The NCAA's Historical Challenges with Antitrust Issues and Its Current Battle for Continued Relevance

Andrew Bondarowicz

On January 12, 2021, the National Collegiate Athletic Association (NCAA) delayed what would be the most significant policy shift in the association in almost 40 years. The proposal would allow student-athletes, for the first time, to earn revenue and profit from the use of their name, image, and likeness (NIL) rights—also known as their rights of publicity. The delayed vote prolongs the NCAA's complicated legal dance with antitrust law, and it also continues the organization's difficult search for its modern identity within the bounds of its original mission. The NCAA also failed to placate its critics who feel that the commercialization of the NCAA exploits student-athletes more than it benefits them. So, the drama continues with a series of internal, congressional, legal, and legislative proposals seeking to revolutionize the amateur sports behemoth.

I. Introduction

A. WHAT IS THE NCAA?

The NCAA is a tax-exempt, unincorporated association that recognizes approximately 1,100 colleges and universities as members.[1] It sponsors over 90 championships in 24 different men's and women's sports and claims about half a million student-athletes participating at the collegiate level.[2] The NCAA is governed by its Board of Governors, while its policy-making body is a series of committees composed of volunteers from its member schools.[3] The NCAA maintains a three-tier system of divisions for competitions. Division I is considered the most competitive and allows schools competing at this level to award students athletics-based scholarships, financial aid, and other benefits for athletic participation.[4] The NCAA maintains maximum scholarship limits for each sport, although it is up to the individuals schools to determine how many scholarships they award each year, within the NCAA limits.[5] Division I includes many of the largest schools in the country. There are currently 350 schools and over 182,000 student-athletes competing at the Division I level.[6] The majority of the professional players drafted into the major American sports leagues come from the Division I ranks.[7]

Division II, like Division I, provides its member schools with the ability to issue athletics-based financial aid; however, the amount of

---

[1] *What is the NCAA?*, NCAA, https://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa (last visited Apr. 10, 2021); *see also National Collegiate Athlete Association*, Nonprofit Explorer, https://projects.propublica.org/nonprofits/organizations/440567264/201711379349300841/IRS990 (last visited July 1, 2021).

[2] *Id.*

[3] *See Governance*, NCAA, https://www.ncaa.org/governance (last visited July 1, 2021).

[4] *See Our Division I* Students, NCAA, https://www.ncaa.org/our-division-i-students (last visited July 1, 2021).

[5] NCAA, DIVISION I MANUAL, OPERATING BYLAWS, 15.01.1 (Aug. 1, 2020), https://www.ncaapublications.com/productdownloads/D121.pdf.

[6] NCAA, RECRUITING FACTS, COLLEGE SPORTS CREATE A PATHWAY TO OPPORTUNITY FOR STUDENT ATHLETES (Aug. 2020), https://ncaaorg.s3.amazonaws.com/compliance/recruiting/NCAA_RecruitingFactSheet.pdf. *Our Three Divisions*, NCAA, https://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions (last visited Apr. 10, 2021).

[7] *See* Chip Patterson, *2021 NFL Draft Picks by College Team*, CBS, May 1, 2021, https://www.cbssports.com/college-football/news/2021-nfl-draft-picks-by-college-team-school-georgia-leads-sec-on-day-2-notre-dame-and-ohio-state-shine/. For a historical analysis of NBA Draft data, see *Basketball, NBA Draft Finder*, Stathead Basketball, https://stathead.com/basketball/draft_finder.cgi (last visited July 1, 2021).

scholarships per sport is lower than Division I.[8] Division II schools also tend to either have smaller enrolled populations and/or dedicate less resources to athletics than their Division I counterparts.[9] Finally, Division III is the largest division based on the number of schools with 438 members—approximately 40% of the total NCAA membership.[10] The NCAA includes an elaborate structure of policy committees that are mainly composed of administrators with input from various student-athlete groups for generating overall NCAA policy.[11] "The NCAA Manual, published and revised annually, contains the NCAA's constitution, bylaws, executive regulations, enforcement procedures, recommended policies, and rules of order."[12] Additionally, each division also has its own self-governance and rule-making apparatus.[13]

There are several principles that are the tenets of the NCAA, including the "Principle of Amateurism" that requires that student-athletes not be compensated directly for athletic performance.[14] This principle is the key differentiator between college athletics and professional sports, where professional athletes can be very highly compensated for their athletic performance. Unlike professional leagues that have unions that represent the player-workers and participate in collective bargaining, student-athletes do not have a formal, direct vote in NCAA policymaking. Instead, NCAA "legislation" is voted on by its member schools.[15]

The NCAA was originally formed in the early 1900s to protect the health and safety of students participating in the emerging sport of football on campuses across the country. Specifically, the organization was formed in 1905 in response to a call to action from then-President Theodore Roosevelt to the university presidents of Harvard, Yale, and Princeton, to address the mounting injuries—and even deaths—in

---

[8] *See* NCAA, DIVISION I MANUAL, (Aug. 1, 2020); NCAA, DIVISION II MANUAL, (Aug. 1, 2020; NCAA, DIVISION III MANUAL, (Aug. 1, 2020).

[9] *See About Division II*, NCAA, https://www.ncaa.org/about?division=d2 (last visited July 1, 2021).

[10] *Our Three Divisions*, NCAA, https://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions (last visited Apr. 10, 2021). Jeff K. Brown, *Compensation for the Student-Athlete: Preservation of Amateurism*, 5 KAN. J.L. & PUB. POL'Y 147, 148 (1996).

[11] *See Governance,* NCAA, https://www.ncaa.org/governance/ (last visited July 1, 2021).

[12] Brown, *supra* note 10.

[13] *See* NCAA, DIVISION I MANUAL, (Aug. 1, 2020); NCAA, DIVISION II MANUAL, (Aug. 1, 2020; NCAA, DIVISION III MANUAL, (Aug. 1, 2020).

[14] NCAA, DIVISION I MANUAL, CONSTITUTION, 2.9 (Aug. 1, 2020), https://www.ncaapublications.com/productdownloads/D121.pdf.

[15] *Id.* at 3.2.1.7.1.

football among colleges around the country.[16] A number of prominent schools banded together to charter an organization known as the Intercollegiate Athletic Association of the United States, which was later renamed to its present name in 1910.[17] From the beginning, the NCAA's charge was to unilaterally protect the health and safety of students competing in intercollegiate athletics by creating standards and regulations to curb injuries and deaths in connection with participation in intercollegiate sports.[18] The NCAA remained small as a governing organization—it did not hire its first full-time employee until 1951—but mushroomed to over 500 employees today.[19] Throughout its history, the NCAA has remained a private, non-governmental self-regulatory association. However, as the complexity of college athletics grew and evolved, so have the NCAA's scope and breadth of responsibility.

As the popularity of college athletics grew, the negative influences of competition led to calls for more oversight to ensure fair competition. The desire to win on the field drove schools to recruit high-level athletes and began to offer financial incentives in the form of academic aid to individuals to lure students to their institutions so they would compete for the schools.[20] In response, the NCAA established its first set of recruiting and financial aid rules in the late 1950s.[21] At the time, the rules were very strict and limited the ability of schools to provide incentives to prospective student-athletes.[22] These restraints were only intended to maintain the member-schools academic mission by disallowing financial windfalls from sports drive students' school selection decisions.

However, that did not stop schools from seeking a competitive advantage in other ways. In *University of Denver v. Nemeth*,[23] a former student sued for workers compensation when he suffered a back injury while participating for the school's intercollegiate football team,

---

16 Jim Weathersby, *Teddy Roosevelt's Role in the Creation of the NCAA*, THE SPORTS HISTORIAN (July 6, 2016), https://www.thesportshistorian.com/teddy-roosevelts-role-in-the-creation-of-the-ncaa/#.

17 *Id.*

18 *Id.*

19 *See National Office Leadership Team*, NCAA, https://www.ncaa.org/about/who-we-are/office-president/ncaa-senior-leadership-team (last visited July 1, 2021).

20 John Kibilko, *The History of Sports Scholarships*, SAPLING, https://www.sapling.com/8144923/history-sports-scholarships (last visited July 1, 2021).

21 *Id.*

22 Andy Staples, *A History of Recruiting; How Coaches Have Stayed a Step Ahead*, SPORTS ILLUSTRATED (June 23, 2008), https://www.si.com/more-sports/2008/06/23/recruiting-main.

23 University of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953).

preventing him from fulfilling his duties as an on-campus maintenance worker, an arrangement that helped provide access to school and secure his participation in football.[24] Nemeth prevailed in showing that the school routinely arranged employment for athletes and, therefore, participating in football was part of his job duties to the university.[25] This led the NCAA to coin the term "student-athlete," add it to their bylaws, and draw a distinction between a student participating in intercollegiate athletics from anything else they may do on campus, including employment.[26] It also clarified that student-athletes were not being compensated for athletic participation.[27]

B. WHERE DOES THE NCAA FIT IN THE AMERICAN NATIONAL SPORTS LANDSCAPE?

In the United States, the sports hierarchy is very disjointed. There are a variety of organizations that are involved in the regulation and organization of sports programs, from purely recreational activities through to professional level competitions. While there are established norms in the development process of each sport, the succession plan for an athlete to ascend to higher levels in a particular sport can vary immensely from one sport to another, and meander through a collection of organizations. At best, these organizations are loosely connected and, in some cases, they are not connected at all.

Purely recreational programs are generally run by non-profit organizations, social clubs, schools, or government agencies. Their intention is to provide children, and even adults, with an opportunity for physical activity, education, and pure recreation. Generally, organized sports, are governed either directly or indirectly, by nonprofit national governing organizations,[28] or by national governing bodies (NGBs) that are often affiliated with the United States Olympic and Paralympic Committee. There may also be intermediary organizational levels, such as state or regional associations or leagues that help administer competition. These intervening organizations include the YMCA and the Amateur Athletic Union (AAU) network are major organizers for sports such as swimming or gymnastics and track and field or basketball, respectively. For most of these sports, the pinnacle of their sports

[24] *Id.* at 424-25.

[25] *Id.* at 430.

[26] Former NCAA Executive Director Walter Byers is credited with coining the term "student-athlete" in 1964.

[27] NCAA, DIVISION I MANUAL, Principal of Amateurism, (Aug. 1, 2020).

[28] Federal tax law provides tax exemption for amateur athletics. *See* 26 U.S.C. § 501(c)(3) (exemption from tax on corporations, certain trusts, etc.).

competition pyramid ends with the Olympics or world championships where the top athletes are able to represent their country in athletic competition.

Separately, educational institutions run their own athletic structure. While elementary and middle school programs are typically run locally, high school sports are typically administered through statewide athletic organizations that provide governance, organization, and administer championship events.[29] While most state organizations belong to the National Federation of High School Associations which provides some support and coordination amongst members, each state typically administers its own competitive programs. [30] High school sports tend to function independently from the national governing sports bodies in many sports, such as soccer and basketball, and create different rules for high school competition versus non-high school competition.[31] In other sports, such as football, baseball, and softball, that are not aligned with the United States Olympic & Paralympic Committee (USOPC), high school rules are often independently developed and align informally to the sport's "norms."[32] In many of these sports, the rules of play vary at different levels without a cohesive central governing body.

The role of professional sports leagues in athletic development varies greatly in the United States. The National Hockey League and Major League Baseball maintain several levels of "minor leagues" where promising athletes can be developed to determine if they have what it takes to reach the major league level.[33] The National Basketball Association recently started to develop the NBA G-League as their official developmental league.[34] While there is a growing trend of the top high school players bypassing college competition for the G-League, this has been very limited to date.[35] Instead, the majority of G-League players are former college players who were not able to make NBA rosters, yet are still aspiring to do so. Major League Soccer (MLS) has the most extensive player development process with their "academy"

[29] *About Us*, NATIONAL FEDERATION OF HIGH SCHOOL ASSOCIATIONS, https://www.nfhs.org/who-we-are/aboutus (last visited April 10, 2021).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Official Release, NBA G League Introduces New Professional Path for Elite Basketball Prospect (Oct. 18, 2018), https://www.nba.com/news/g-league-professional-path-official-release.

[35] *Id.*

structure extending down to pre-teen ages.[36] The NFL has almost no role in the developmental process. It does not maintain a minor league nor are there internal pathways for youth athletes to the professional ranks. Instead, they rely on the college ranks to develop their talent for them. By comparison, European soccer clubs maintain an integrated structure from the youth level to the professional ranks. While most youth sports in the United States maintain a "pay to play" system, European clubs usually have low or no cost youth programs where they instead look to garner development fees from other clubs who sign their developed talent to professional contracts.[37]

NCAA sports align most closely with other education-based sports programs, such as high school athletics, and create a unique character to college sports. The NCAA create its own eligibility and recruiting rules and maintain their own unique rules of competition. For example, pass interference and time management rules in NCAA football are different than similar rules in the NFL. College basketball games are 40 minutes, broken into two 20-minute halves, while NBA games run 48 minutes and are played in 12-minute quarters. NCAA rules in other sports can also vary from rules in non-NCAA competition. Like high school sports, college athletes are not paid for their participations and are thus considered amateur athletes. Yet, the unique nature of college sports does not limit their popularity and ability to generate revenue. For example, college football programs broadcast more games in total per week than the NFL.[38]

The NCAA also plays a vital role in player development. For the NFL, almost all of their new talent each season emerges from the college ranks through the draft process. NFL draft rules require an aspiring player to be at least three years removed from high school or at least twenty years of age to be eligible to be drafted.[39] That leaves players with few options other than to play college football. The NBA also has a similar draft rule although their rule only requires one year of post-high

---

[36] Associated Press, *MLS Unveils New Youth Development Plan After U.S. Soccer Shutters Academy Program*, SPORTS ILLUSTRATED (May 14, 2020), https://www.si.com/soccer/2020/05/14/mls-youth-academy-development-program-us-soccer.

[37] *Id.*

[38] The National Football League is composed of thirty-two teams playing games once per week. There are over 130 NCA Division I Bowl Subdivision teams also playing weekly. Almost all FBS games are broadcast through lineal or streaming services through various contracts and broadcasting arrangements.

[39] Collective Bargaining Agreement by and Between the National Football League and the National Football League Players Association, at 34 (2020), available at https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf.

school development and at least nineteen years of age.[40] The Women's National Basketball League (WNBA) requires draft prospects to be at least twenty-two years old during the calendar year in which such Draft is held and have either completed their college degree or have renounced any remaining intercollegiate eligibility.[41] Participating in college football and basketball allows players to mature physically, hone their athletic skills, and also gain name recognition, before they become eligible for professional drafts. For athletes in many Olympic sports, college competition provides enhanced training and coaching, access to facilities, and a team environment for athletes to continue competing in their sports. Collegiate level-sports is often the highest level of competition available to many athletes who do not qualify for national teams in sports such as swimming, rowing, or gymnastics.

In the majority of the twenty-four NCAA-sponsored sports, athletes often toil in relative obscurity without major televised appearances, media, or other recognition. Even the top competitors in most of these sports are largely anonymous to the general public. Conversely, a few NCAA-sponsored sports—namely football and basketball—receive significant marketing and public relations support such that many of the sports' top athletes enjoy higher name recognition than many professional athletes in their sports. These sports generate millions of dollars in revenue from lucrative television contracts and live attendance. As a result, NCAA schools pour millions into marketing, upgrading facilities, and promoting these particular sports to drive attendance and recruit the best athletes in a self-perpetuating cycle.[42] The success of college football and basketball has also brought significant criticism because generated revenues are not shared with the players in the same way they are in professional sports leagues. In professional leagues, collective bargaining forces a certain percentage of league revenues to flow to the players in the form of salary and benefits.

[40] Collective Bargaining Agreement by and Between the National Basketball Association and the National Basketball Players Association, at 273 (2017), available at https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf.

[41] Collective Bargaining Agreement by and Between the Woman's National Basketball Association and the Woman's National Basketball Players Association, at 110 (2020), available at https://wnbpa.com/wp-content/uploads/2020/01/WNBA-WNBPA-CBA-2020-2027.pdf.

[42] *See* David Ridpath, *Who Actually Funds Intercollegiate Athletic Programs?*, FORBES (Dec. 12, 2014), https://www.forbes.com/sites/ccap/2014/12/12/who-actually-funds-intercollegiate-athletic-programs/?sh=3277fb0f17af.

The distribution of revenues in college sports versus professional leagues is another major difference that separates them. In professional domestic leagues, the business model is singularly focused around a single team competing in a single sport. So, the constituents are very easy to establish for the distribution of revenues – players and management. Conversely, colleges face a much different challenge. College athletic departments are organized as nonprofit entities, therefore, private inurement is prohibited. There are no "owners" or "shareholders" and, likewise, the concept of revenue-sharing is not possible in the same way it is in the professional leagues. Instead, revenues beyond those needed to run the business are redistributed across a school's entire athletic program. Currently, the NCAA requires each school competing at the Division I level to maintain a minimum of sixteen teams.[43] Title IX requires that schools receiving any form of federal funding offer athletic opportunities to both men and women in proportion to the gender balance at each school.[44] These two requirements limit some of the business decisions that schools can make for themselves by forcing a broader dispersal of revenues than a typical professional team. In fact, most NCAA schools are dependent on subsidies from their universities, donations from sponsors, and student fees to alleviate budget deficits.[45]

The complexity of the sports landscape does not provide a clear answer on whether NCAA sports more closely resemble professional or amateur sports organizations. Competitively, it can be argued that college sports are intended to be competitions organized for amateurs; however, the revenue generating potential of college sports makes it difficult to view it as purely "amateur." So, the debate shifts to whether NCAA athletics should be viewed as commercial activity – like professional leagues – or more like their not-for-profit brethren.

---

[43] NCAA, DIVISION I MANUAL, (Aug. 1, 2020). *See* also *Preparing for Budget Crunch, Five Conferences Ask NCAA for Relief*, SPORTS ILLUSTRATED (April 15, 2020), https://www.si.com/college/2020/04/15/ncaa-conferences-coronavirus-pandemic-impact.

[44] Cohen v. Brown University, 991 F.2d 888, 899 (1st Cir.1993).

[45] *See Finances of Intercollegiate Athletics*, NCAA, https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics (last visited July 1, 2021).

II. The Rise of Antitrust Claims in Professional Sports

A. HISTORY OF NCAA AND ANTITRUST

Professional sports have been subject to antitrust scrutiny since the early 1900s. *Federal Baseball Club v. National League* [46] provided professional baseball with a shield from antitrust by classifying baseball as an "exhibition" and not actual interstate commerce.[47] The *Federal Baseball Club* decision protected the industry of professional baseball from antitrust scrutiny for decades, particularly in the area of labor relations.[48] Baseball was able to restrict the freedom of players to change teams/employers at the expiration of their employment contracts through a concept known as the "reserve clause."[49] The reserve clause was challenged in *Flood v. Kuhn*,[50] although the Supreme Court leaned on stare decisis and cited *Federal Baseball Club* in its opinion.[51] *Flood* became the watershed case that gave rise to the power and influence of organized labor in professional sports. The Major League Baseball Players Association (MLBPA) was officially recognized as a union in 1966.[52] While the MLBPA never overcame the precedent of *Federal Baseball Club*, the sport suffered through numerous labor stoppages over the next forty years.[53]

Other professional sports leagues were not as lucky in avoiding antitrust scrutiny. In 1956, the National Football League (NFL) was first exposed to antitrust scrutiny.[54] Bill Radovich, an offensive lineman who played for the NFL's Detroit Lions, bucked the NFL when he decided to join the Los Angeles Dons of the rival All-America Football Conference

---

[46] Federal Baseball Club v. National League, 259 U.S. 200 (1922).

[47] *Id.* at 209.

[48] A number of labor and employment challenges were waged against Major League Baseball after the Court's decision in *Federal Baseball*. The courts have cited the precedent set in that case on many occasions. *See* Curt Flood v. Bowie Kuhn, et. al. 407 U.S. 258.

[49] Flood v. Kuhn, 407 U.S. 258, 259 (1972).

[50] *Id.*

[51] *Id.* at 290.

[52] *The History of Baseball Unionization: The MLBPA Before it was the MLBPA*, MARC NORMANDIN (Oct. 16, 2020), https://www.marcnormandin.com/2020/10/16/the-history-of-baseball-unionization-the-mlbpa-before-it-was-the-mlbpa/.

[53] Nick Selbe, *This Day in Sports History: MLB Players Go on Their First Strike*, SPORTS ILLUSTRATED (April 1, 2020), https://www.si.com/mlb/2020/04/01/this-day-history-mlb-players-strike mlbpa#:~:text=In%20the%20long%20history%20of%20Major%20League%20Baseball%2C,from%20Aug.%206-7.%20Others%20have%20been%20more%20consequential.

[54] Radovich v. National Football League, 352 U.S. 445, 446 (1957).

(AAFC).[55] He was subsequently "blacklisted" from returning to employment with any NFL-affiliated teams and filed suit.[56] In *Radovich v. National Football League*,[57] the Supreme Court determined that the NFL constituted a business under American antitrust laws but did not enjoy the same antitrust protection as Major League Baseball.[58] Meanwhile, the National Football League Players Association (NFLPA) gained momentum amongst players around the same time and was officially recognized as the bargaining unit in 1956.[59] The burgeoning union made small inroads in its representation of NFL players until work stoppages in the 1980s and 1990s solidified its standing in labor negotiations.[60]

On the business front, the NFL also faced antitrust scrutiny in its televised broadcasting of games. The NFL, unlike other professional sports leagues at the time, relied on the pooling of broadcasting rights among its members to offer networks a collective bundle of rights.[61] This arrangement was viewed as anticompetitive; however, the NFL was successfully able to lobby Congress for the passage of the Sports Broadcasting Act of 1961, which provided a limited antitrust exemption.[62] This Act was also a catalyst in clearing the way for the merger of the American Football League and the National Football League into the NFL we know today.[63]

B. THE NCAA'S CHALLENGES WITH ANTITRUST ISSUES

Until the 1970s the education-based institutions that were part of the NCAA were viewed more like high school sports than professional sports despite the growing revenue that was driven largely by live

---

55 *Id.* at 448.

56 *Id.*

57 Radovich v. National Football League, 352 U.S. 445, 446 (1957).

58 *Id.* at 447-48, 452.

59 *See Our History of Wins*, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, https://nflpa.com/about/history (last visited Apr. 7, 2021).

60 *See NFL Labor History Since 1968*, ESPN.COM (Mar. 3, 2011), https://www.espn.com/nfl/news/story?page=nfl_labor_history.

61 The *Sports Broadcasting Act of 1961* was passed in response to a court decision which ruled that the NFL's method of negotiating television broadcasting rights violated antitrust laws. *See United States of America v. National Football League, 196 F. Supp. 445*; 15 U.S.C. §§ 1291–1295 (2018).

62 *See* Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291–1295 (2018).

63 The two leagues were considered rivals previously and subject to antitrust scrutiny otherwise. *See* Cecilia Kang, *How the Government Helps the NFL Maintain its Power and Profitability*, WASH. POST, (Sept. 16, 2014), https://www.washingtonpost.com/news/business/wp/2014/09/16/how-the-government-helps-the-nfl-maintain-its-power-and-profitability/.

attendance. As the importance of television as a broadcasting medium grew in the 1940s and 1950s, the NCAA largely eschewed broadcasting rights for its membership as it was viewed as a threat to live attendance revenue that almost all NCAA members relied upon.[64] In 1953, the NCAA began to offer a very restrictive package of televised games that allowed only one televised game per week, did not allow a school to play in more than one televised game per season, and required all members of the NCAA to share in the revenue.[65] The NCAA used its central role in collegiate sports to drive compliance from its members.

Despite increasingly restrictive rules in its control of television rights, the NCAA was largely spared from antitrust scrutiny until the 1970s. In 1979, the College Football Association (CFA), an association of sixty-four football-playing universities, challenged the NCAA's monopoly on negotiating television rights on behalf of member schools by negotiating its own rights deal.[66] In response, the NCAA sought to impose sanctions against the schools that participated in the CFA deal.[67] The sanctions were met with a suit brought by the University of Georgia and University of Oklahoma in the case that became known as *Board of Regents v. NCAA*.[68] In this case, the University of Georgia and University of Oklahoma sued the NCAA claiming the association's restrictions on schools' rights to unfettered televised broadcasting of college football games was an unlawful restraint on trade in violation of the Sherman Act and United States antitrust laws.[69] The NCAA countered the allegations with a "rule of reason" affirmative defense, claiming that limiting an individual school's ability to appear on television and controlling the overall supply of televised games benefits members by encouraging live attendance at games and providing more schools with the opportunity to appear on television.[70]

The Supreme Court ruled in favor of the plaintiffs.[71] This ruling essentially rendered the NCAA powerless and irrelevant in the expansion of televised college football and ultimately the tremendous growth and commercialization of college sports, namely football and basketball.[72] This holding also sparked a power shift from the NCAA to the CFA to negotiate broadcasting deals with networks, thereby

64 Nat'l Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 89–90 (1984).
65 *Id.* at 90, 92–94.
66 *Id.* at 94–95.
67 *Id.* at 95.
68 *Id.* at 88.
69 *Id.*
70 *Nat'l Collegiate Athletic Ass'n*, 468 U.S., at 113-115.
71 *Id.* at 120.
72 *Id.*

decentralizing power. Conferences were the beneficiaries as their role as aggregators of media rights for a smaller subset of schools provided an opportunity to establish conference-based networks such as the Big Ten Network and SEC Network.

As the revenue from increased television exposure has grown since the 1980s, it has created a significant amount of upheaval within the NCAA. Schools started to shift allegiances from their conference alliances, creating widespread realignment that was based more on revenue opportunities rather than regional rivalries and other synergies that were the traditional basis for conference membership.

C. THE NCAA'S CURRENT ANTITRUST BATTLE GROUND

While the NCAA's loss in *Board of Regents* created an entirely new economic landscape in college athletics, it also opened the NCAA up to additional challenges on antitrust grounds by other constituencies. In response, some courts have provided some level of protection for the NCAA and its ability to regulate college athletics—including amateurism—while not limiting its ability to curtail economic activity within its enterprise.

In addition to the challenges accompanying the *Board of Regents* ruling, the NCAA faced another major challenge to its authority to regulate college football. Rumors concerning Southern Methodist University (SMU), one of the top college football teams in the mid-1980s, began to surface concerning impermissible benefits, including cash, provided by boosters to SMU's current players and potential recruits. These payments were intended to retain top players and allow SMU to stay on top of their sport.[73] The egregious and repeated violations of the NCAA's amateurism rules led to the "death penalty" for SMU's football program as it was unable to compete in 1987 and 1988.[74] In response, SMU alumni filed suit against the NCAA challenging its authority to sanction the school by cancelling it's 1987 season. In *McCormack v. Nat'l Collegiate Athletic Assoc.*,[75] the plaintiffs alleged that the NCAA's suspension of SMU's football program for violation of its amateurism rules, which prevented student-athletes from being compensated, was a violation of the Sherman Act.[76] In this Fifth Circuit opinion, the Court struck down this challenge to the NCAA and provided some protection for amateurism.[77] The Court reasoned that the restrictions imposed by

[73] Mark Asher, *NCAA Cancels SMU's 1987 Football*, WASH. POST, (Feb. 26, 1987).

[74] *Id.*

[75] McCormack v. Nat'l Collegiate Athletic Assoc., 845 F.2d 1338 (5th Cir. 1988).

[76] *Id.* at 1340.

[77] Brown, *supra* note 10, at 149 (citing *McCormack,* 845 F.2d at 1340).

amateurism protected the "special product" that college athletics is from the increasing commercialization pressures that were starting to engulf college sports.[78]

Another challenge to the NCAA's authority actually pre-dated the SMU case, although the Supreme Court did not rule on the issue until 1988. In 1977, the NCAA investigated the University of Nevada, Las Vegas ("UNLV"), for questionable recruiting practices involving their head coach Jerry Tarkanian.[79] Tarkanian was an outspoken critic of the NCAA's regulatory regime dating back to his time as head coach at his previous school, Long Beach State in California, where he was also sanctioned.[80] Tarkanian was sanctioned at Long Beach State for compliance issues and for criticizing the NCAA for being lenient with large schools while it instead "picked on" smaller schools that did not have the resources to fight against it.[81] The NCAA levied sanctions against UNLV and the school bowed into the pressure and promptly suspended Tarkanian for two seasons.[82] Tarkanian filed suit against the NCAA in Nevada state court.[83] The NCAA challenged the injunction in a case that eventually was argued before the Supreme Court.[84] The Supreme Court ruled that the NCAA was not a state actor, and thus was not subject to the same sort of due process requirements as a governmental agency.[85] The NCAA was not found to be sufficiently entangled with state universities, nor was it found that UNLV, a public university, delegated enough authority to the NCAA to make the association a state actor.[86]

In the wake of the *Tarkanian* case, the State of Nevada passed a law which attempted to force the NCAA to provide additional due process protections to institutions, coaches, and student-athletes in Nevada.[87] The law also prevented the NCAA from retaliating against Nevada

---

[78] Brown, *supra* note 10.

[79] *See* Tarkanian v. Nat'l Collegiate Athletic Ass'n*, 741 P.2d 1345 (Nev. 1987)* for procedural history. This long standing litigation grew out of an initial investigation by the NCAA in the UNLV basketball program and its head coach's recruiting activity.

[80] *See Case Decision Against Long Beach State*, Legislative Database for Major Infractions, NCAA (published Jan. 6, 1974), https://web3.ncaa.org/lsdbi/search/miCaseView?id=277.

[81] *Id.*

[82] *Nat'l Collegiate Athletic Ass'n.*, 488 U.S. at 180.

[83] Tarkanian v. Nat'l Collegiate Athletic Ass'n, 741 P.2d 1345 (Nev. 1987).

[84] *Nat'l Collegiate Athletic Ass'n.*, 488 U.S. at 182.

[85] *Id.* at 195.

[86] *Id.* at 199.

[87] J. M. Schwartz, *Recent Development:* NCAA v. Tarkanian*: State Action In Collegiate Athletics*, 63 TUL. L. REV. 1703, 1709-10 (1989).

schools for the enactment of the law.[88] The NCAA challenged the law based on the Dormant Commerce Clause, a corollary to the Commerce Clause, which prevents a state from passing laws which unduly burden interstate commerce.[89] The NCAA won the case in the Court of Appeals for the Ninth Circuit, with Nevada's state law being deemed unconstitutional.[90]

Ironically, although the Supreme Court did not find the NCAA to be a "state actor" in the *Tarkanian* case, it later reversed itself in a similar case affecting high school athletics regulation. In *Brentwood Academy v. Tennessee Secondary School Athletic Association (TSSAA)*,[91] the TSSAA imposed recruiting violations on Brentwood Academy, a private high school in the state.[92] The Supreme Court ruled, in a 5-4 decision, that the TSSAA was a "state actor" and thus violated Brentwood's due process rights.[93] This case was distinguished from *Tarkanian* in that TSSAA's actions were authorized and regulated under state law and it predominantly regulated public schools.[94] This case established a distinction between college and high school athletics.[95]

The growing importance of football revenues, and to a lesser extent basketball, provided coaches with leverage to demand skyrocketing salaries and other benefits which greatly increased schools' budgets.[96] Salaries for a handful of men's basketball assistant coaches surpassed levels that typically were more akin to head coaches and placed a strain on resources for smaller schools looking to compete against schools with greater revenues.[97] In response, the NCAA attempted to rein in overall expenditures on coaches' salaries by establishing a category for "restricted earnings coaches" which would be capped at $16,000 per year.[98] These restrictions were immediately met with an antitrust suit from coaches impacted by the new rule claiming the new rules were a restraint on trade. In *Law v. Nat'l Collegiate Athletic Ass'n,* the Tenth

88 *Id.*

89 *Id.*

90 *Id.*

91 Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., 531 U.S. 288 (2001).

92 *Id.* at 293.

93 *Id*. at 291.

94 *Id*. at 297-98.

95 *Id.*

96 *See Where Does the Money Go?*, NCAA, https://www.ncaa.org/about/where-does-money-go (last visited Apr. 7, 2021).

97 *See NCAA Salaries*, USA TODAY, https://sports.usatoday.com/ncaa/salaries/ (last visited July 1, 2021).

98 *See* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1016, 1024 (10th Cir. 1998).

Circuit ruled that such caps were not protected under the rule of reason and did indeed place undue restraints on trade. [99]

The biggest challenge to the NCAA, however, has been over a decade in the making on how it classifies its student-athletes. As schools' athletic department budgets have grown exponentially, the opportunities and benefits to players have not grown at the same rate. These additional revenues have largely flowed into even higher coaches' salaries and other department priorities such as facilities and multimedia.[100] Student-athlete benefits have expanded mainly in reaction to bad publicity – such as players not being provided sufficient food and nutrition – and legal challenges.[101] The NCAA faced more public scrutiny as its revenues continued to increase exponentially while student-athletes did not see proportional increases in benefits.

In a progression that will transform college athletics, former UCLA and NBA star Edward O'Bannon filed an antitrust suit in 2009 against the NCAA. O'Bannon claimed that the NCAA engaged in unauthorized use of student-athletes names, images, and likenesses in the broadcasting of college sporting events and that they should be compensated for such use after they graduate.[102] While the plaintiffs initially prevailed at the trial court level, the decision was partially reversed on appeal.[103] The U.S. Supreme court denied certiorari in 2016.[104]

A separate suit, *Jenkins v. NCAA*,[105] challenged the NCAA's financial aid caps for student-athletes.[106] These caps limited financial aid awards

[99] *Id.* at 1016, 1024.

[100] Dr. Kevin Blue, *Rising Expenses in College Athletics and the Non-Profit Paradox*, ATHLETIC DIRECTOR U, https://athleticdirectoru.com/articles/kevin-blue-rising-expenses-in-college-athletics-and-the-non-profit-paradox/ (last visited Apr. 7, 20201).

[101] In response to a public outcry from comments made by University of Connecticut star Shabazz Napier during the 2014 NCAA Men's Basketball Tournament about student-athletes not having enough food to eat some nights, the NCAA abruptly amended its regulations to allow schools to provide unlimited meals. *See* Mike Singer, *Connecticut's Shabazz Napier: 'We do have hungry nights'*, CBS (April 7, 2014), https://www.cbssports.com/college-basketball/news/connecticuts-shabazz-napier-we-do-have-hungry-nights/.

[102] O'Bannon v. NCAA, 802 F.3d 1049, 1052 (9th Cir. 2015).

[103] *Id.*

[104] *Id*.

[105] In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig. (Jenkins v. NCAA), 958 F.3d 1239, 1243 (9th Cir.), cert. granted sub nom; Nat'l Collegiate Athletic Ass'n v. Alston, 208 L. Ed. 2d 504 (Dec. 16, 2020), and cert. granted sub nom; Am. Athletic Conf. v. Alston, 141 S. Ct. 972, 208 L. Ed. 2d 504 (2020).

[106] In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig. (Jenkins v. NCAA), 958 F.3d 1239, 1243 (9th Cir.), cert. granted sub nom; Nat'l Collegiate

to the value of tuition, room and board, and required fees at each school.[107] While the plaintiffs initially prevailed, the verdict was rendered moot on appeal as the NCAA had already made some concessions in their bylaws to provide for "full cost of attendance" grants which provided student-athletes with allowances beyond the challenged restrictions.[108]

The most recent legal challenge will likely be the most significant as the U.S. Supreme Court has granted the NCAA's petition for certiorari in *Alston v. NCAA*.[109] Plaintiffs in *Alston* claim that any caps on education-related benefits are unlawful restraints on trade, while the NCAA has responded with its usual "rule of reason" defense. The Supreme Court rendered its decision on June 21, 2021.[110]

While the NCAA suffered a major defeat in *NCAA v. Board of Regents* in its ability to control television revenue unilaterally, the courts have been more sympathetic to preserving the NCAA's brand of "amateurism." Courts have been reluctant to find amateurism to be a restraint on trade and violative of antitrust laws. An "amateur" is generally defined as "one who engages in a pursuit, study, science, or sport as a pastime rather than as a profession" or "one lacking in experience and competence in an art or science."[111] However, the NCAA's definition of "amateurism" significantly expands the traditional definition. Per the NCAA, the simple act of hiring an "agent" is sufficient for a student-athlete to lose "amateur" status and violate the NCAA principles regardless of whether the student-athlete actually earns any compensation or is successful in garnering a professional contract.[112] In *Banks v. NCAA*,[113] Braxton Banks, a standout football player for the University of Notre Dame, challenged the NCAA's amateurism

Athletic Ass'n v. Alston, 208 L. Ed. 2d 504 (Dec. 16, 2020), and cert. granted sub nom; Am. Athletic Conf. v. Alston, 141 S. Ct. 972, 208 L. Ed. 2d 504 (2020).

107 *Id*.

108 *Id*.

109 Nat'l Collegiate Athletic Ass'n v. Alston, 208 L. Ed. 2d 504 (Dec. 16, 2020). Oral arguments were heard on March 31, 2021.

110 National Collegiate Athletic Association v. Alston Et Al., Slip Opinion published June 21, 2021. *See* US Supreme Court Opinions: https://www.supremecourt.gov/opinions/slipopinion/20.

111 "Amateur" Merriam-Webster Online Dictionary, 2021, https://www.merriam-webster.com/dicti.onary/amateur April 2021).

112 NCAA Bylaw 12.3.1 *Use of Agents*. An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport.

113 Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992).

requirements.[114] Before exhausting his NCAA eligibility, Banks took the active step to make himself eligible for the 1990 NFL Draft and signed with an agent to enhance his draft prospect.[115] When he was not drafted nor offered a contract with an NFL team, Banks petitioned the NCAA for reinstatement so he could play out his final year of eligibility at Notre Dame.[116] After the NCAA refused to consider Banks' request for reinstatement, Banks filed an antitrust lawsuit against the NCAA claiming that their amateurism rules were an unlawful restraint on trade.[117] Both the district court and Seventh Circuit ruled in favor of the NCAA, finding that Banks failed to show that the NCAA's rules were anticompetitive.[118]

III. The Current Battleground: What are Rights of Publicity?

A. NAME, IMAGE, AND LIKENESS RIGHTS

Name, image, and likeness rights (NILs), often referred to as "rights of publicity" or "rights of celebrity," provide an individual with "the right to control the commercial use of" their NILs, and any other unequivocal aspect of one's personality.[119] Unlike most intellectual property claims, the power to bring suit upon this right is not preempted by federal law. In fact, most rights of publicity claims are brought under state statute or common law.[120] The Second Restatement of Torts recognizes four categories of protected privacy rights: intrusion upon another's seclusion, misappropriation of a name or likeness, unreasonable or unauthorized publicity, and false light.[121]

The phrase, "right of publicity," was first introduced by Judge Frank in his majority opinion for *Haelan Laboratories, Inc. v. Topps Chewing*

114 Banks v. NCAA, 977 F.2d 1081, 1083 (7th Cir. 1992).

115 *Id*. at 1084.

116 *Id*.

117 *Id*.

118 Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1093 (7th Cir. 1992).

119 *Rights of Publicity*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/publicity. *See generally* Jonathan Faber, *A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY, http://rightofpublicity.com/brief-history-of-rop (last updated July 31, 2015) (discussing Indiana's right of publicity statute, which gives a property interest in an individual's "distinctive appearance, gestures [and] mannerisms.").

120 *See id.* (explaining that some states have codified the common law right of publicity).

121 *See* RESTATEMENT (SECOND) OF TORTS § 652A (Am. L. Inst. 1977).

Gum, Inc.,[122] which was a lawsuit that centered on the right to use a baseball player's photograph on baseball cards.[123] Judge Frank cited false endorsement cases from the early 1900s that recognized an individual's right to control the use of their own likeness.[124] In defining this right, Judge Frank stated that:

[A] man has a right in the publicity value of his photograph, i.e. the right to grant the exclusive privilege of publishing his picture…This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authoring advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains, and subways.[125]

Although *Haelan Laboratories* set a foundation for violations of rights of publicity causes of action, rights of publicity claims were rarely brought until the Supreme Court ruled on *Zacchini v. Scripps-Howard Broadcasting Co*.[126] In its first major opinion examining the right of publicity, the Supreme Court held that a news broadcasting company is not necessarily protected by the first amendment when it uses a performer's likeness without authorization.[127] Writing for the majority, Justice White established a balancing test that weighs the societal value established through a publisher's first amendment usage of an individual's NILs and the individual's own right to profit from the exploitation of those rights.[128]

Later, the Sixth Circuit established in *Carson v. Here's Johnny Portable Toilets, Inc.*[129] that the right to control one's likeness includes unlicensed use of "symbolic" mannerisms or catchphrases and that a plaintiff only had to prove that a defendant generated an economic benefit derived from unauthorized use of the plaintiff's likeness.[130]

The right of publicity continued to expand until *Comedy III v. Saderup*,[131] where the Court held that a work may portray the likeness of a public figure if the representation amounts to a transformative

122 Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

123 *Id*. at 867.

124 *See id*. at 868 (citing Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88 (1917); Madison Square Garden Corp. v. Universal Pictures Co., 7 N.Y.S.2d 845 (N.Y. App. Div. 1938).

125 *Id.* (emphasis added).

126 Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

127 *See id.* at 577-78.

128 *Id.*

129 Carson v. Here's Johnny Portable Toilets, 698 F.2d 831 (6th Cir. 1983).

130 *Id.* at 836.

131 *See* Comedy III Prod., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387 (Cal. 2001).

reinterpretation.[132] Here, the Defendant's "cutting and pasting" of the public figure's image to a T-Shirt violated the Plaintiff's right of publicity, but, its use in combination with other creative elements, transformed the work as a whole into a new, protectable expression. [133]

On the federal level, suits raising "rights of publicity" concerns typically seek to establish a claim under the "false endorsement of origin" claim under Section 43(a) of the Lanham Act.[134] Unlike state-based right of publicity actions, 43(a) claims require a false or misleading description or representation of fact which is likely to cause confusion or to deceive about the affiliation or association of a person with another person.[135] This approach emphasizes the likelihood of confusion in the origin of a work and, therefore, practically limit its' application to well-known celebrities, while non-celebrities whose likeness is misappropriated are limited to only right of publicity claims.[136] NFL Hall of Fame player Jim Brown unsuccessfully pursued this strategy in his 2013 suit against Electronic Arts, Inc. where he raised Lanham act claims against the use of his likeness in the company's popular *Madden NFL* series of video games. [137] Citing the "Rogers test" in the case, [138] the Ninth Circuit affirmed the District Court's ruling finding that Brown had not alleged facts that satisfied either condition to allow a § 43(a) claim to succeed under the *Rogers* test.[139] Despite its shortcomings in these cases, the Lanham Act claims can be used as a forum selection issues by allowing plaintiffs to raise or strengthen claims in jurisdictions where state rights of publicity statutes or common law may not be not as favorable.[140]

Rights of publicity are not unique to sports, but rather provide a broad cause of action to give individuals to decide how and by whom

---

132 *Id.* at 404.

133 *Id.* at 393, 395, 409.

134 15 U.S.C. § 1125(a).

135 *Id.*

136 *Id.*

137 Brown v. Electronic Arts, Inc., 724 F.3d 1253, 1237 (9th Cir. 2013).

138 Recognizing the need to balance the public's First Amendment interest in free expression against the public's interest in being free from consumer confusion about affiliation and endorsement, the Second Circuit created the "*Rogers* test" in *Rogers v. Grimaldi*. 875 F.2d 994 (2d Cir. 1989). Under the *Rogers* test, § 43(a) will not be applied to expressive works "unless the [use of the trademark or other identifying material] has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the [use of trademark or other identifying material] explicitly misleads as to the source or the content of the work." *Id.* at 999.

139 *Brown*, 724 F.3d at 1248.

140 Mark S. VanderBroek, Understanding False Endorsement and Right of Publicity Claims in a Digital Age, Vol 73 No. 12, INTABULLETIN (July 15, 2018).

their NILs can be exploited. The higher the "celebrity status" of an individual, the greater the likelihood that exploitation or misappropriation can impair the rightsholder's economic interests.

B. THE CURRENT BATTLEGROUND: NCAA AND NIL RIGHTS

While the NCAA has been facing almost constant litigation from student-athlete representatives on the antitrust claims against the NCAA's limits on scholarship numbers, amount of grants in aid, and other claims invoking the restraints on the labor market for student-athletes competing in NCAA events, the NCAA is also battling on a new front. Rather than attacking amateurism as a whole, as contemplated in the antitrust cases, the effort to grant student-athletes the right to capitalize on their NIL rights provides a narrower focus by separating the issue of compensation for athletic participation – or employment – from the right to earn compensation through other means through the exploitation of their rights of publicity. However, the NCAA's reluctance to date has given rise to a tidal wave of state legislation has been weaponized against it to allow players to otherwise circumvent NCAA amateurism rules.

While the right of publicity provides an individual with the right to control the commercialization rights of their own persona, the NCAA has prohibited such opportunities as a violation of its Principle of Amateurism. Per NCAA Bylaw 2.9, "[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived.[141] Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."[142] The NCAA steadfastly leans on amateurism to eschew any compensation related to commercial opportunities connected to a student-athlete's athletic participation.[143]

---

141 NCAA, DIVISION I MANUAL, at 3, (Aug. 1, 2020).

142 *Id.*

143 2019-2020 NCAA DIVISION I MANUAL, Bylaw 12.5.2.1 at 77 (2019), http://www.ncaapublications.com/productdownloads/D120.pdf (addressing Advertisements and Promotions After Becoming a Student-Athlete and stating "after becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual: (a) Accepts 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").

With the courts upholding the NCAA's ability to force athletes to forgo outside compensation related to their athletic participation, proponents for student-athletes chose a different strategy. Instead of challenging amateurism in the courts, they instead turned to state legislatures to undercut the NCAA's ability to enforce restrictions against a student-athlete's ability to profit from their NILs. California was the first state to pass legislation that enjoined the NCAA and its member institutions from placing any limits on the ability of student-athletes to capitalize on their NIL rights.[144] California's Fair Play to Pay Act made it the first state in the nation to enact legislation allowing student athletes to capitalize from the use of their NILs and earn compensation.[145] The law allows all student athletes enrolled in public and private four-year colleges and universities in California to hire agents to assist in generating revenue from their rights of publicity and to seek out these revenue opportunities without the fear of losing their NCAA eligibility or scholarships. California colleges were also barred from enforcing NCAA amateurism rules that prevent student-athletes from earning such compensation as well as restricting the NCAA from disqualifying California universities from intercollegiate sports for violating the NCAA's amateurism rules in this regard.[146] The California law, however, provided a window for the NCAA to react to the legislation by delaying the effective date until January 1, 2023.[147] Other states did not provide the NCAA with that same luxury. Florida's law is set to take effect on July 1, 2021, providing the NCAA with only a limited window to react to the new law.[148] New Jersey, Colorado, and Nebraska also passed similar legislation creating a complex compliance environment

144 Press Release, Office of the Governor Gavin Newsom, Governor Newsom Signs SB 206, Taking on Long-Standing Power Imbalance in College Sports (Sept. 30, 2019) (available at https://www.gov.ca.gov/2019/09/30/governor-newsom-signs-sb-206-taking-on-long-standing-power-imbalance-in-college-sports/).

145 *Id*.

146 *Id*.

147 Dan Murphy, *Florida Name, Image, Likeness Bill now a Law; State Athletes can Profit from Endorsements Next Summer*, ENT. & SPORTS PROGRAMMING NETWORK (June 20, 2020), https://www.espn.com/college-sports/story/_/id/29302748/florida-name-image-likeness-bill-now-law-meaning-state-athletes-profit-endorsements-next-summer.

148 Press Release, The Fla. Senate, Intercollegiate Athlete Compensation & Rights Legislation Signed Into Law (June 12, 2020) (on file with author at https://www.flsenate.gov/Media/PressRelease/Show/3557) (discussing Florida's legislation concerning the state name, image, likeness bill now a law, which would allow state athletes to profit from endorsements next summer); Dan Murphy, *Florida Name, Image, Likeness Bill Now a Law; State Athletes Can Profit From Endorsements Next Summer*, ENT. & SPORTS PROGRAMMING NETWORK (June 20, 2020), https://www.espn.com/college-sports/story/_/id/29302748/florida-name-image-likeness-bill-now-law-meaning-state-athletes-profit-endorsements-next-summer.

with varying legal provisions and effective dates across the country.[149] The NCAA quickly assembled its own legislation to amend its rules to comply with the emerging state laws,[150] although the NCAA changed those plans when the US Department of Justice voiced concern that the proposed NCAA rules would potentially trigger antitrust laws.[151] The NCAA then looked to Congress to pass legislation to preempt these new state laws.

On the federal level, elected officials have also jockeyed amongst themselves to capitalize on the popularity of supporting student-athletes with their legislative proposals. Senators Cory Booker (D-N.J.) and Richard Blumenthal (D-Conn.) introduced an athlete-friendly bill, dubbed the "College Athletes Bill of Rights," which would introduce professional league-styled revenue sharing, group licensing, lifetime education benefits, and other player benefits at the expense of the NCAA.[152] The Booker-Blumenthal bill also focuses predominantly on providing relief to men's football and basketball players.[153] The bill ignores the existing redistributive properties in the NCAA that fund other sports, male and female. While celebrated by football and basketball players, it is probably the least administrable and most disruptive bill to the current realities and constraints of the NCAA. Senator Marco Rubio (R-Fla.) introduced his own competing

[149] Press Release, Insider NJ, 'New Jersey Fair Play Act' Signed Into Law (Sept. 14, 2020) (on file with author at https://www.insidernj.com/press-release/new-jersey-fair-play-act-signed-law/); Steve Berkowitz, *Colorado Governor Signs College Athlete Name, Image and Likeness Bill*, USA TODAY (Mar. 20, 2020), https://www.usatoday.com/story/sports/college/2020/03/20/colorado-governor-signs-college-athlete-name-image- likeness-bill/2887481001/; Press Release, Neb. Legislature, (July 21, 2020) (on file with author at http://news.legislature.ne.gov/dist08/2020/07/21/press-release-legislature-passes-the-nebraska-fair-pay-to-play-act/).

[150] *DI Council Introduces Name, Image and Likeness Concepts into Legislative Cycle*, NAT'L COLLEGIATE ATHLETIC ASS'N: Media (Oct. 14, 2020), https://www.ncaa.org/about/resources/media-center/news/di-council-introduces-name-image-and-likeness-concepts-legislative-cycle.

[151] Lilah Burke, *NCAA to Delay Name, Image and Likeness Vote After DOJ Letter*, INSIDE HIGHER ED (Jan. 11, 2021), https://www.insidehighered.com/quicktakes/2021/01/11/ncaa-delay-name-image-and-likeness-vote-after-doj-letter.

[152] Ross Dellenger, *Inside the Landmark College Athletes Bill of Rights Being Introduced in Congress*, SPORTS ILLUSTRATED (Dec. 17, 2020), https://www.si.com/college/2020/12/17/athlete-bill-of-rights-congress-ncaa-football

[153] *Id*.

legislation,[154] which the NCAA endorsed.[155] This rival bill to the Booker/Blumenthal measure supports student-athlete NIL rights but also provides some antitrust protections for the NCAA, thus making the likelihood of a quick resolution in a fiercely partisan Congress unlikely.

While the concept of amateurism is noble in theory, it fails to appreciate the reality of today's college sports landscape. Cable networks frequently telecast Division I football and basketball games, which generate hundreds of millions of dollars in broadcast revenues.[156] Schools spend significant resources on multimedia and public relations to engage fans and grow not only their own brand, but also the brand of their student-athletes as a by-product of their success. Many college athletes have greater name recognition and commercial earning potential than not only other professional athletes, but also local congresspersons, experts in their fields, and even many television or film actors and actresses.

NILs present a unique opportunity to capitalize on the platform that the sports industry presents. Student-athletes also have the opportunity to create their own fame. For example, Donald De La Haye has been deemed ineligible as an NCAA player because of the money he has made off of his YouTube videos.[157] As a backup kicker on the University of Central Florida football team, De La Haye gained a sizable following on YouTube for a series of videos that he created chronicling the life of a backup kicker in major college football.[158] Based on current NCAA rules, he was forced to decide whether to monetize his videos and gain revenue or remain an amateur under the NCAA's definition and forego the revenue opportunities.[159] Modern technology and social media allows student-athletes to amass large followings that become attractive to corporate marketers looking to utilize their influence. The De La Haye case shows that marketability does not need to be tied to

---

154 Ralph D. Russo, *Florida Sen. Rubio Introduces NIL bill to Push NCAA Changes*, ASSOCIATED PRESS, June 18, 2020, https://apnews.com/article/7d9e67592f2e2b34eb3445f004233315.

155 *NCAA Statement on Sen. Marco Rubio Bill*, NAT'L COLLEGIATE ATHLETIC ASS'N: Media (June 18, 2020), https://www.ncaa.org/about/resources/media-center/news/ncaa-statement-sen-marco-rubio-bill.

156 Jordan James, *Report: SEC TV Deal will Increase School Payouts by $20 Million*, 247SPORTS (Dec. 20, 2019), https://247sports.com/college/auburn/Article/SEC-college-football-TV-contract-CBS-ESPN-ABC-revenue-140925524/.

157 Chuck Schilken, *Central Florida Kicker Donald De La Haye Loses his NCAA Eligibility because of his YouTube Videos*, L.A. TIMES (Aug. 01, 2017), https://www.latimes.com/sports/more/la-sp-ucf-kicker-ineligible-youtube-20170801-story.html.

158 *Id.*

159 *Id.*

athletic success, but rather the name recognition and notoriety of becoming a "celebrity."

The "celebrity factor" that is the root of the current battle on the NIL front is a classic "chicken and egg" problem. The NCAA has traditionally eschewed student-athletes of any athletics-related revenue opportunities while simultaneously promoting many of these same student-athletes to celebrity status. Many sports fans revered names such as Tim Tebow, Zion Williamson, and Trevor Lawrence well before they even progressed past their freshman years in college. The NCAA fears that the dollar signs in the eyes of seventeen and eighteen-year-old prospects will greatly undermine the recruiting process and further skew the competitive landscape.[160] Yet this fear bears little difference to the current recruiting landscape, where sports facilities are the most common mediums for luring top prospects. High profile recruiting scandals at both the University of Tennessee's football team and University of Louisville's basketball team illustrate only the latest examples of the corruption, money, and violative actions taken by schools, boosters, and coaches to garner success on the field. [161] Allowing players to harness the value of their personal brands allows these actions to come above board and be tracked. But this approach does not fit well with the NCAA's typical "command and control" regulatory model. The NCAA fears that once NIL restrictions are lifted, they will never be able to be controlled again since such restrictions would then curtail economic interests and conflict with antitrust laws.[162] At least right now, the NCAA has the veil of amateurism to hide behind in issuing its regulations.

Player advocates have pursued the "states first" strategy on the legislative front and targeted labor-friendly states such as California and New Jersey and other states, such as Florida, where college athletics

---

160 *See* Ross Dellenger, *With Recruiting in Mind, States Jockey to One-Up Each Other in Chaotic Race for NIL Laws*, SPORTS ILLUSTRATED (March 4, 2021), https://www.si.com/college/2021/03/04/name-image-likeness-state-laws-congress-ncaa.

161 Adam Sparks, *Tennessee Football's Violations were Level I and Level II: Here's What that Means*, NASHVILLE TENNESSEAN (last updated January 19, 2021), https://www.tennessean.com/story/sports/college/vols/2021/01/18/tennessee-vols-football-ncaa-violations-jeremy-pruitt-firing/4207318001/; Ben Kercheval, *Louisville Basketball Receives NCAA Notice of Allegations in Connection with FBI Investigation*, CBS SPORTS (May 4, 2020), https://www.cbssports.com/college-basketball/news/louisville-basketball-receives-ncaa-notice-of-allegations-in-connection-with-fbi-investigation/.

162 Lilah Burke, *NCAA to Delay Name, Image and Likeness Vote After DOJ Letter*, INSIDE HIGHER ED (January 11, 2021), https://www.insidehighered.com/quicktakes/2021/01/11/ncaa-delay-name-image-and-likeness-vote-after-doj-letter.

carry disproportionate importance. This strategy forced the NCAA to act.[163] The state-based approach, however, is hugely problematic. Unlike legislation promoted through the Uniform Laws Commission (ULC), this approach is haphazard and divergent from one state to the other and therefore lacks uniformity. Further, this approach places unique limitations on schools based on the states in which they reside. A state such as University of Florida can have very different standards than its neighbor, the University of Georgia; yet, the two schools play each other every season. While the "states first" strategy has proven to be successful in gaining market-share for the legislation, the patchwork nature of state laws to regulate a national sports enterprise is bound for unwieldy complexity and, ultimately, failure.

IV. Where Does the NCAA Go From Here?

Granting players with the opportunity to capitalize on their NIL rights is the easy answer for the NCAA. It essentially allows student-athletes to control their own revenue potential without costing NCAA schools anything by allowing the athletes to remain amateur athletes and non-employees. The NCAA's paternalistic tendencies were pushing the organization to implement a rigid framework and "police" NIL deals until the Department of Justice stepped in. The NCAA's desire to prevent manipulation of NIL deals for recruiting benefits ignores the skewed recruiting landscape that already exists. Many industry watchers believe such measures will lead to disaster and consequently alienate the NCAA from key members and move the organization beyond a point of no return. Instead, the NCAA would be better served by imposing a moratorium on its own restrictions and allowing the NIL rights market to develop before looking at how to control it. Existing bylaws already provide a safety net for some of the negative behavior the NCAA tries to control and would not need to be discarded in their entirety.

Meanwhile, Congress must enact legislation to bring common sense to college athletics. Unlike professional leagues where players and management collectively bargain and have mutual interests, college athletics is a unique enterprise that needs oversight and guardrails

163 *See* Dan Murphy, *Florida Name, Image, Likeness Bill Now a Law; State Athletes can Profit from Endorsements Next Summer*, ESPN (June 12, 2020), https://www.espn.com/college-sports/story/_/id/29302748/florida-name-image-likeness-bill-now-law-meaning-state-athletes-profit-endorsements-next-summer; *see also* PRESS RELEASE, *Intercollegiate Athlete Compensation & Rights Legislation Signed Into Law*, FLA. S. (June 12, 2020), https://www.flsenate.gov/Media/PressRelease/Show/3557.

against itself. Left to its own devices, the NCAA has proven it lacks responsiveness and flexibility by taking often zealous stances to emerging issues. Secondly, the NCAA's authority itself has been increasingly challenged by its membership, as depicted in the academic scandal at the University of North Carolina and the sexual abuse incidents at both Penn State and Michigan State.[164] The NCAA's strict adherence to amateurism despite the tremendous explosion of technological innovation and multimedia has alienated others as well.

More important than regulating NILs, the NCAA's primary interest is protecting amateurism. Amateurism allows NCAA schools to still consider their student-athletes as students, not employees, and therefore continue to escape wages, benefits, and other compensation due to employees. This conversion of amateur athletes to employment status would be far more devastating for the NCAA than permitting student-athletes to solicit and capitalize on their own efforts to market their NILs. Classifying student-athletes as employees would force schools to actually compensate athletes beyond scholarships and the "soft" group benefits, such as enhanced educational opportunities, academic support, and other collective benefits at each school. In addition to the cost of wages and taxes, it would also subject the schools to a host of other employment laws and regulations and likely lead to collective bargaining at some point. If the NCAA's goal is to preserve a level playing field for the breadth of the schools that are competing within its framework, then it is actually in its best interests to allow student-athletes to harness the power of their platforms.

In the Northwestern football players' attempt to unionize in 2014,[165] the NCAA was steadfastly concerned that recognizing the football players as a union and establishing student-athletes as employees, would undermine their status as amateur – not professional – athletes and thus places the employment burdens on schools themselves.[166] Federal and state laws maintain very clear standards in the classification of workers, but mainly between employees and

---

164 *See* Greg Barnes, *UNC Response Challenges NCAA Missteps*, 247SPORTS.COM (Aug. 4, 2016), https://247sports.com/college/north-carolina/board/102714/Contents/unc-response-challenges-ncaa-missteps-71286851/; Dennis Dodd, *After its Penn State Failures, NCAA Must Get it Right with Larry Nassar, Michigan State*, CBS SPORTS (Jan. 24, 2018), https://www.cbssports.com/college-football/news/after-its-penn-state-failures-ncaa-must-get-it-right-with-larry-nassar-michigan-state/.

165 *See generally, Board Unanimously Decides to Decline Jurisdiction in Northwestern Case*, NLRB.GOV: NEWS AND PUBLICATIONS (Aug. 17, 2015), https://www.nlrb.gov/news-outreach/news-story/board-unanimously-decides-to-decline-jurisdiction-in-northwestern-case.

166 *Id.*

independent contractors.[167] Control is typically the main differentiator as employers are able to exercise the greatest amount of control over their employees while independent contractors retain more flexibility and independence in providing services to their client-employers.[168] Similar difficulties previously existed in the classification of graduate research assistants at universities where they share responsibilities of an employee and a student, but under the direction of supervising professors.[169]

For student-athletes, they are under the tight control of coaches who regulate their practice schedules, meetings, nutrition, and even their academic schedules to fit into the needs of the team. Scholarships are controlled by the coaches as well and can be terminated or extended based on the coaches' goals and objectives in building their rosters – or workforce. Ironically, classification of student-athletes as employees would provide the NCAA member schools with the greatest level of control over their athletes – including the regulation of their NILs in a manner consistent with their employment – but it would impose the burden of employees on the universities.

Approving NILs for student-athletes is the easy answer for the NCAA as it would not force a change in employment classification. It allows the student-athletes to become their own entrepreneurs and control their own NIL rights without costing the NCAA schools anything. It is true that some student-athletes will prosper while others will not see as much benefit; however, this self-control absolves the NCAA of the responsibility of monitoring this system. Instead of preserving the "communistic" system of ensuring that all student-athletes receive the same direction financial compensation (namely, zero), it would allow the NCAA to be more capitalistic and allow student-athletes to control their own destiny.

Lastly, the NCAA must shift its mindset from the "command and control" regulatory environment to a self-regulatory environment, possibly with federal government oversight to provide it with great investigative authority to regulate abuses. There is precedent for government oversight and monitoring of private, self-regulatory

[167] IRS, PUBLICATION 15-A, EMPLOYER'S SUPPLEMENTAL TAX GUIDE: WHO ARE EMPLOYEES? (2021), https://www.irs.gov/publications/p15a#en_US_2021_publink1000169466.

[168] *Id*.

[169] "As of March 15, 2021, the proposed NLRB rule published on September 23, 2019, at 84 FR 49691, and corrected on October 16, 2019, at 84 FR 55265, is withdrawn." Jurisdiction-Nonemployee Status of University and College Students Working in Connection With Their Studies, 86 Fed. Reg. 14,297 (March 15, 2021) (to be codified at 29 C.F.R. pt. 103).

organizations.[170] This model has been the basis of regulation in the financial industry for decades where organizations such as the New York Stock Exchange, FINRA, and others have been granted regulatory authority to police themselves with government oversight of their activities.[171] These organizations do maintain tight rules on their membership with oversight from the Securities and Exchange Commission. This approach would be a powerful step in bringing credibility back to the NCAA and allowing it to function more effectively. It allows the NCAA to set the guard rails for the process of regulating the impacts of the proposed NILs while having federal oversight to prevent abuses and ensure the NCAA is true to its mission.

[170] *What is a Self-Regulatory Organization (SRO)?*, CORP. FIN. INST. (last accessed Apr. 6, 2021), https://corporatefinanceinstitute.com/resources/knowledge/other/self-regulatory-organization-sro/.

[171] *Id*.