California has earned the distinguished label of leading all states in the movement to protect student-athletes from both health-related and financial-related injuries. Aside from federal courts in California hosting several landmark legal challenges to NCAA rules,[120] the California State Legislature has passed state laws designed to protect student-athletes. In 2012, California passed the "Student-Athletes Bill of Rights,"[121] which forced universities to pay insurance premiums for low-income athletes, cover medical expenses for student-athletes up to two years after they exhaust their eligibility, and, if the student-athlete suffers an incapacitating injury, provide a scholarship for up to five academic years or until the student-athlete completes their degree.[122]

In September 2019, California passed SB 206, publicly known as the Fair Pay to Play Act.[123] The text of the Act aims squarely at the NCAA's economic restrictions on student-athlete compensation.[124] The Act's purpose is to "develop policies to ensure appropriate protections are in place to avoid exploitation of student-athletes, colleges, and universities."[125] Generally, it prohibits California's postsecondary educational institutions (except community colleges), athletic associations, conferences, or organizations with authority over intercollegiate athletics, from disciplining student-athletes who license their NIL rights or obtain professional representation relating to their participation in intercollegiate athletics.[126]

Alternatively, the Act prohibits athletic associations, conferences, or organizations with authority over intercollegiate athletics from restricting

118. *Id.*

119. *See* Nat'l Coll. Athletic Assn. v. O'Bannon, No. 15-1388, 2016 U.S. LEXIS 5140, at *1 (U.S., Oct. 3, 2016); O'Bannon v. Nat'l Coll. Athletic Assn., No. 15-1167, 2016 U.S. LEXIS 5164, at *1 (U.S., Oct. 3, 2016).

120. *See supra*, Part II.

121. *See* S.B. 206, Cal. State Assemb., 2019-20 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB206.

122. *See* Dennis Dodd, *California passes Student-Athlete Bill of Rights*, CBS SPORTS (Oct. 9, 2012, 5:18 PM), https://www.cbssports.com/college-football/news/california-passes-student-athlete-bill-of-rights/.

123. *See* S.B. 206, Cal. State Assemb., 2019-20 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB206.

124. *See id.*

125. *See id.*

126. *See id.*

postsecondary educational institutions' (other than a community college) participation in intercollegiate athletics as a result of one of their student-athletes receiving compensation for the use of their NIL rights.[127] It also prohibits revocation of a student's scholarship as a result of earning such compensation.[128] Furthermore, it prohibits postsecondary institutions from restricting compensation to *prospective* student-athletes relating to their NIL rights.[129] Notably, the Act permits student-athletes access to a professional representative, licensed by the State of California, to assist them in contracting or other legal matters.[130] In sum, the law purports to protect both student-athletes and its California-based member-institutions from NCAA bylaws restricting compensation related to the use of NIL rights.

Although these rules appear on their face to accomplish the goal of providing student-athletes access to their NIL rights, the Act's text is overly broad and ambiguous, which may lead to unnecessary confusion when enforcing it.[131] For instance, one rule prohibits a student-athlete from entering into a contract providing compensation for use of their NIL rights if a provision of that contract is in conflict with a provision of the student-athlete's team contract.[132] But a separate rule prohibits a team contract from preventing a student-athlete from using their NIL rights for commercial purposes when they are not engaged in official team activities, as specified by the rule.[133] These rules could create conflicts of interest for student-athletes trying to sign endorsement deals, leaving such deals susceptible to being voided.[134] If, for example, a student-athlete went to a school that had a preexisting contract with Nike, they wouldn't then be able to sign an individual endorsement deal with Adidas, as that deal would likely conflict with the school's contract with Nike.[135] Consequently, these rules severely restrict a player's freedom of movement to do what they wish with their own NIL rights.[136]

Student-athletes, many of whom are minors when they first enroll at NCAA member-institutions, should not have their freedom to contract

127. *See id.*
128. *See id.*
129. *See id.*
130. *See id.*
131. *See* Jess Mixon, *Future of student-athlete compensation remains uncertain after California bill*, DAILY PA. (Oct. 14, 2019, 7:05 PM), https://www.thedp.com/article/2019/10/pennsylvania-college-athletes-compensation-law-california-robin-harris.
132. *See* S.B. 206, Cal. State Assemb., 2019-20 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB206.
133. *See id.*
134. *See* Andrew Rossow, *Will California's 'Fair Pay to Play Act' Bring Legal Problems for NCAA Athletes?*, GRIT DAILY (Oct. 1, 2019), https://gritdaily.com/california-signs-fair-pay-to-play-act-defying-ncaa/.
135. *See id.*
136. *See id.*

heavily restricted during one of the most economically opportunistic periods of their lives.[137] The freedom to contract is a fundamental right that requires additional legal protections, especially when limitations are sought to be imposed based on status (i.e., as a student-athlete) rather than capacity or subject matter of the contract.[138] Therefore, a plan must be conceived to implement robust legal protections for student-athletes seeking cash compensation in exchange for the right to license their NIL rights.

B. IMPLEMENTATION STRATEGY

The implementation of legal protections concerning student-athletes' NIL rights should be consistent with suggestions made by the appellate court in *O'Bannon*, which held that the NCAA is subject to anti-trust scrutiny and its policies must be tested under the Rule of Reason.[139] The *O'Bannon* ruling requires the NCAA to provide student-athletes with grants equal to the cost of attendance, but nothing more.[140] Consequently, universities should not be involved with the process of implementing NIL rights, nor should they participate in compensating student-athletes monetarily. Not paying student-athletes in cash would allow universities to maintain some semblance of amateurism,[141] while directly paying student-athletes may exacerbate the NCAA's concerns about competitiveness in collegiate sports[142] and be closer to the troubling notion that college sports would morph into professional sports.[143] Although the Ninth Circuit recognized these considerations, the court did not go so far as to say that it would be improper to permit student-athletes to license *their own* NIL rights for profit.[144] Therefore, a law that permits student-athletes to profit from their individual NIL rights, accompanied by reasonable limitations to how these rights may be used and mechanisms for receiving profits, is a viable solution.

One way to afford student-athletes access to their NIL rights is for legislatures to enact laws expressly granting student-athletes in public universities the right to use their own name, image, or likeness for profit without eligibility or participation repercussions from the university for

137. *See supra*, Part I (B).

138. *See* David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE H.R. & DEV. L.J. 51, 54 (2013).

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

140. *Id.*

141. *See supra*, Part I (B).

142. Members of the NCAA Board of Governors, *NCAA responds to California Senate Bill 206*, NCAA (Sept. 11, 2019, 10:08 AM), http://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206.

143. *See* 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.

144. *See generally* O' Bannon v. Nat'l Coll. Athletic Assn., 802 F.3d 1049, 1066 (9th Cir. 2015).

whom they play *provided* that they do not infringe on the publicity rights of the university. In a Forbes article discussing the language that the NCAA could add to their bylaws, Professor Marc Edelman of Baruch College laid out a provision that would accomplish such a task:

> Permissible Student-Athlete Licensing Rights. A payment administered by a non-educational institution is not considered to be pay or the promise of pay for athletics skill, provided the student-athlete does not use the trademarks of the NCAA or any NCAA member college in any manner that may be construed as an endorsement, unless such manner is otherwise protected by principles of the First Amendment or fair use.[145]

The language in Professor Edelman's proposed NCAA rule addresses the concern that permitting student-athletes unrestricted access to their NIL rights may give rise to contractual conflicts with the endorsement deals that NCAA member-institutions have on their own.[146] As Professor Edelman points out, this rule would also assuage any concerns about student-athletes using member-institutions' trademarks in conjunction with their student-athlete endorsement deals that might imply a false relationship between the NCAA or a member-institution with any particular brand or product,[147] which is not entirely clear under California's Fair Pay to Play Act.[148] This rule would essentially serve as a carve-out to NCAA bylaws; one that does not conflict with other NCAA restrictions on compensation.[149]

The language of Professor Edelman's proposed rule should be utilized by state legislatures (and ideally federal) in proposed legislation then signed into law. By using this or similar language, payment by a third party's use of a student-athlete's NIL rights would not be construed as pay for athletic skill, which is currently prohibited by NCAA bylaws.[150] Additionally, this language includes a caveat to student-athletes licensing rights, indicating that the student-athletes' right to endorse products or services would not grant them any rights to infringe upon existing trademarks.[151] The simplicity and narrowness of this language will reduce confusion amongst

145. Marc Edelman, *NCAA Can't Figure Out How To Grant Student-Athletes Endorsement Rights, But It's Simple – Really*, FORBES (May 10, 2018, 10:17 AM), https://www.forbes.com/sites/marcedelman/2018/05/10/the-ncaa-cant-figure-out-how-to-grant-student-athlete-endorsement-rights-so-i-will-help-them/#75e81efe2c01.

146. *See* Thomas Baker, *5 Issues To Keep An Eye On With The NCAA's New NIL Policy*, FORBES (Nov. 1, 2019, 11:40 AM), https://www.forbes.com/sites/thomasbaker/2019/11/01/examining-the-ncaas-evolving-nil-policy-keep-an-eye-on-the-following-issues/#5e41f4d97591 (describing how California's new law includes the limitation that athletes can't endorse brands that compete with school sponsorships).

147. *See* Edelman, *supra* note 145.

148. *See generally* S.B. 206, Cal. State Assemb., 2019-20 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB206.

149. *See* Edelman, *supra* note 145.

150. *See generally* NCAA, 2019-2020 NCAA DIVISION I MANUAL 1, 234 (2019), https://web3.ncaa.org/lsdbi/reports/getReport/90008.

151. *See* Edelman, *supra* note 145.

courts interpreting these and limit courts who seek to broaden interpretations of acceptable uses of student-athlete NIL rights that may be inconsistent with the intent of the legislature.[152]

Critics may argue that any laws containing such language would unduly interfere with interstate commerce and should be deemed unconstitutional under the Commerce Clause, or its corollary, the Dormant Commerce Clause.[153] They may argue that, since the NCAA broadcasts games across state lines, sell and ship merchandise across state lines, and coordinates games across state lines, such a law could plausibly lead to interference with interstate commerce.[154] Indeed, the NCAA won a similar argument in *NCAA v. Miller*, where Judge Ferdinand Fernandez of the Ninth Circuit held that the Commerce Clause barred the State of Nevada from requiring the NCAA to provide it certain procedural due process protections during a sanctions enforcement proceeding.[155] Judge Fernandez expressed concerns that the NCAA would be required to adopt the rules of Nevada for every state in order for the rule to apply equally; there was also the possibility other states might adopt different requirements.[156]

Nevertheless, in defending itself from probable future litigation, California (or any legislature that enacts this type of legislation) should indicate that these laws are distinguishable from the outlawed Nevada statute because they do not concern the NCAA's ability to punish institutions for misconduct, it merely pertains to the relationship between college athletes and third parties.[157] Any future litigation must also consider the court's rationale in *O'Bannon* and current public policy considerations regarding *any* compensation for student-athletes. A court considering these issues in the future should, like the court in *O'Bannon*, come to the conclusion that the modernization and commercialization of college sports requires reevaluation in how courts analyze rules with economic restrictions on student-athletes' individual NIL rights.[158]

Some may opine that it would be much more efficient and realistic for the NCAA itself to adopt such language to their bylaws.[159] In fact, soon after the commencement of drafting this Note, the NCAA announced that their top decision makers voted to allow college athletes to profit from their names, images and likenesses "in a manner consistent with the collegiate

152. *See supra*, Part II (B).
153. *See* McCann, *supra* note 143.
154. *See id.*
155. *See id.*
156. *See id.*
157. *See id.*
158. *See* O'Bannon v. Nat'l Coll. Athletic Assn., 7 F. Supp. 3d 955, 1007 (N.D. Cal. 2014).
159. *See* Edelman, *supra* note 145.

model."[160] The spokesperson for the working group, Gene Smith (Athletic Director at Ohio State University), indicated that the new rules would not follow the "California model" of an unrestricted market, but that the working group would remain involved in sorting out the details of how to implement new rules and the NCAA would likely stay involved as the group in charge of regulating future endorsement deals.[161]

However, herein lies another example of the NCAA kicking the tires while also attempting to keep itself involved in these issues. As the NCAA has indicated in the past, they have not been keen on amending their bylaws in this way,[162] nor should legislatures hold their breath waiting for them to do so. This announcement came from a working group that has been focused on these issues since May 2019,[163] and still the NCAA has yet to come up with a practical model conveying new rights of publicity rules for student-athletes or how to implement them. Nor has the NCAA detailed what "in a manner consistent with the collegiate model" would look like. As noted above, the NCAA should not be involved in an implementation process in any capacity because there are blatant conflicts of interest for a working group that has ties to the NCAA.[164] Therefore, in addition to codifying the language above, legislatures should also adopt provisions laying out a comprehensive implementation plan that describes how student-athletes may exercise newfound NIL rights, i.e., how student-athletes can license their NIL rights and when or how they may receive profits from deals they make.

Legal scholars and legislatures have suggested one of the first steps in implementing such a solution would be to permit student-athletes the use of a professional representative to assist them in exploring any licensing, marketing, or endorsement deals.[165] Tye Gonser, one of the founding

160. Dan Murphy, *NCAA clears way for athletes to profit from names, images and likenesses*, ESPN (Oct. 9, 2019), https://www.espn.com/college-sports/story/_/id/27957981/ncaa-clears-way-athletes-profit-names-images-likenesses.

161. *Id.*

162. In this article, U.S. Congressman Mark Walker is quoted as saying, ". . . [w]hile their words are promising they have used words in the past to deny equity and basic constitutional rights for student-athletes." *See id.*

163. *See* Garrett Stepien, *Ohio State AD Gene Smith comments on NCAA likeness vote*, 247 SPORTS (Oct. 29, 4:25 PM), https://247sports.com/college/ohio-state/Article/Ohio-State-Buckeyes-Gene-Smith-student-athlete-name-image-likeness-law-NCAA-vote-Fair-Pay-to-Play-Act-137708836/.

164. Gene Smith is part of the working group while also being the Athletic Director at the Ohio State University. Like others in the working group with ties to the NCAA, he has an incentive to look out for the best interests of the NCAA, not student-athletes. *See* Georgia Stoia, *'The NCAA will implode': OU professor, expert in intercollegiate athletics weighs in on NCAA's pay-for-play ruling and how it will affect Oklahoma athletics*, OU DAILY (Oct. 31, 2019), http://www.oudaily.com/sports/the-ncaa-will-implode-ou-professor-expert-in-intercollegiate-athletics/article_1cbb81d8-fc36-11e9-8803-2f7072b8ff1e.html.

165. *See* John Meghamez, *An All-Encompassing Primer on Student-Athlete Name, Image, and Likeness Rights and How O'Cannon v. NCAA and Keller v. NCAA Forever Changed College*

partners of Weinberg Gonser, LLP and owner of website Fairplay4ncaa.com, developed a three-step solution called "The Plan" that bills itself as a "practical plan providing monetization and amateurism for the Student-Athlete."[166] Gonser's plan suggests that: (1) all student-athletes assign their NIL rights to an independent third party, the Clearinghouse, who would serve as a professional representative; (2) the Clearinghouse would then negotiate both individual and group deals on behalf of all student-athletes; and finally, (3) the Clearinghouse would distribute funds upon graduation of the athlete, with a percentage disbursed from group deals, a percentage disbursed from individual deals, and a percentage disbursed to the community.[167]

Assigning student-athletes' NIL rights to an independent third party is one possibility, however, as in California's Fair Pay to Play Act, it would be more beneficial for student-athletes to be represented by members of the legal profession who are able to handle many different matters for them.[168] Student-athletes are typically minors who should not be expected to be able to effectively manage business issues that arise upon licensing one's NIL rights. Moreover, their priorities should be largely focused towards education and athletics.[169] Legal counsel can not only aid in navigating contractual and legal matters, but can also be charged with directing student-athletes in other matters, such as personal finance management, investment management, insurance, and important tax consequences.[170] Legal counsel would be effective in combatting the concern that student-athletes may be further exploited[171] because lawyers are held to high ethical and moral standards employed by the state bar they are associated to,[172] as opposed to third parties who may not be subject to the same standards. But even still, because of the sensitivity of these issues, such representatives should be further subjected to a separate, carefully formulated code of conduct which aims to prevent potential abuses and offset concerns

Athletics, 9 LIBERTY U. L. REV. 313, 367 (2015); Yishun Wang M.A., *Student-Athletes' Right of Publicity Legal Issue and Implications*, A Dissertation Submitted to the Faculty of the University of Minnesota (May 2016), https://conservancy.umn.edu/bitstream/handle/11299/181683/Wang_umn_0130E_17171.pdf?sequence=1; *See also* S.B. 206, Cal. State Assemb., 2019-20 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB206.

166. *See* Tye Gonser, *Intro*, FP4NCAA (2017), https://www.fairplay4ncaa.com.

167. *See* Tye Gonser, *The Program*, FP4NCAA (2017), https://www.fairplay4ncaa.com.

168. *See* Wang, *supra* note 165.

169. *See* David A. Grenardo, *The Duke Model: A Performance-Based Solution for Compensating College Athletes*, 83 BROOK. L. REV. 157, 203 (2018).

170. Katie Davis, *How Taxes Could Disrupt the Gameplan of Paying Student-Athletes*, JAMES MOORE, https://www.jmco.com/student-athlete-tax-issues (last visited Nov. 22, 2019).

171. *See* Dalton Thacker, *Amateurism vs. Capitalism: A Practical Approach to Paying College Athletes*, 16 SEATTLE J. FOR SOC. JUST. 183, 191–93 (2017).

172. *See Model Rules of Professional Conduct: Preamble & Scope*, ABA, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/ (last visited Nov. 22, 2019).

regarding student-athletes taking side payments from boosters or being unduly influenced by bad actors.[173]

Assigning NIL rights to a third party to negotiate on behalf of *all* student-athletes raises questions as to how revenue will be distributed, especially once one considers what each parties' equitable contribution may be to earning those funds.[174] This is almost an impossible calculation unless revenue generation is considered. But, in assessing *individual* NIL rights, revenue generation from each sport is irrelevant to calculating the value of such rights,[175] and attempting to conjure valuations could get particularly messy.[176] Additionally, assigning those rights to the NCAA runs the risk of creating an agency relationship, which the NCAA has taken exhaustive steps to avoid.[177] Therefore, it is in the best interests of student-athletes, in the current environment, to forego this route and focus primarily on profiting from their individual NIL rights until the NCAA modernizes their total compensation rules.[178]

In order to preserve principles of amateurism and allow student-athletes to profit from their NIL rights, several legal scholars agree that it makes sense to hold any profits student-athletes earn in a legal trust fund, distributed during their career only to cover day-to-day expenses, and in full after their career as a student-athlete is complete.[179] The appeals court in *O'Bannon* rejected the concept of a trust fund financed through universities in the form of shared royalties from revenues generated by student-athletes' NIL rights, however, the court did not opine on trust funds financed by student-athletes' individual NIL rights revenue, which may resolve the underlying concern with the initial concept.[180] Similar to the manner by which the International Olympics Committee has created trust funds for its own athletes, these trusts should be funded mainly by collecting money earned from individual student-athletes' NIL rights deals.[181] The purpose of such a trust would be to cover the expenses of attending college that are not covered by scholarships a student-athlete has received, be it from the

173. *See* Lathrop, *supra* note 40.

174. *See* Chaz Gross, *Modifying Amateurism: A Performance-Based Solution to Compensating Student–Athletes for Licensing Their Names, Images, and Likenesses*, 16 CHICAGO-KENT J. INTELL. PROP. 259, 284 (2017).

175. *See* Matt Savare, *The Price of Celebrity: Valuing the Right of Publicity in Calculating Compensatory Damages*, 11 UCLA ENT. L. REV. 129, 162-64 (2004).

176. *See id.* at 150–60.

177. *See* Meghamez, *supra* note 165, at 370 n. 412.

178. *See* Thomas Barrabi, *NCAA votes to let student athletes profit from their names, images*, FOX BUS., https://www.foxbusiness.com/fox-business/ncaa-votes-to-let-student-athletes-profit-from-their-names-images (last visited Nov. 22, 2019).

179. *See* Meghamez, *supra* note 165, at 370 n. 412; *see also* Kristine Mueller, *No Control Over their Rights of Publicity: College Athletes Left Sitting the Bench*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 70, 87 (2004); Vladimir P. Belo, *The Shirts Off Their Backs: Colleges Getting Away with Violating the Right of Publicity*, 19 HASTINGS COMM. & ENT. L. J. 133, 154 (1996).

180. *See generally* O' Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).

181. Belo, *supra* note 179, at 154.

institution or otherwise.[182] When the student-athlete graduates or leaves the institution for professional sports or another career, termination of the trust would be triggered and the residue (the remaining funds) of the trust distributed to that individual student-athlete.[183] Some have suggested that the release of such funds should be conditioned on graduation and performance metrics,[184] but these funds would not be tied to the member-institution nor directly relate to education, and therefore should not have education-related performance requirements conditioned for their release.

The trust fund solution is a fair solution because it maintains features of amateurism that the NCAA seeks to maintain.[185] It permits athletes to reap the financial benefits of their NIL rights while helping keep the spotlight off those benefits and instead on what is more important: education and amateur athletics.[186] Furthermore, it will provide necessary funding to the many student-athletes who come from poverty,[187] some of whom cannot even afford to pay for cafeteria meals during sports season.[188] Also, because most student-athletes will never go on to fulfill a lucrative professional career,[189] many will still be permitted to realize their publicity value during their limited window of opportunity as a student-athlete.[190]

Ultimately, the intention of this two-part solution, the suggested legislation and implementation of these rights, is to balance notions of fairness amongst student-athletes and the NCAA. Unfortunately, as it stands, the NCAA and its system of governance is inherently unfair.[191] There are multiple divisions within the NCAA, comprised of schools of all shapes and sizes, that offer different types of sports and generate differing levels of revenues.[192] If the NCAA were forced into sharing royalty payments with student-athletes, it could invoke other regulatory considerations, like Title IX, that would require the NCAA to figure out fair economic treatment of athletes from smaller schools and different genders.[193] Although this would be great progress for all student-athletes,

182. *Id.* at 154–55.
183. *Id.*
184. *See generally* Gross, supra note 174.
185. Mueller, *supra* note 179, at 87–88.
186. *Id.*
187. *See* Thacker, *supra* note 171, at 190 (describing the stories of many athletes who come from poverty and do not have the money to pay their school expenses).
188. *See* Roger Sherman, *Shabazz Napier: 'There's hungry nights where I'm not able to eat'*, S.B. NATION (Apr. 7, 2014), https://www.sbnation.com/college-basketball/2014/4/7/5591774/shabazz-napier-uconn-basketball-hungry-nights.
189. *See* Zak Cheney-Rice, *Here's What Happens to the 98% of College Athletes Who Don't Go Pro*, MIC (Mar. 19, 2014), https://www.mic.com/articles/85789/here-s-what-happens-to-the-98-of-college-athletes-who-don-t-go-pro.
190. Vladimir P. Belo, *The Shirts Off Their Backs: Colleges Getting Away with Violating the Right of Publicity*, 19 Hastings Comm. & Ent. L. J. 133, 156 (1996).
191. *See* Thacker, *supra* note 171, at 201.
192. *See id.*
193. *See id.*

such action may serve to dilute the potential value of financial awards to student-athletes and increase the risk of universities cutting their athletic programs entirely due to increased costs; in other words, the risk may not be worth the reward.[194] This solution offers fair consideration of the NCAA's desire to maintain features of amateurism while also recognizing that student-athletes should have the right to profit from their own NIL rights, just like any other student of higher learning.

CONCLUSION

In sum, the absence of relief under federal antitrust law calls for a new strategy in providing legal relief to student-athletes who continue to be economically oppressed by the NCAA: protecting student-athletes' NIL rights. After decades of federal courts' reluctance to apply the Sherman Act to the NCAA's restrictions on student-athlete compensation, it is up to the individual states or Congress to draw up legislation permitting student-athletes the use of their NIL rights. Legislatures must expressly grant student-athletes in public universities the right to use their own name, image, or likeness for profit without eligibility or participation repercussions from the university for whom they play, provided that they do not infringe on the publicity rights of the university itself. Additionally, legislatures should adopt provisions that detail the mechanisms of exercising these rights, including student-athlete use of licensed legal representatives and utilizing trust funds.

Paul A. Schwabe Jr.[*]

194. *See* Meghamez, *supra* note 165, at 371.

* B.A., The Pennsylvania State University, 2014; J.D. Candidate, Brooklyn Law School, 2021. Thank you to the editorial staff of the Brooklyn Journal of Corporate, Financial & Commercial Law for their work in preparing this Note for publication. Thank you to Kat, Michael, Brian and Don for their hard work and support during an unprecedented semester. Special thank you to my best friend and partner, Laura, for supporting me throughout law school and allowing me to pursue my intellectual curiosities. This Note is dedicated to all the hard-working student-athletes out there, past and present, who have been economically oppressed for far too long.