

1-1-2021

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Dylan Akers
Suffolk University Law School

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Recommended Citation

26 Suffolk J. Trial & App. Advoc. 203 (2020-2021)

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FEDERAL LEGISLATION NEEDED TO SETTLE STUDENT-ATHLETE NAME, IMAGE, LIKENESS ISSUE*

I. INTRODUCTION

On September 30, 2019, California Governor Gavin Newsom signed the Fair Pay to Play Act (“the Act”) into law, allowing California college athletes to profit off their own “names, images, and likenesses” (“NIL”) beginning in 2023.¹ Following the bill’s enactment, many states introduced similar legislation, fearing that prospective athletes may flock to California schools where they can be fairly compensated.² These proposed pieces of legislation fundamentally challenge the century-old system of collegiate athletics established by the National Collegiate Athletic Association (“NCAA”), which holds a monopoly and monopsony over the various markets that comprise the college athletics industry.³ The NCAA currently jus-

**Editor’s Note: This piece was written before the emergence of COVID-19 in the fall of 2019. It does not address how the pandemic has since effected the administration of college sports.*

¹ See S.B. 206, Reg. Sess. (Cal. 2019) (“It is the intent of the Legislature to continue to develop policies to ensure appropriate protections are in place to avoid exploitation of student athletes, colleges, and universities.”); see also Steve Berkowitz, *California Gov. Gavin Newsom at Center of Perfect Storm for NCAA on Name, Image, Likeness*, USA TODAY (Sept. 30, 2019, 4:15 PM), <https://www.desmoinesregister.com/story/sports/2019/09/30/gavin-newsom-ncaa-athletes-law/3824040002/> (discussing NCAA’s pushback to S.B. 206). The Act does not require that athletes be paid by the institutions they attend, but allows for negotiations and deal making with third-party companies. Berkowitz, *supra* note 1. The Act restricts an athlete’s ability to sign deals with companies that conflict with their school’s sponsorship and agents not licensed by the state of California. Berkowitz, *supra* note 1; Michael McCann, *California’s New Law Worries NCAA, but a Federal Law Is What They Should Fear*, SPORTS ILLUSTRATED (Oct. 4, 2019), <https://www.si.com/college/2019/10/04/ncaa-fair-pay-to-play-act-name-likeness-image-laws> (“[T]he Act shouldn’t be confused or conflated with legal efforts to require colleges to pay their athletes—the Act is about contractual relationships between college athletes and companies that wish to use the players’ names, images and likenesses.”)

² See McCann, *supra* note 1 (identifying states that have introduced similar legislation). New York State Senator Kevin Parker (D) has introduced legislation that would allow student athletes to hire agents and receive compensation for use of their NIL. *Id.* Similar bills in Florida and Illinois have been introduced as well. *Id.*

³ See *NCAA v. Miller*, 795 F. Supp. 1476, 1485 (D. Nev. 1992) (discussing how legislation establishing due process protections for student athletes will prompt states to create own versions of bill). The district court notes that, should other states adopt legislation inconsistent with the Nevada statute, the NCAA would be deprived of “a uniform rule and procedural basis for conducting its investigation and review of member institutions.” *Id.*; *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1109 (N.D. Cal. 2019) (concluding NCAA operates as monopsony).

tifies its stronghold by maintaining that student-athletes' amateur status prevents them from participating in the free market.⁴

This Note will first address the issues underlying the movement for furthering collegiate-athlete rights, and the fallacy of the NCAA's notion of "amateurism" as its reason for denying those rights.⁵ Next, this Note will discuss how the NCAA is in violation of the Sherman Act and antitrust law.⁶ Additionally, it will explain how state legislation, though necessary to help build consensus and draw general attention to the issue, will not withstand a Commerce Clause challenge brought by the NCAA.⁷ This Note will then explore the repercussions of multiple state bills, such as the Act, on college athletics.⁸ Finally, this Note will argue that a federal NIL bill is the best avenue for providing college athletes the right to profit off their NIL and participate in the free market.⁹

II. FACTS

In 2018, the Department of Education reported that college sports programs collected a total annual revenue of fourteen billion dollars—a number surpassing any other sports league except for the National Football League ("NFL").¹⁰ The Division I Men's Basketball Tournament alone, known colloquially as *March Madness*, attracts over 100 million viewers and generates one billion dollars in media revenue—more than the NFL's

⁴ See GERALD GURNEY ET AL., UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT 11-24 (2017) (explaining origins of "amateurism" and NCAA model).

⁵ See *O'Bannon v. NCAA*, 802 F.3d 1049, 1072 (9th Cir. 2015) (noting NCAA's argument that amateurism is essential to "increasing consumer demand for college sports"); see also *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1257 (9th Cir. 2020) (discussing NCAA's amateurism argument).

⁶ See GURNEY, *supra* note 4, at 216 (discussing how NCAA's pay restrictions violate Sherman act).

⁷ See McCann, *supra* note 1 (explaining state-by-state approach will be ineffective); *Miller*, 795 F. Supp at 1488 (providing example of NCAA's successful Dormant Commerce Clause argument).

⁸ See McCann, *supra* note 1 (noting options for future legislation at state and federal level); see also Sherman Antitrust Act, 15 U.S.C. § 1 (making unreasonable restraints on interstate commerce illegal).

⁹ 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> (discussing possibility of Dormant Commerce Clause defense); see also U.S. CONST. art. 1, § 8, cl. 3 (reserving regulation of interstate commerce to Congress).

¹⁰ See Chris Murphy, *Madness, Inc.: How Everyone is Getting Rich Off College Sports — Except the Players*, www.murphy.senate.gov/download/madness-inc (last visited Apr. 16, 2021) (reporting Department of Education statistic regarding college athletics industry and revenues).

total revenue collected during the entirety of the league's post-season playoffs.¹¹ The college system mirrors professional sports leagues operation and revenue practices, but is distinct in that it is overseen by the NCAA, an organization created in 1906 to preserve the notion of “amateurism[.]”¹² Under the amateur system, student-athletes are barred from receiving compensation, and instead are offered monetary benefits through scholarships and grants.¹³ The NCAA has purported that restricting fair compensation fosters a character essential to the commercial potential of the industry.¹⁴ The NCAA's argument has spurned controversy and has been the subject of legal dispute over the last forty years.¹⁵

It is undeniable that every key player in the college athletics ecosystem reaps significant profit from their involvement in the industry—except the actual players.¹⁶ Grandiose and sport-specific facilities have be-

¹¹ See *id.* (reporting revenue figures for college sports compared to professional counterparts); Tim Baysinger, *Advertisers Bet Big on March Madness as Live Sports Ratings Wane*, REUTERS (Mar. 17, 2017, 3:22 PM), <https://www.reuters.com/article/us-ncaa-basketball-advertising-idUSKBN16K2G9> (reporting revenue generated by different sports leagues); *The Tools You Need for Equity in Athletics Analysis*, U.S. DEP'T OF EDUC., <https://ope.ed.gov/athletics/#/> (last visited Apr. 16, 2021) (reporting revenue generated by different sports leagues); Steven Kutz, *NFL Took in \$13 Billion in Revenue Last Season — See How it Stacks Up Against Other Pro Sports Leagues*, MARKETWATCH (July 2, 2016, 10:53 AM), <https://www.marketwatch.com/story/the-nfl-made-13-billion-last-season-see-how-it-stacks-up-against-other-leagues-2016-07-01> (comparing NFL revenue to other sports leagues).

¹² See Murphy, *supra* note 10 (arguing “amateur” players exploited because of their profitable NIL).

¹³ See Cork Gaines, *Chart Shows How Little Of College Sports Revenue Goes To The Athletes*, BUS. INSIDER (Sept. 24, 2014 5:03 PM), <https://www.businessinsider.com/college-sports-revenue-athlete-scholarships-2014-9> (surveying evolving benefits in athletic scholarships over time).

¹⁴ See Murphy, *supra* note 10 (“Commercialism has always been embedded in college athletics, and the tension between the business-side and the amateurism of the industry is largely why the National Collegiate Athletic Association (NCAA) formed in the early 1900s . . .”)

¹⁵ See *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1247 (9th Cir. 2020) (detailing suit against NCAA and eleven power conferences that “sought to dismantle the NCAA’s entire compensation framework”); *O’Bannon v. NCAA*, 802 F.3d 1049, 1055 (9th Cir. 2015) (outlining suit brought by college basketball and football players after their depiction in video game); Patrick Hruby, *Amateurism Isn’t Educational: Debunking the NCAA’s Dumbest Lie*, VICE (June 14, 2017, 9:00 AM), https://www.vice.com/en_us/article/kzqevz/amateurism-isnt-educational-debunking-the-ncaas-dumbest-lie (noting NCAA “paint[s] itself as an academic guardian, and that tactic is working, at least in federal antitrust court.”)

¹⁶ See Murphy, *supra* note 10 (reporting average salaries of college coaches and administrators); see also Andrea Adelson et al., *The Perks of Being a College Football Coach: Cars, Planes and . . . Good Behavior Bonuses?*, ESPN (Aug. 16, 2017), https://www.espn.com/college-football/story/_/id/20176937/college-football-coaches-perks-sweeten-deals-nick-saban-daboswinney-jim-harbaugh-urban-meyer-jimbo-fisher-mike-leach (discussing evolving benefits included in coaching contracts). The Department of Education reported \$14 billion in total revenue collected by college sports program in 2018. Adelson, *supra* note 16. David Grenardo, an attorney, associate professor at St. Mary’s School of Law, and former Rice University football player,

come the industry standard, resulting in skyrocketing athletic-coaching and administration salaries.¹⁷ Annual coaching salaries, and even some assistant coaching positions, regularly reach multimillion-dollar figures like their professional counterparts.¹⁸ Pointedly, in thirty-nine out of fifty states, college football or men's basketball coaches are the highest paid public employees in the state.¹⁹ Between 2004 and 2014—when adjusted for inflation—the cumulative per-year facilities spending of a forty-eight school sample-size increased by 89% from \$408 million to \$772 million.²⁰ These numbers demonstrate the value states see in the business of collegiate sports, which is evidently beyond that of a mere venue for amateur athletics.²¹

Athletics apparel companies, such as Nike, Adidas, and Under Armour, account for 97% of all program sponsorships and regularly invest hundreds of millions of dollars in universities where student athletes act as uncompensated representatives of their brands.²² The support of these companies went beyond fiscal investment; in fact, these same apparel companies were recently exposed for engaging in federal crimes, including

claimed that during his time in college he struggled financially because his \$385 monthly stipend from Rice barely covered the \$300 monthly rent associated with sharing an apartment with two other student-athletes. Adelson, *supra* note 16; Hruby, *supra* note 15 (highlighting lucrative college athletics revenues and denial of fair compensation to athletes).

¹⁷ See Murphy, *supra* note 10 (outlining increase in facility expenditures by universities over past two decades); see also Will Hobson & Steven Rich, *College Spend Fortunes on Lavish Athletic Facilities*, CHI. TRIBUNE (Dec. 23, 2015), <https://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html> (addressing how certain schools are providing state-of-the-art facilities for its athletes at high cost). These college athletics facilities are often outfitted with high budget amenities, such as barber shops or video game rooms, and massive locker and weight rooms; construction costs of these facilities can be as high as fifty million dollars or more. See Hobson & Rich, *supra* note 17.

¹⁸ See Adelson, *supra* note 16 (noting coaches receive large bonuses for merely winning games). For example, “Iowa State’s Matt Campbell gets \$500,000 for winning six games, while in-state rival Ferentz pockets \$500,000 for eight or more wins and \$100,000 for any bowl appearance.” *Id.*

¹⁹ See Richard Johnson, *A History of Skyrocketing College Football Coach Salaries, from Camp to Dabo*, BANNER SOC’Y (Aug. 15, 2019, 11:53 AM), <https://www.bannersociety.com/2019/8/15/20732192/coach-salaries-history-highest> (discussing increasing coaching salaries); see also *Who’s the Highest-Paid Person in Your State?*, ESPN (Mar. 20, 2018), http://www.espn.com/espn/feature/story/_/id/22454170/highest-paid-state-employees-include-ncaa-coaches-nick-saban-john-calipari-dabo-swinney-bill-self-bob-huggins (reporting highest paid public employee in thirty-nine out of fifty states were athletics coaches).

²⁰ See Hobson & Rich, *supra* note 17 (noting increase in expenditures on sport-specific athletic facilities).

²¹ See *id.* (noting lavish expenditures are financed, in part, by state governments).

²² See Murphy, *supra* note 10 (reporting statistics for athletic sponsorship agreements between apparel companies and universities). Murphy identifies several large collegiate athletic programs sponsored by Nike, Under Armour, and Adidas. *Id.* The University of California at Los Angeles alone received a record breaking \$280 million contract with Under Armour. *Id.*

bribery and wire fraud, and schemes directing high-school athletes to sign with the company's school of choice.²³ The relationship between Louisville Men's Basketball Head Coach, Rick Pitino, and Adidas is the paradigm example of the correlation between exorbitant coaching salaries and apparel company investment.²⁴ Pitino received 98% of the Adidas sponsorship deal with the University of Louisville and was later accused of improperly funneling money to Brian Bowen, an incoming freshman on the Louisville team.²⁵ The scheme implicated Pitino and high-ranking executives within Adidas and the sports agency ASM Sports, and was part of a continued pattern of activity inducing recruits to join various universities through illegal payments to players and their families.²⁶

Although student-athletes are compensated with full scholarships, most do not reap the value of a free college education due to the conditions of their athletic involvement on campus.²⁷ The most profitable programs—overwhelmingly football and men's basketball programs within the Power Five conferences—regularly graduate student athletes at rates much lower than their non-athletic peers.²⁸ Beginning their freshman year, university

²³ See Tyler Tynes, "Money, Bribes, and Basketball": *The Trial of Christian Dawkins*, THE RINGER (May 10, 2019, 5:45 AM), <https://www.theringer.com/2019/5/10/18563524/christian-dawkins-college-basketball-bribery-trial> (reporting multiple criminal acts in paying student athletes to join university basketball programs). The athletics apparel company coordinated with the university to pay high-school athletes to join their program, and later, when that student matriculated to a professional league, the coaching staff from the university would encourage the student to sign a sponsorship agreement with the athletics company. *Id.*

²⁴ See Dan Gartland, *Rick Pitino got 98% of the Money From Louisville's Apparel Deal With Adidas*, SPORTS ILLUSTRATED (Oct. 5, 2017), <https://www.si.com/college/2017/10/05/rick-pitino-louisville-adidas-contract-money> (describing problematic relationship between Pitino, Adidas, and Louisville). Adidas and the University of Louisville agreed to the sponsorship, worth millions. *Id.*; see also Murphy, *supra* note 10 (explaining shocking apparel contract between Pitino and Adidas).

²⁵ See Gartland, *supra* note 24 (reporting amount paid to Rick Pitino was part of Louisville's Adidas deal); see also Press Release, U.S. Attorney's Office, Southern District of New York, *U.S. Attorney Announces the Arrest of 10 Individuals, Including Four Division I Coaches, for College Basketball Fraud and Corruption Schemes*, U.S. DEP'T OF JUST. (Sept. 26, 2017), <https://www.justice.gov/usao-sdny/pr/us-attorney-announces-arrest-10-individuals-including-four-division-i-coaches-college> (finding bribery and wire fraud committed in continuing payment scheme).

²⁶ See Michael Powell, *The Most Honest Man in College Basketball is Going to Prison*, N.Y. TIMES (May 3, 2019), <https://www.nytimes.com/2019/05/03/sports/college-basketball-trial.html> (reporting Dawkins' candid comments about payments he arranged for players).

²⁷ See Murphy, *supra* note 10 (identifying different ways in which athletes are deprived full value of their scholarships).

²⁸ See *id.* (reporting graduation rate averages from Power Five colleges ranging from 20% to 35%). The term "Power Five" refers to the five most profitable and visible athletic conferences within the Football Bowl Subdivision of NCAA Division I: the Atlantic Coast Conference, the Big Ten Conference, the Big 12 Conference, the Pac-12 Conference, and the Southeastern Conference. *Id.*

athletic departments often guide players into either “easy” majors or “paper” courses to increase players’ graduation rates.²⁹ Moreover, the ordinary demands of participation in a Division 1 athletic program leave little room for the requisite amount of study and class time necessary for a traditionally high-profiting major.³⁰ Chris Murphy, U.S. senator from Connecticut, argued in his multi-part report “Madness, Inc.” that “the refusal to compensate college athletes is a modern civil rights issue, as black teenagers are kept poor in order to enrich white adults.”³¹

Additionally, athletic departments such as the University of North Carolina, Chapel Hill (“UNC”) employ fraudulent tactics to keep their students eligible for competition.³² In the late 1980’s, UNC granted two independent study courses to two UNC basketball players with mediocre academic records—courses that were normally only granted to students with outstanding academic records.³³ The courses, commonly referred to as “paper classes”, required only a research paper at the end of the semester, on which the student athletes were guaranteed at least a “B” grade regardless of quality or paper length.³⁴ In the later years of the scheme, these

²⁹ See Chris Murphy, *Madness, Inc.: How colleges keep athletes on the field and out of the classroom*,

https://www.murphy.senate.gov/imo/media/doc/FINAL_Sen.%20Murphy%20NCAA%20Madness%20Inc.%20Report%202%20-%20How%20Colleges%20Keep%20Athletes%20on%20the%20Field%20and%20Out%20of%20the%20Classroom.pdf (last visited June 6, 2021) (describing academic fraud within “paper classes”). From a schoolwork or schedule perspective, these “easier” majors hold less value than comparable majors, which require more work or a more demanding schedule (such as engineering, finance, or science-based fields of study). *Id.*; see also Marc Tracy, *N.C.A.A.: North Carolina Will Not Be Punished for Academic Scandal*, N.Y. TIMES (Oct. 13, 2017), <https://www.nytimes.com/2017/10/13/sports/unc-north-carolina-ncaa.html> (discussing history of “paper classes” and role in collegiate athletics). The “paper classes,” which are outright fraudulent in nature, were championed and promoted by coaches and athletic administrators alike in hopes of increasing academic metrics and graduation rates associated with athletics programs. See Tracy, *supra* note 29.

³⁰ See Hruby, *supra* note 15 (discussing varying limitations on majors athletes must choose from).

³¹ See Murphy, *supra* note 29 (noting general constraints on athletes which deprive them of full value of scholarship). Murphy adds: “The failure of so many black athletes to graduate, especially in the program that makes the most money is another aspect of the growing civil rights crisis in college athletics.” *Id.*

³² See JAY SMITH & MARY WILLINGHAM, CHEATED: THE UNC SCANDAL, THE EDUCATION OF ATHLETES, AND THE FUTURE OF BIG-TIME COLLEGE SPORTS 20-24 (2015) (finding UNC engaged in ongoing scheme to keep athletes eligible using fraudulent classes).

³³ See Tracy, *supra* note 29 (recounting origins of cheating scandal and its evolution).

³⁴ See *id.* (detailing widespread academic fraud throughout university athletic programs); see also Jake New, *Academic Fraud at Syracuse*, INSIDE HIGHER ED (Mar. 9, 2015), <https://www.insidehighered.com/news/2015/03/09/ncaa-suspends-syracuse-u-basketball-coach-vacates-108-wins> (noting Coach Jim Boenheim’s suspension for enabling academic fraud); Jake New, *Two Decades of ‘Paper Classes’*, INSIDE HIGHER ED (Oct. 23, 2014),

“paper classes” expanded to include “lecture” courses, which never actually met despite appearing in the course catalog as meeting on a weekly basis.³⁵ The scheme quickly grew to hundreds of students in only ten years.³⁶ The scheme proved to be successful as it prevented 170 athletes from falling below the GPA-eligibility point and allowed eighty students to receive diplomas who otherwise would not have graduated.³⁷ After the scheme was uncovered, the university received a mere NCAA probation, while student-athletes bore the brunt of the punishment through NCAA competition bans.³⁸ The highly-profitable UNC men’s basketball program and head coach Roy Williams, on the other hand, were not punished—despite being one of the school programs with the highest number of athletes participating in the scheme.³⁹

The NCAA has yet to take a hardline stance on what role the furtherance of education plays in their governance structure and overall mission.⁴⁰ In *O’Bannon v. National Collegiate Athletic Association*, the organization claimed that education was the core reason for preventing student athletes from profiting off their “Name, Image, and Likeness rights.”⁴¹ However, in response to a lawsuit over the UNC academics scandal, the NCAA asserted it has no legal duty to ensure that a quality education is effectively delivered to student athletes.⁴² This admission speaks volumes to the association’s disregard for student-athlete’s best interests, while allowing others to profit off their participation in competitions.⁴³

<https://www.insidehighered.com/news/2014/10/23/report-finds-academic-fraud-u-north-carolina- lasted-nearly-20-years> (discussing mechanics of “paper classes”).

³⁵ See Murphy, *supra* note 29 (detailing evolution of fraud scandal to include classes that never met); see also Tracy, *supra* note 29 (reporting lack of meaningful discipline for UNC’s academic fraud scheme).

³⁶ See Tracy, *supra* note 29 (describing specifics of UNC academic fraud scheme).

³⁷ See New, *supra* note 34 (reporting specifics on how academic fraud scheme kept athletes eligible).

³⁸ See Murphy, *supra* note 29 (detailing disparity in punishment handed down as result of scandal). “Further, despite widespread participation by men’s basketball players, neither the program nor its Hall of Fame coach, Roy Williams, received any punishment and went on to win multiple national championships in the aftermath.” *Id.*

³⁹ See *id.* (reporting lack of specific sanctions on UNC’s mens basketball program).

⁴⁰ See Hruby, *supra* note 15 (detailing NCAA’s contradictory legal arguments).

⁴¹ See *O’Bannon v. NCAA*, 802 F.3d 1049, 1058-59 (9th Cir. 2015) (detailing NCAA’s argument that amateurism is essential to marketability of college sports); see also Hruby, *supra* note 15 (refuting amateurism argument with statistical analysis).

⁴² See Hruby, *supra* note 16 (discussing NCAA’s argument that there is no duty to provide comprehensive education to student athletes); Sara Ganim, *NCAA: It’s Not our Job to Ensure Educational Quality*, CNN (Apr. 2, 2015), <https://www.cnn.com/2015/04/01/sport/ncaa-response-to-lawsuit/> (noting NCAA not responsible for academic standards at member schools).

⁴³ See Ganim, *supra* note 42 (discussing hypocrisy of duty argument given NCAA’s history). Ganim argues that it makes little sense for an organization that provides detailed information

Despite the many issues that have beguiled the current collegiate system, the federal government has taken a markedly hands-off approach in its regulation of such a massive interstate commercial industry, and has allowed wide discretion over the administration of collegiate sports.⁴⁴ While Title IX regulates some aspects of collegiate athletics, there is little federal guidance on labor standards for student-athletes.⁴⁵ Instead, the NCAA operates as a de facto cartel, and its rulebook includes several anti-competitive regulations in violation of the Sherman Act.⁴⁶ Despite a growing public consensus that the current model takes advantage of student-athletes, the NCAA has refused to consider alternative approaches that would create a more equitable framework for the collegiate-athletic industry.⁴⁷

III. HISTORY

The NCAA was founded in 1906, but its role and scope of operations in managing collegiate sports has evolved over the course of its history.⁴⁸ The NCAA functionally operates as a trade association, comprised of athletic and coaching officials and conference administrators, whose main

about academic standards to claim it has no legal duty to ensure that those standards are actually met, especially when it has a history of imposing punishment as a result of academic related issues. *See id.*

⁴⁴ *See* NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984) (discussing wide berth of discretion accorded to NCAA in managing intercollegiate athletics); *see also* *See* Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200, 207-09 (1922) (holding professional baseball league exempt from antitrust law). The Supreme Court has consistently used a hands-off approach when considering whether organizations such as the NCAA are subject to antitrust law. *See* Fed. Baseball Club of Baltimore, 259 U.S. at 207-09.

⁴⁵ *See* 20 U.S.C. § 1681 (1972) (requiring universities to provide equal funding for men and women's athletics programs). Title IX regulates the equality of funding and availability of sports programs and addresses sexual discrimination and sexual violence issues – but it fails to proscribe any standards relating to athlete labor standards. *See id.*

⁴⁶ *See* Sherman Antitrust Act, 15 U.S.C. § 1 (making unreasonable restraints on interstate commerce illegal); *see also* O'Bannon v. NCAA, 802 F.3d 1049, 1079 (2015) (holding NCAA's rules on student athletes NIL violate § 1 of Sherman Act); Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 80-81 (2013) (discussing cases where NCAA violated Sherman Act).

⁴⁷ *See* Edelman, *supra* note 46, at 66-67 (outlining NCAA's unwillingness to change model). The NCAA has consistently argued that amateurism is essential to the marketability of their product, despite varying standards for compensation allowances based on sport participation. *Id.*; *see also* *See* Hruby, *supra* note 15 (addressing amateurism argument). If this were the case, college sports that permit athletes to keep some cash prizes, such as tennis, skiing, and golf, should be disproportionately less popular and have a different fan-base demographically than those sports where cash prizes are restricted. *See* Hruby, *supra* note 15.

⁴⁸ *See* GURNEY, *supra* note **Error! Bookmark not defined.**, at 16-21 (detailing NCAA's evolution during 20th century).

interests are to enhance their own profits in relation to collegiate athletics.⁴⁹ In 1996, the NCAA abandoned its previous democratic system of governance for a committee model with sixteen members, eight of which are members from Division 1 football programs.⁵⁰ The overrepresentation of Division 1 football programs shaped the overarching policy, strategy, and decisionmaking of the association over the next twenty years.⁵¹ A crucial component of this structure led to the creation of the term “student-athlete”—aimed at both insulating the programs from liability, and preventing working class players from sharing in the profits in any meaningful capacity.⁵²

The term “student-athlete” was created by the NCAA’s legal team as a defense to a workers’ compensation claim brought by a late college football player’s widow.⁵³ Ray Dennison died from a head injury sustained while playing football for the Fort Lewis A&M Aggies.⁵⁴ When his wife sought compensation under the Colorado workers’ compensation statute, the Colorado Supreme Court accepted the school’s argument that Dennison was not a traditional employee because the school was “not in the football business.”⁵⁵ The court found there was no contractual obligation that Dennison play football, and consequently, the employer-employee relationship did not exist.⁵⁶ Congress’ failure to close similar loopholes through the

⁴⁹ See *id.* at 16 (detailing NCAA’s functionality as trade organization). While the NCAA oversees all collegiate athletics, an emphasis on profits led to the organization’s investment focus on football, and to a lesser extent, men’s basketball programs. *Id.*

⁵⁰ See *id.* at 18 (discussing change to governance model to allow for more influence by football).

⁵¹ See *id.* (detailing influence of football on overarching strategy, policy, and marketing); see also Edelman, *supra* note 46, at 76-78 (noting NCAA financial structure).

⁵² See Chuck Slothower, *Fort Lewis’ First ‘Student-Athlete’*, THE DURANGO HERALD (Sept. 25, 2014, 2:58 PM), <https://durangoherald.com/articles/79431> (reporting first use of term “student-athlete”).

⁵³ See 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/?single_page=true (detailing NCAA’s creation of term “student-athlete” to insulate itself from liability); see also Hruby, *supra* note 15 (discussing worker’s compensation case brought by Ernest Nemeth against NCAA). In 1953, Ernest Nemeth, a former University of Denver football player, was found eligible for workers’ compensation by the Colorado Supreme Court. See Hruby, *supra* note 15. The NCAA used the term “student-athlete” as a way to shield member institutions from liability for workers’ compensation claims and other similar claims which threatened to upend the amateurism system. See Hruby, *supra* note 15.

⁵⁴ See Branch, *supra* note 53 (detailing Dennison’s injuries).

⁵⁵ See Slothower, *supra* note 52 (explaining court’s holding in Dennison case).

⁵⁶ See Slothower, *supra* note 52 (finding players are “student-athletes” and have no employer-employee rights).

legislative process has enabled the NCAA to profit at the player's expense.⁵⁷

Under the Commerce Clause, Congress may regulate channels of interstate commerce, instrumentalities of interstate commerce, and those activities which have a substantial effect on interstate commerce.⁵⁸ This third category is interpreted broadly in application and, as a result, the commerce power is considered both profound and wide reaching.⁵⁹ Under the Dormant Commerce Clause theory, the Commerce Clause grants jurisdiction over interstate commerce exclusively to the legislature—precluding states from enacting legislation that has a substantial effect on interstate commerce.⁶⁰ Given the exorbitant revenues collected by universities through athletics programs, and the necessity that teams travel across interstate lines to compete, it is logical to classify collegiate sports as activities which substantially affect interstate commerce.⁶¹ However, the NCAA has successfully challenged state legislation regulating restrictions on student athletes under Dormant Commerce Clause actions.⁶² In *National Collegiate Athletic Association v. Miller*, the U.S. District Court for the District of Nevada held that a Nevada law which created procedural rights for student-athletes was unconstitutional under the Commerce Clause.⁶³ Consequently, future state-level legislation invading the NCAA's sphere of power will likely incur similar challenges.⁶⁴

⁵⁷ See Murphy, *supra* note 10 (discussing NCAA's use of free labor to increase program profits); see also Branch, *supra* note 53 (noting NCAA's use of free labor).

⁵⁸ See U.S. CONST. art. I, § 8, cl. 3 (granting Congress power to regulate interstate commerce).

⁵⁹ See *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (finding Congress reserves exclusive right to regulate activities that substantially affect interstate commerce); see also *Gonzales v. Raich*, 545 U.S. 1, 18-19 (2005) (noting Congress may regulate production of marijuana taken together for effect on interstate commerce). *But see* *United States v. Lopez*, 514 U.S. 549, 561 (1995) (finding statute regulating gun possession near schools exceeded congressional Commerce Clause authority).

⁶⁰ See U.S. Const. art. I, § 8, cl. 3 (granting power to regulate interstate commerce to legislative branch); see also sources cited *supra* note 59 (noting limits of congressional power through commerce clause).

⁶¹ See McCann, *supra* note 1 (asserting college athletics is properly regulated under Commerce Clause).

⁶² See *id.* (discussing legal risk of state-by-state approach).

⁶³ See *NCAA v. Miller*, 795 F. Supp. 1476, 1488 (D. Nev. 1992) (holding Nevada statute in question violated Commerce Clause). Cases like *Miller* call into question whether the NCAA will challenge future state-level regulations under the Dormant Commerce Clause theory. *Id.*

⁶⁴ See McCann, *supra* note 9 (describing why state-by-state approach will be easily challenged by NCAA). State-level legislation will be susceptible to challenge as long as universities within that state continue to operate within the NCAA model or schedule games against other schools who are NCAA members. *Id.*

The Sherman Act allows Congress to exercise its power under the Commerce Clause to regulate interstate commercial activity.⁶⁵ The Sherman Act works to maintain a competitive balance in the marketplace by outlawing activities which seek to restrict trade and competition.⁶⁶ Section 1 of the Sherman Act states “every contract, combination[,] . . . or conspiracy, in the restraint of trade or commerce . . . is declared to be illegal[,]” and lays out a framework, which instructs that “unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress.”⁶⁷ In evaluating whether a restraint on trade is in violation of the Sherman Act, courts apply a two-part test.⁶⁸ A court will first determine whether the restraint involves “concerted action between two legally distinct economic entities,” and then whether that restraint affects “trade or commerce among the several states.”⁶⁹ If the initial two-part test is satisfied, a court then will apply one of three tests to evaluate the competitive effects caused by the restraint: (1) a per se test; (2) a rule of reason test; or (3) a quick look test.⁷⁰ A court applies the per se test when it presumes, on first impression, that a restraint depresses competition and applies the quick look test when it presumes that the restraint has a competitive benefit.⁷¹ The rule of reason test is employed when a court must distinguish “between restraints with anti-competitive effect that are harmful to the consumer and restraints stimulating competition in the consumers best interest.”⁷² The rule of reason test requires courts to consider every aspect of the restraint in question, including: whether the parties to the restraint have any power to control the relevant market (known as “market power”); whether the restraint has an overall effect of encouraging or suppressing competition; and whether the

⁶⁵ See Sherman Antitrust Act, 15 U.S.C. § 1 (2004) (outlawing unreasonable restraints on free market).

⁶⁶ See *Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, BONA LAW PC, <https://www.businessjustice.com/antitrust-standards-of-review-the-per-se-rule-of-reason-and-quick.html> (last visited May 27, 2021) (balancing pro-competitive and anti-competitive restraints).

⁶⁷ See *Antitrust Standards of Review*, *supra* note 66 (finding free and unrestrained market most beneficial to consumers); see also *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 7-8 (1958) (establishing framework for identifying illegal restraints on interstate commerce).

⁶⁸ See Edelman, *supra* note 46, at 71 (identifying framework applied in antitrust cases).

⁶⁹ See *id.* at 71-72 (outlining initial two-pronged test to be applied in cases brought under Sherman Act).

⁷⁰ See *id.* at 73-74 (noting different tests developed by SCOTUS to evaluate restraints on commerce).

⁷¹ See *id.* (describing test used to evaluate presumptive benefit or depression to competitor).

⁷² See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (holding court must weigh effects of restraint in question to determine potential benefit to consumer).

restraint caused any “antitrust harm.”⁷³ Using the Sherman Act as a vehicle for remedy, parties have brought claims against the NCAA relative to restraints on name, image, and likeness rights of students-athletes.⁷⁴

In *O’Bannon v. National Collegiate Athletic Association*, the Ninth Circuit found that NCAA rules prohibiting student-athletes from profiting off their names, images, and likenesses were subject to antitrust law and, accordingly, violate § 1 of the Sherman Act.⁷⁵ Applying the rule of reason test, the court held that the NCAA’s rules had an anticompetitive effect on the college education market.⁷⁶ The court reasoned that, because colleges effectively colluded to set the value of a player’s labor and NIL rights at zero, the NCAA rules constituted a price-fixing agreement.⁷⁷ The court accepted two of the NCAA’s arguments, in part, finding that there were some procompetitive justifications for the restraint—specifically, increasing consumer demand for college sports by promoting amateurism and preventing the formation of a “wedge” between student athletes and their peers who did not participate in sports.⁷⁸ The court then found there were at least two viable, less-restrictive alternatives that would not undermine procompetitive justifications and subsequently affirmed the district court’s judgment that universities provide grants-in-aid up to the full cost of attendance.⁷⁹ In summation, the Ninth Circuit declared that the NCAA regulations are subject to antitrust scrutiny and are appropriately evaluated under the rule of reason test, but should be treated with deference if they are found to be serving a procompetitive effect.⁸⁰

IV. ANALYSIS

While *O’Bannon* is the seminal case regarding collegiate athletics NIL, the Ninth Circuit arguably erred in validating both NCAA arguments

⁷³ See Marc Edelman, *Upon Further Review: Will the NFL’s Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of American Needle v. Nat’l Football League*, 16 STAN. J.L. BUS. & FIN. 183, 197 (2011) (illustrating court’s analysis in determining whether restraint benefitted or harmed consumer).

⁷⁴ See *O’Bannon v. NCAA*, 802 F.3d 1049, 1052 (9th Cir. 2015) (outlining argument that NCAA restrictions on athletes’ NIL rights violate Sherman Act).

⁷⁵ See *id.* at 1079 (holding NCAA video game agreement violated Sherman Act).

⁷⁶ See *id.* at 1057 (holding restriction of NIL rights depressed market for college education in United States).

⁷⁷ See *id.* at 1057-58 (holding NCAA barring compensation for NIL rights constituted illegal price-fixing).

⁷⁸ See *id.* at 1058 (evaluating legitimacy of NCAA offered pro-competitive benefits).

⁷⁹ See *O’Bannon*, 802 F.3d at 1053 (affirming district court’s decision that NCAA schools must provide full cost of attendance in grant-in-aid).

⁸⁰ See *id.* at 1079 (holding NCAA bylaws are subject to regulation under Sherman Act).

pertaining to the procompetitive effects of amateurism; rather, the evolution of NIL rights indicates there is increasing support for student athlete claims, and similar decisions in the future may lean in favor of athletes rather than the NCAA.⁸¹ State-level legislation addressing college athletics NIL, however, creates a difficult problem, as it is susceptible to a Dormant Commerce Clause challenge brought by the NCAA.⁸² The Commerce Clause under the U.S. Constitution dictates that Congress regulates interstate commerce.⁸³ Given that collegiate athletics qualify as interstate commerce, Congress is the appropriate body to consider NIL and amateurism issues.⁸⁴ The Dormant Commerce Clause is a legal doctrine that forbids states from discriminating or unduly burdening interstate commerce.⁸⁵ In fact, the NCAA successfully brought a Dormant Commerce Clause challenge against a Nevada state regulation affecting intercollegiate play in *National Collegiate Athletic Association v. Miller*.⁸⁶ In the aforementioned case, the NCAA argued that they could not effectively operate as a national organizing body if they were forced to comply with conflicting laws in different states.⁸⁷

⁸¹ See Edelman, *supra* note 46, at 91-95 (supporting why *O'Bannon* might be decided differently if it were reconsidered today).

⁸² See McCann, *supra* note 1 (describing how NCAA can easily challenge state-level approach).

⁸³ See U.S. CONST. art. I, § 8, cl. 3 (identifying Congress as appropriate branch to regulate interstate commerce).

⁸⁴ See McCann, *supra* note 1 (suggesting Congress should step in to handle NIL issue under commerce clause).

⁸⁵ See *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 98 (1994) (outlining Dormant Commerce Clause doctrine). The Dormant Commerce Clause “denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.” *Id.*; see also Norman R. Williams, *Why Congress May Not “Overrule” the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 187 (2005) (explaining legislative silence cannot overrule Dormant Commerce Clause).

⁸⁶ See *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993) (holding Nevada law substantially interfered with regulation of interstate commerce by legislative branch).

⁸⁷ See *id.* at 639 (arguing NCAA would be unable to operate if subjected to conflicting state laws). In reality, the NCAA cited issues in adhering to individual state laws are not administrative in nature. *Id.* Rather, these issues are tied directly to the continued propagation of the amateurism model. *Id.*; see also Vincent J. DiForte, *Prevent Defense: Will The Return Of The Multi-year Scholarship Only Prevent The Ncaa's Success In Antitrust Litigation?*, 79 BROOK. L. REV., 1333, 1355 (2014) (stating that “[c]ritics admonish the NCAA’s antiquated notion of amateurism, argue that commercialization permeates NCAA, and indicate that the only individuals prevented from benefitting from the system are the student-athletes who generate billions of dollars in revenue for the NCAA’s member institution.”) While varying NIL laws would possibly lead to recruiting advantages and disadvantages among member schools, there is nothing stopping the NCAA from changing their bylaws to allow for the type of compensation explicitly made legal by proposed state-level legislation. DiForte, *supra* note 87, at 1355.

Regardless of the NCAA's ability to mount legal challenges, enacting state-level legislation is an inefficient approach to address the NIL issue because such legislation would only control college athletes participating in programs in states where these bills were enacted.⁸⁸ In response to California's bill, states with single or multiple "powerhouse" athletic programs will be incentivized to pass legislation to create a competitive advantage—or at the very least, mitigate against California's competitive advantage for the universities in their state.⁸⁹

While a number of states have already introduced laws mirroring the Act, their passage will likely deemphasize the need for national reform.⁹⁰ If such an approach was widely utilized by several states, it would likely turn college athletics into an intrastate commercial activity, as out-of-state schools may be unwilling to schedule games or participate in conferences with those schools with state laws that are more favorable to student athletes' NIL rights.⁹¹ A widespread state-level approach might also concentrate college athletics to the few states that pass NIL legislation—relegating states that do not effectively operate to the D3 level.⁹² Congress must pass legislation to maintain the current, national interstate market for college athletics.⁹³

Putting aside the possibility of voluntarily changes to NCAA by-laws, a federal law addressing student-athletes' NIL rights would be the

⁸⁸ See McCann, *supra* note 1 (identifying issues with state-by-state approach to student-athlete compensation quandary).

⁸⁹ See *id.* (listing states which have introduced their own NIL legislation). Each additional state that passes NIL legislation—independent of a federal bill—will simultaneously bolster the NCAA's legal argument that the association cannot effectively administer its rules. *Id.*; see also NCAA v. Miller, 795 F. Supp 1476, 1488 (D. Nev. 1992) (noting additional legislation will disrupt uniformity).

⁹⁰ See McCann, *supra* note 1 (predicting California legislation will prompt other states to create own versions of California's bill). The states that introduced this type of legislation after California legislation include: New York, Ohio, Florida, Illinois, Nevada, Pennsylvania, and South Carolina. *Id.*

⁹¹ See McCann, *supra* note 9 (discussing ramification of state-by-state approach). States with expansive NIL rights for athletes might create their own league made up of schools only in states with similar legislation and leave behind the NCAA model entirely. *Id.* Other states who choose to continue with the NCAA's amateurism model may be prevented from scheduling games against schools in states with NIL legislation. *Id.*

⁹² See McCann, *supra* note 9 (discussing further ramifications of state-by-state approach). This change could come as a result of NCAA action, such as removing those schools in states with NIL legislation, or through market equilibrium, as the vast majority of talented players will look to sign with schools in states where they will be allowed to participate in the free market regarding their NIL rights. *Id.*

⁹³ See McCann, *supra* note 9 (discussing how college athletics landscape will change as result of Act). Once California's act goes into effect, California-based NCAA member schools will no longer be allowed to participate in NCAA sanctioned events. *Id.* As more states follow suit, the structure of the NCAA model will be in jeopardy. *Id.*

most effective means for reform, and would also attract widespread, bipartisan support.⁹⁴ Not only would a federal law preclude a Dormant Commerce Clause challenge by the NCAA, but it would also eliminate states' desire to seek the passage of NIL legislation to obtain a competitive advantage in college athletics.⁹⁵ In a political climate where across-the-aisle work between Republicans and Democrats is minimal, there still remains bipartisan consensus on the need to reconsider compensation and NIL rights for college athletes.⁹⁶ Because most athletes participating in the revenue-producing sports of football and basketball are African American, many consider compensation rights for student-athletes an important civil rights issue in the modern era.⁹⁷ Revaluation of compensation is also necessary considering that for the vast majority of student athletes, the marketability and value of their NIL rights are at their peak in college—a time when they are also subsequently the most vulnerable to a career-altering injury.⁹⁸

The NCAA's no-pay rules for student athletes restrict their access to a free market for their services and are subject to scrutiny under § 1 of the Sherman Act.⁹⁹ Section 1 provides “a comprehensive charter of eco-

⁹⁴ See McCann, *supra* note 1 (discussing how California legislation will prompt other states to create their own versions of Act). Legislation introduced in the House of Representatives, known as the “Student-Athlete Equity Act[.]” would condition the NCAA’s status as a non-profit organization on their allowing student athletes to be compensated for the NIL. *Id.*

⁹⁵ See *id.* (discussing how federal law would supplant state law because of supremacy clause); see also Murphy, *supra* note 10 (noting incessant need to compete among athletic programs).

⁹⁶ See Matt Gaetz (@mattgaetz), TWITTER (Oct. 2, 2019, 10:46 AM), <https://twitter.com/mattgaetz/status/1179407308801089538?lang=en> (commenting on unity between political ideologies for collegiate athletes). Representative Gaetz (R-FL), tweeted “The NCAA has devised a system where predominantly young, black adult student-athletes create value at huge cost to their bodies. Then, predominantly old, white administrators see the benefit. BS!.” *Id.*

⁹⁷ See Murphy, *supra* note 10 (identifying restrictions on student-athletes in revenue-generating sports as modern-day civil rights concern).

⁹⁸ See Branch, *supra* note 53 (discussing prevalence of injuries in college football industry). There are 20,000 college football injuries alone per year in the NCAA, including 4,000 knee injuries and 1,000 spinal injuries. *Id.* Forty student-athletes have died while playing college football since the year 2000. *Id.*; Paula Lavigne, *Documents, Claims Bring NCAA Medical Care Issues into Question*, ESPN (Nov. 26, 2019), https://www.espn.com/espn/otl/story/_/id/28116817/documents-claims-bring-ncaa-medical-care-issues-question (discussing prevalence of death in college football); Chris Murphy, *Madness, Inc., How College Sports Can Leave Athletes Broken and Abandoned*, <https://www.murphy.senate.gov/imo/media/doc/Madness%203...pdf> (last visited Jun. 6, 2021) (providing statistics of football-related student deaths and injuries). College football players are 4.5 times more likely to die during training session than while competing in practice or a game, and are 3.6 times more likely to die than high-school football players. Murphy, *supra* note 10.

⁹⁹ See Sherman Act, 15 U.S.C. §§ 1-7 (2006) (providing restrictions on free market competition subject to scrutiny under Act); see also *NCAA v. Bd. of Regents*, 468 U.S. 85, 99 (1984)

conomic liberty aimed at preserving free and unfettered competition as the rule of trade[.]” and prohibits those contracts which “unreasonably” restrain trade.¹⁰⁰ In making this determination, a court examines if the restraint in question involves a “concerted action between at least two legally distinct economic entities” in a way that affects “trade or commerce among the several States[.]”¹⁰¹ Where the threshold burden has been met, a court will examine the restraint under a number of factors, including whether or not it unreasonably suppresses free competition within a relevant market.¹⁰² The issue in bringing a Sherman Act claim on behalf of student athletes is not in meeting the two-prong test to determine if a restraint is illegal, but rather in the NCAA’s classification of student athletes as different than employees—a classification mistakenly accepted by the courts.¹⁰³ Moreover, courts have incorrectly implied that the NCAA and intercollegiate athletics operate in a manner similar to other educational programs, and should therefore be exempt from the analysis.¹⁰⁴ However, given the revenues associated with running these programs, particularly men’s basketball

(“By participating in an association which prevents member institutions from competing against each other . . . the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another. A restraint of this type has often been held to be unreasonable as a matter of law.”)

¹⁰⁰ See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (interpreting Sherman Act’s purpose and Congress’ objective in enacting it); see also *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342-43 (1979) (describing Congressional understanding of what constitutes “business” under Sherman Act).

¹⁰¹ See *Primetime 24 Joint Venture v. Nat’l Broad. Co.*, 219 F.3d 92, 103 (2d Cir. 2000) (quoting *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 542 (2d Cir. 1993)) (defining threshold burden of proof for determining illegal restraint on trade).

¹⁰² See *Banks v. NCAA*, 746 F. Supp. 850, 858 (N.D. Ind. 1990) (“Whether a particular arrangement violates the Sherman Act depends upon the arrangement’s effects upon competition in the relevant marketplace.”)

¹⁰³ See *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 197 (2010) (“An ongoing § 1 violation cannot evade scrutiny simply by giving the ongoing violation a name and label.”); *NCAA v. Miller*, 795 F. Supp. 1476, 1487 (D. Nev. 1992) (considering students and employees in same classification); see also Slothower, *supra* note 52 (introducing classifications among students and employees); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete As Employee*, 81 WASH. L. REV. 71, 129 (2006) (identifying how NCAA member schools do not consider student athletes as victims of wage fixing).

¹⁰⁴ See *Jones v. NCAA*, 392 F. Supp. 295, 303-04 (D. Mass. 1975) (classifying intercollegiate ice hockey as educational program); see also *Hennessey v. NCAA*, 564 F.2d 1136, 1151 (5th Cir. 1977) (holding NCAA bylaws that have sufficient impact on commerce subject to Sherman Act); Erin Guruli, Article, *Commerciality Of Collegiate Sports: Should The IRS Intercept?*, 12 SPORTS LAW J. 43, 61 (2005) (noting that “while the NCAA has not agreed to compensate college athletes, university athletic programs, namely those associated with NCAA Division I athletics and the BCS, look very similar to for-profit entities.”)

and football, it would be inconsistent to find that these activities do not constitute interstate economic activity.¹⁰⁵

If a court finds that both the threshold requirements and competitive effects tests are satisfied, it subsequently examines the competitive effects created by the restraint under one of three “rule of reason” test.¹⁰⁶ This per se test is applied when a restraint is “so nefarious” that it is unlikely to have any redemptive value and would be declared illegal, unless a special antitrust exemption applies.¹⁰⁷ If a court believes there may be some benefit to the restriction, it will apply the rule of reason analysis, and examine whether: the parties to the restraint have any power to control market power and the restraint either suppresses or encourages free market competition—consequently causing “antitrust harm.”¹⁰⁸ If a plaintiff successfully shows anticompetitive effects in their complaint, the court will apply a “‘quick-look’ analysis under the rule of reason[,]” which requires a less comprehensive analysis because a court relies on the presumption of illegality.¹⁰⁹ In most cases involving the NCAA, the courts will employ a “full” rule of reason test—citing the common interest of NCAA member institutions in “making the entire league successful and profitable.”¹¹⁰

¹⁰⁵ See *O’Bannon v. NCAA*, 802 F.3d 1049, 1065 (9th Cir. 2015) (finding non-commercial activity argument “not credible”).

¹⁰⁶ See *id.* at 1070 (articulating different tests under rule of reason); see also Marc Edelman & Brian Doyle, *Antitrust and “Free Movement” Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT’L. L. & BUS. 403, 414-15 (2009) (describing “rule of reason” test).

¹⁰⁷ See Edelman & Doyle, *supra* note 106, at 415 (“In the context of professional sports . . . the two most applicable defenses or exemptions to Section 1 of the Sherman Act are the statutory labor exemption and the non-statutory labor exemption.”)

¹⁰⁸ See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (explaining rule of reason is “an inquiry into market power and market structure”); see also *Worldwide Basketball, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004) (“Under the rule of reason analysis, the plaintiff bears the burden of establishing that the conduct complained of ‘produces significant anticompetitive effects within the relevant product and geographic markets.’”) (quoting *NHL v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003)).

¹⁰⁹ See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999) (directing quick look test be used when there is conclusion of anticompetitive effect). When applying a quick-look test, the court will require evidence of overwhelming pro-competitive effects of a restraint to determine that it withstands scrutiny under the Sherman Act. *Id.* at 764.

¹¹⁰ See *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 202 (2010) (finding common interest of NFL Teams “provides a perfectly sensible justification for making a host of collective decisions”); see also *Texaco Inc. v. Dagher*, 547 U.S. 1, 3 (2006) (finding it is not per se illegal under Sherman Act for “a lawful, economically integrated joint venture to the set prices” at which it sells its products); *Justice v. NCAA*, 577 F. Supp. 356, 380 (D. Ariz. 1983) (observing that “[a] clear trend has emerged in recent years under which courts have been extremely reluctant to subject the rules and regulations of sports organizations to the group boycott *per se* analysis.”)

V. CONCLUSION

To fully address the issue of NIL rights for student athletes, Congress must exercise its Commerce Clause power and pass federal legislation establishing a nation-wide standard for student-athlete rights. Students deserve marketplace rights equal to those enjoyed by workers in non-athletic industries—specifically, the ability to pursue the fair market value of licensing their likeness. Given the racial identities of a majority of collegiate football and basketball athletes and the fact that coaches and administrators reap the rewards of their fruitful labor, the NIL issue could be considered one of the more prominent modern-day civil rights issues. Further, because of the immense public interest in college athletics, the current system of “amateurism” does more to constrain the rights of athletes than it does to serve the marketability or revenue-generating ability of the industry. If college athletics is to remain a flourishing industry that profits from its amateur athletes, Congress must enact legislation that abolishes the NCAA’s reliance on amateurism, empowers student-athletes regarding their NIL rights, and catapults the industry into an unrestrained era of college sports.

Dylan Akers