TWO MINUTE TIMEOUT: HOW ANTITRUST ISSUES LED TO THE NCAA'S DOWNFALL

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Charges of violations of antitrust laws and scrutiny regarding the inequity of profit distribution have plagued the NCAA since the late 1970s, at a cost of both money and reputation. Working with the United States Congress to draft a federal NIL bill that defines and protects the rights of student athletes would benefit both the NCAA and its members and students. Another solution to some of these issues that have dogged the NCAA would be to seek and secure a federal antitrust exemption of the type previously granted to Major League Baseball.

This paper argues that the NCAA is becoming obsolete, and in order to remain relevant, they must make some severe changes. Part I gives a brief history of NCAA antitrust litigation and discusses the current state of the NCAA. Part II examines how Major League Baseball received its antitrust exemption and how it might be possible the NCAA to go the same route. Part III explores the possibility of a federal bill governing name, image, and likeness for the purposes of returning a little control back to the NCAA. Part IV gives a deep dive into the intercollegiate athletes as employees query. Part V discusses a detailed analysis of the benefits of an antitrust exemption for the NCAA.

> It is likely that the challenged restraints, as well as other perceived inequities in college athletics and higher education generally, could be better addressed as a policy matter by reforms other than those available as a remedy for the antitrust violation found here. Such reforms and remedies could be undertaken by the NCAA, its member schools and

conferences, or Congress.[1]

-Judge Claudia Wilken

INTRODUCTION

In 1905, the founding of the Intercollegiate Athletic Association of the United States was a lifesaving event.[2] Initiated in direct response to the many injuries and deaths that occurred during the football season of that year, its mission was a commitment to the protection and welfare of college athletes who played at the mercy of a disordered and sometimes barbaric system. [3] Renamed the National Collegiate Athletic Association (NCAA) a few years later, it has remained the ruling body that governs college sports at over one thousand institutions.

NCAA policies and practices have seen several seismic adjustments over the years as the needs of its athletes and member schools have evolved and as societal standards have progressed. Major changes occurred in the 1970s in response to larger schools investing more expenses in their athletic programs, leading to the separation of the NCAA membership into Divisions I, II and III.[4] Federal Title IX laws led to an explosion of NCAA policy changes and administrative additions for the proliferation of women's sports programs in the 1980s.[5] The next seismic adjustment ahead for the NCAA will be the formulation of modern rules that regulate how students' name, image, and likeness (NIL) will be used.

I. BRIEF HISTORY OF NCAA ANTITRUST LITIGATION

The NCAA is no stranger to antitrust scrutiny. The first time the NCAA faced serious backlash for violating the Sherman Act was

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[1] O'Bannon v. Nat'l College Athletics Ass'n, 7 F.Supp 3d 955, 1009 (N.D. Cal 2014).

[2] *History*, NCAA, https://www.ncaa.org/sports/2021/5/4/history.aspx.

[3] *Football's Death Harvest of 1905, or How Teddy Roosevelt Saved the Grid Game*, NEW ENGLAND HISTORY SOCIETY, https://newenglandhistoricalsociety.com/footballs-death-harvest-of-1905-or-how-teddy-roosevelt-saved the-grid-game/.

[4] *National Collegiate Athletic Association*, BRITANNICA, https://www.britannica.com/topic/National-Collegiate Athletic-Association

[5] Elisa van Kirk, *Title IX and Its Impact on Opportunities for Women in NCAA Coaching and Administrative Leadership*, THE SPORT JOURNAL, https://thesportjournal.org/article/title-ix-and-its-impact-on-opportunities-for women-in-ncaa-coaching-and-administrative-leadership/.

in *NCAA v. Board of Regents of the University of Oklahoma* in 1984.[6] In this case, the Universities of Oklahoma and Georgia, along with other members of the College Football Association, contested the NCAA's broadcasting plan, which was designed to limit the total television broadcasts of college football games and the number of appearances of individual schools, as well as to fix the compensation to be received by individual schools.[7]

The Supreme Court struck down the television plan, finding that the NCAA television plan on its face constituted a restraint upon the operation of a free market and that the universities had shown the television plan had raised prices and reduced output, both of which were unresponsive to consumer preference.[8] In response to this showing, the NCAA failed to establish any procompetitive efficiencies that might justify the television plan, and the Supreme Court affirmed the judgment of the lower courts, holding the NCAA's television plan violated Section 1 of the Sherman Act.[9]

Justice John Paul Stevens wrote the majority opinion which found that the NCAA can pass rules related to its mission to promote amateur collegiate athletics but the television plan restricted supply, raised prices, and could not be used to protect live attendance at football games.[10] The Supreme Court struck down the NCAA's television plan as violating antitrust law, but in so doing it held that the rules regarding eligibility standards for college athletes are subject to a different and less stringent analysis than other types of antitrust cases.[11]

In 2009, Ed O'Bannon sued the NCAA arguing that the association's amateurism rules "prevented student-athletes from being compensated for the use of their NILs," and were an illegal restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. §

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[6] Michael Steele, *O'Bannon v. NCAA: The Beginning of the End of the Amateurism Justification for the NCAA in Antitrust Litigation*, 99 MARQ. L. REV. 511, 517 (2015); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984).

[7] *Bd. of Regents*, 468 U.S. at 88.

[8] *Id.*

[9] Mary H. Tolbert & Kent Meyers, *The Lasting Impact of NCAA v. Bd. of Regents of The University of Oklahoma: The Football Fan Wins*, 89 OBJ 22 (Oct. 2018).

[10] *Important NCAA Lawsuits*, ATHNET, https://www.athleticscholarships.net/important-ncaa-lawsuits.

[11] *Bd. of Regents*, 468 U.S. at 119.

1.[12] He filed a federal lawsuit against the NCAA over its use of former student athletes' images in DVDs, video games, photographs, apparel, and other material.[13]

O'Bannon accused the NCAA of illegally directing student athletes to sign away their rights to the commercial use of their images and of not sharing any of the proceeds from their use with former athletes.[14] Every year, before they can compete in a Division I sport, athletes must sign a seven-page Student-Athlete Statement. This form that states they are amateurs and give up any compensation for playing and that they promise to abide by all the rules in the NCAA Manual, including those dealing with amateurism and the use of athletes' images.[15]

According to the lawsuit, student-athletes "forgo their identity rights in perpetuity" in part because they are required to sign this document.[16] Eventually, the plaintiffs in the case numbered 20 current and former college student athletes, all of whom play or played for an FBS football or Division I men's basketball team between 1956 and the present.[17]

In particular, the plaintiffs alleged that the NCAA's rules and bylaws operate as an unreasonable restraint of trade because they preclude FBS football players and Division I men's basketball players from receiving any compensation, beyond the value of their athletic scholarships, for the use of their names, images, and likenesses in video games, live game telecasts, re-broadcasts, and archival game footage.[18] O'Bannon argued that upon graduation, a former student athlete should become entitled to financial compensation for NCAA's commercial uses of their image.[19]

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[12] O'Bannon v. Nat'l College Athletics Ass'n, 802 F.3d 1049, 1055 (9th Cir. 2015).

[13] *Former Bruin O'Bannon sues NCAA*, ESPN (July 21, 2009), https://www.espn.com/mens-college basketball/news/story?id=4346470.

[14] *Id.*

[15] *The NCAA Lawsuit*, FRONTLINE (Oct. 04, 2011), https://www.pbs.org/wgbh/frontline/wgbh/pages/frontline/money-and-march-madness/ncaa-lawsuit/.

[16] *Id.*

[17] John Wolohan, *A full review of the O'Bannon v. NCAA judgment*, LAWINSPORT (Aug. 21, 2014), https://www.lawinsport.com/topics/item/your-full-review-of-the-o-bannon-v-ncaa-judgment.

[18] *Id.*

[19] Kurt Streeter, *NCAA is sued by former athletes*, LOS ANGELES TIMES (July 22, 2009),

The Ninth Circuit Court of Appeals held that although the NCAA's amateurism rules are procompetitive, they are not exempt from antitrust legislation and must be analyzed using the Rule of Reason.[20]

This was a pivotal case because of the Court agreeing that the NCAA restrained trade in the market of college athletics.[21] When giving the opinion, Honorable Jay S. Bybee stated the following:

Today, we reaffirm that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason. When those regulations truly serve procompetitive purposes, courts should not hesitate to uphold them. But the NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules. In this case, the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market. The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more.[22]

Recently, in 2021, numerous Division I football and basketball players, including former University of West Virginia football player Shawne Alston, sued the NCAA arguing that the NCAA's rules limiting student athlete compensation violated antitrust law.[23] The Supreme Court refused to overlook the NCAA's restrictions on education-related benefits for the purpose of preserving the NCAA's amateurism model and specified that the NCAA cannot be immune from antitrust laws simply because the NCAA sits at "the intersection of higher education, sports, and money."[24] The Court affirmed the ruling of the lower court that the NCAA's restrictions violated the Sherman Act because it created anticompetitive effects in the relevant market of Division I intercollegiate sports.[25]

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https://www.latimes.com/archives/la-xpm-2009-jul-22-sp-videogames-lawsuit22-story.html.

[20] O'Bannon v. Nat'l College Athletics Ass'n, 802 F.3d 1049, 1053 (9th Cir. 2015).

[21] Michael T. Jones, *Real Accountability: The NCAA Can No Longer Evade Antitrust Liability Through Amateurism After O'Bannon v. NCAA*, 56 B.C.L. REV. E-SUPPLEMENT 79, 84 (2015).

[22] *O'Bannon*, 802 F.3d at 1079.

[23] Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 74 (2021).

[24] *Id.* at 94.

[25] *Id.* at 99.

A. Current State of the NCAA

The NCAA is navigating several significant changes and challenges in intercollegiate athletics. The landscape has been shaped by the conflicting fundamental, social, and economic values within the member schools and the NCAA, itself.[26] The NCAA has been forced to adapt in a post-*Alston* world.

Despite all of these changes, the NCAA is still pushing its alleged agenda of amateurism while continuing to worry about the academic integrity of its member institutions.[27] The NCAA has implemented an amateurism certification process designed to ensure that prospective student-athletes meet minimum academic standards to compete.[28]

The NCAA is also dealing with the economic interests that have arisen from Title IX, a federal law that requires gender equity in intercollegiate sports. Although women's sports have been gaining popularity recently, they still do not produce enough revenue to cover their costs.[29]These social and economic pressures have instigated many schools to seek an increase in revenue from more popular sports such as football and men's basketball.

Unfortunately for the NCAA, Congress has not been especially helpful. They have had a few congressional hearings, but nothing solid has come from them. When Congress does decide to step in, there are a couple of ways that their actions could greatly assist the NCAA.

II. HOW BASEBALL BECAME ANTITRUST EXEMPT

In 1922, the Federal Baseball Club of Baltimore sued the National League of Professional Baseball Clubs, the American League of Professional Baseball Clubs, and others for threefold damages under the Antitrust Act.[30] The Federal Baseball Club of

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[26] Thomas J. Horton, Drew DeGroot, Tyler Custis, *Addressing the Current Crisis in NCAA Intercollegiate Athletics: Where Is Congress?*, 26 MARQ. SPORTS L. REV. 363, 365 (2016).

[27] *Id*.

[28] *Id*.

[29] Glenn M. Wong et. al., *NCAA Division I Athletic Directors: An Analysis of the Responsibilities, Qualifications and Characteristics*, 22 JEFFREY S. MOORAD SPORTS L.J. 1, 11 (2015).

[30] Federal Baseball Club of Baltimore v. Nat'l League of Professional Base Ball Clubs, 259 U.S. 200, 207 (1922).

Baltimore argued that the National League and the American League were conspiring to combine into one single company, thus violating the Sherman Act.[31] The Supreme Court held that although baseball involved interstate commerce due to the teams having to travel from state to state, it was merely incidental and not subject to the Sherman Act; the exhibitions of baseball are "purely state affairs."[32]

Thirty-one years later, the Supreme Court was faced with another antitrust case regarding baseball in *Toolson v. New York Yankees, Inc.*; multiple professional baseball players sued the owners of professional baseball clubs, arguing that the reserve clause and other practices of organized baseball restricted their freedom to negotiate with teams and violated antitrust laws.[33] However, the Court determined that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."

Congress fortified baseball's exemption in 1998 by passing 15 U.S.C.A. § 26b, also known as the Curt Flood Act.[34] This legislation explicitly maintained baseball's antitrust exemption except in regard to employment issues. After almost thirty years later, Major League Baseball is still the only national sport that is exempt from federal antitrust laws.

When discussing the MLB's antitrust exemption, it is important to discuss the vitriol numerous people feel towards it. Many find that this exemption has outlived any purpose it originally served.[35]

Although the Curt Flood Act was a win for professional baseball players, it did not fix everything. This Act made it legal for a professional athlete to bring antitrust claims against their

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[31] *Id*.

[32] *Id*. at 208.

[33] Toolson v. New York Yankees, 346 U.S. 356 (1953).

[34] 15 U.S.C.A. §26b (West).

[35] Tyler Hoguet, *Baseball's Antitrust Exemption*, THE REGULATORY REVIEW (Jun 26, 2024), https://www.theregreview.org/2024/06/26/hoguet-baseballs-antitrust-exemption/.

respective league, but only if the player decertified their union.[36] No player has ever chosen to do this.[37]

The Curt Flood Act had virtually no effect on the negotiations in professional baseball because the Major League Baseball Players Association had all the bargaining power.[38] In 1981, the MLB had the second longest player strike in baseball history due to players wanting to expand the scope of free agency.[39] This strike lasted fifty days.[40]

The 1981 strike was followed by the 1994 MLB strike. Due to financial situations arising, team owners offered players a guaranteed salary and $1 billion worth of benefits.[41] The catch was the implementation of a salary cap, along with free agency changes and the removal of arbitration.[42] This strike lasted 232 days.[43]

While it is undoubtedly true that the MLB's antitrust exemption was detrimental to players and fans, the same results would not occur if an exemption was granted to the NCAA. A large part of the MLB's problems were due to employment and salary issues which do not occur in the NCAA. As long as the NCAA and most courts continue to not recognize student athletes as employees of their institutions, there should be no similar problems.

A. How the NCAA Could Attempt to Receive an Antitrust Exemption

Because federal antitrust laws only govern interstate commerce, it must be determined whether the NCAA acts in an

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[36] L. Edward Martin, IV, *A Century of Turmoil: Examining the Modern Effects of MLB's Antitrust Exemptions on Labor Relations in Major and Minor League Baseball*, 26 HOUS. L. REV. (2024).

[37] *Id.*

[38] *Id.*

[39] Dan Freedman, *MLB's Antitrust May Be Showing Some Cracks*, FORBES (Jun 13, 2024), https://www.forbes.com/sites/danfreedman/2024/06/13/mlbs-antitrust-exemption-may-be-showing-some-cracks/.

[40] Chris Bumbaca, *Explaining the 1981 MLB Season: How baseball survived shortened year*, USA TODAY (Mar 15, 2020), https://www.usatoday.com/story/sports/mlb/2020/03/15/1981-mlb-season-coronavirus-delay baseball/5054780002/.

[41] Adrienne Goehler, *Reliving The 1994 MLB Strike 28 Years Later*, SPORTS ILLUSTRATED (Feb 21, 2022), https://www.si.com/mlb/guardians/opinion/reliving-the-1994-mlb-strike-as-2022-labor-negotiations-continue.

[42] *Id.*

[43] *Id.*

interstate manner. When deciding that baseball did not act in an interstate manner, the Supreme Court based this opinion on two factors: baseball was purely a "state affair" and baseball did not constitute "trade or commerce."[44] Both of these are applicable to the NCAA.

Analyzing the first factor, baseball was considered to be a purely state affair because each game generated revenue by selling tickets to an event which occurred at each respective stadium in a single state. Justice Holmes then stated that teams crossing state lines to participate in games was not enough to constitute interstate commerce.[45]

It is important to first note that it is still possible to purchase sporting event tickets in person at the respective stadium.[46] In person pulls are a popular tradition at many institutions.[47]

Nowadays, it is wise to assume that almost all college sports participate in internet ticket sales.[48] In person ticket sales do not certify that everyone buying a ticket is domiciled in that particular state. There is no way to prove that everyone who comes to buy an in-person ticket is domiciled in that particular state. Also similar to in person ticket sales, the money goes to the school. Despite the internet, the ticket sales are staying in state.

At the time of the *National League of Professional Baseball Clubs* decision, ticket sales were the main source of revenue for sporting events. Today, tickets sales are typically less than broadcasting revenue. Although broadcasting was not as well-known as it is now, it was still happening.

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[44] Fed. Baseball Club, 259 U.S. at 209.

[45] *Id.*

[46] Chuck Glenewinkel, *Tent Policy for Ticket Pull*, https://studentaffairs.tamu.edu/tent-policy-for-ticket-pull-news/.

[47] Graham Harmon, Ticket Pull for Texas A&M football vs. Texas Reportedly Spiraled Out of Control, https://gigemgazette.com/ticket-pull-for-texas-a-m-football-vs-texas-reportedly-spiraled-out-of-control.

[48] *SeatGeek Partners with Paciolan, the Largest Ticketing Company in College Athletics*, LEARFIELD (Feb. 2023), https://www.learfield.com/2023/02/seatgeek-partners-with-paciolan-the-largest-ticketing-company-in-college-athletics/#:~:text="Paciolan%20is%20thrilled%20to%20join,of%20digital%20%26%20technology%20for%20parent. (discussing how over 160 colleges used Paciolan to for mobile ticketing).

The first live radio sports broadcast was a boxing match that took place on April 11, 1921[49], which was thirteen months before the Supreme Court rendered its judgment in National League of Professional Baseball Clubs in May 1922. Within three months, another boxing match was broadcasted.[50]

On May 17, 1939, the National Broadcasting Company aired the United States' first televised collegiate sporting event, a baseball game between Princeton University and Columbia University.[51] Additionally, professional basketball has been airing on television since October 1953.[52]

With all of these broadcasts, it is reasonable to believe that at the time of *National League of Professional Baseball Clubs*, the Supreme Court was aware that national radio sports broadcasting was on the uprise. Certainly, by the Toolson case in November 1953, they were aware of the lucrative business of sports broadcasting.

When observing the second factor, it is important to note that the definitions of trade and commerce have drastically changed in the last century. Justice Holmes argued that "personal effort, not related to production, is not a subject of commerce."[53]

B. "Unique Characteristics" of Baseball

Although the MLB has an exemption under antitrust laws, there are still limits. The exemption "rests on a recognition and acceptance of baseball's unique characteristics and needs."[54] The courts have not been able to determine a uniform application of this standard. In 1982, the United States District Court for the Southern District of Texas offered the first approach with Henderson Broadcasting Corp. v. Houston Sports Association[55]

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[49] *First live sporting event broadcast on radio*, HISTORY (Aug. 25, 2021), https://www.history.com/this-day-in history/historic-sports-radio-broadcasts.

[50] *Id*.

[51] Leonard Koppett, *Baker Field: Birthplace of Sports Television*, https://www.college.columbia.edu/cct_archive/spr99/34a.html.

[52] Andrew Fischer, *History of the NBA on Television*, GIVEMESPORT (June 25, 2024), https://www.givemesport.com/history-nba-on television/#:~:text=The%20NBA%2C%20founded%20in%201946,with%20the%20DuMo nt%20Television%20Net work.

[53] Fed. Baseball Club, 259 U.S. at 209.

[54] Flood v. Kuhn, 407 U.S. 258, 282 (1972).

They decided that the "unique characteristics" are strictly factors that are integral to the game.[56]

This means that the specificity of the "unique characteristics" are not the important part; the important part is that there are unique characteristics, at all. The NCAA's biggest characteristic is also its most unique characteristic: amateurism. Requiring student athletes to be amateur athletes is what differentiates the NCAA from professional sports organizations.

Amateur sports have an important place, not only in institutions of higher learning, but in society at large. The vast majority of people who participate in sporting activities across the globe are amateurs. The benefits of amateur sports are undisputed and can range from contributions to physical and mental well-being to learning social traits valued by the community such as character and sportsmanship.

Development of organized amateur sports in the United State saw a significant surge in the 19th century. This development was particularly accelerated in private schools and universities where upper- and middle-class men competed as amateur students.[57] The proliferation of amateur athletic competitions in colleges and universities continued through the 19th century, crew competitions and track and field events being the most popular until football became the most popular collegiate sport in the late 1950s.[58]

College football rules differed from school to school and evolved until the game became a dangerous, sometimes fatal college activity by the first of the 20th century. Unregulated game play, such as gang tackling and mob formations, gave the game a reputation as a brutal sport and football was banned on some college campuses.[59]

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[55] Henderson Broad. Corp. v. Houston Sports Ass'n, Inc., 541 F. Supp. 263 (S.D. Tex. 1982).

[56] *Id.* at 265.

[57] Guy Lewis, *The Beginning of Organized Collegiate* Sport, AMERICAN QUARTERLY (Aug. 9, 2013), https://history.msu.edu/hst329/files/2015/05/LewisGuy-TheBeginning.pdf.

[58] *The History of the Sport of* Rowing, ATHNET, https://www.athleticscholarships.net/history rowing#:~:text=Rowing%20was%20the%20most%20popular,offered%20at%20the%20NCAA%20level.

[59] Bill Carey, *Football Was So Brutal in the 1890s That Many Called for Its Ban*, TENNESSEE MAGAZINE (Oct. 1, 2021), https://www.tnmagazine.org/football-was-so-brutal-in-the-1890s-that-many-called-for-its-ban/.

As football continued to be played on many campuses, injuries and deaths continued. No universal rules were in place and some colleges paid men to play who were not enrolled in the school. Public outcry to modify or prohibit college football play altogether grew after the 1904 college football season when 18 deaths and 159 serious injuries occurred on the field.[60]

During the 1905 season, multiple players had their nose broken and one player died of a cerebral hemorrhage due to being kicked in the head.[61] After nineteen deaths and 137 serious injuries, the Chicago Tribune referred to this football season as the "death harvest."[62]

In October of 1905, President Theodore Roosevelt met with college athletics leaders to ask them to clean up the game, but deaths and injuries continued during the season.[63] In December of the 1905 football season, the chancellor of New York University gathered leaders from thirteen colleges and universities.[64] Sixty two colleges and universities became charter members of the Intercollegiate Athletic Association of the United States later that month, evolving into the rules making body known as the National Collegiate Athletic Association by 1910.[65]

The NCAA is unique in that it was created to formulate and regulate policies intended to protect college athletes from bodily harm. Its mission has evolved and expanded to monitor and govern over one thousand college athletic systems in this country.

The primary mission and responsibility of colleges and universities, and their associated college athletic systems, is to provide an education that will provide opportunities for success in life after college athletes matriculate. The culture of amateur athletics in these institutions, and the degree to which schools adhere to their educational missions, has become hugely affected by the introduction of opportunities for staggering amounts of money into their athletic systems. Current rules prohibit football and basketball players from being hired by professional sports

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[60] *History*, *supra* note 2.

[61] Christopher Klein, *How Teddy Roosevelt Saved Football*, HISTORY (Sep. 16, 2012), https://www.history.com/news/how-teddy-roosevelt-saved-football

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

teams straight from high school. This leaves college athletic programs as the only route available to athletes pursuing a professional athletic career. Players have no other organized access to opportunities for positions on professional sports teams.

Ohio State professor David Ridpath wrote:

> The United States is the only country in the world that has a significant portion of elite athletic development and commercialized sport embedded within its education system. Consider that ten of the biggest outdoor sports stadiums in the world (excluding auto racing venues) are American college football stadiums. None of the largest ones are NFL stadiums. To fix the problem and separate the athletes who are getting an education just because they want to play a sport from those who actually want to go to college, the United States needs a true amateur or minor league that feeds into professional sports.[66]

III. FEDERAL NIL BILL

While a complete antitrust exemption would be most beneficial to the NCAA, a federal NIL bill passed by Congress would greatly benefit the association. A federal bill would allow the NCAA to continue enforcing rules around scholarships, eligibility, and amateurism.

The NCAA has virtually no control over what its member schools do when it comes to NIL. Although earlier this year they reached a deal with Power Five conference schools to directly pay their players,[67] in reality it is just for optics. If these schools really wanted permission, they would have gotten permission from their state legislature to allow pay-for-play.

Although the NCAA made the agreement with the Power Five schools, it makes sense that they would not actually be for this. The NCAA pedestal has two main components: amateurism and education. The NCAA made that agreement because they knew

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[66] B. David Ridpath, *A Path Forward for Reforming College Sports*, THE JAMES G. MARTIN CENTER FOR ACADEMIC RENEWAL (Jan. 15, 2020), https://jamesgmartin.center/2020/01/a-path-forward-for-reforming-college-sports/.

[67] Dan Murphy & Pete Thamel, *NCAA Power 5 Agree to Deal That Will Let Schools Pay Players*, ESPN (May 23, 2024), https://www.espn.com/college-sports/story/_/id/40206364/ncaa-power-conferences-agree-allow-schools-pay players

there was no other choice. They are aware that the new era of college sports is coming with or without them.

If the NCAA turned back on their agreement with Power Five conference schools today, schools in Georgia would still be able to pay their players because state law trumps NCAA regulations. In order for the NCAA to have control, it is crucial to get federal law involved.

On September 17, 2024, Governor Brian Kemp signed an order prohibiting the NCAA from penalizing Georgia colleges and universities for "offering compensation, or compensating an intercollegiate student-athlete for the use of such student-athletes NIL."[68] Athletic directors from both the University of Georgia and Georgia Institute of Technology have expressed gratitude towards this order, stating, "In the absence of nationwide name, image and likeness regulation, this executive order helps our institutions with the necessary tools to fully support our student-athletes in their pursuit of NIL opportunities, remain competitive with our peers and secure the long-term success of our athletics programs."[69]

This order is quite similar to the Virginia legislation which also gave colleges and universities permission to directly play student-athletes without repercussion from the NCAA.[70] These orders are a direct response to the NCAA's rule forbidding colleges and universities from directly paying student-athletes. It is only a matter of time before other states follow suit and defy the archaic rules of the NCAA.[71]

It is obvious, by these states actively passing orders going against NCAA policies, that they are trying to free their universities from the domineering hand of the NCAA – and based on the endorsement of the University of Georgia and Georgia Tech's athletic directors, it seems that the schools are on the same page.

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[68] Dan Murphy & Mark Schlabach, *Georgia Governor Signs Order to Allow Schools to Pay* Players, ESPN (Sep. 17, 2024, 1:21 PM), https://www.espn.com/college-sports/story/_/id/41302121/georgia-governor-signs-order allows-schools-pay-players.

[69] *Id*.

[70] *Id*.

[71] Eli Henderson, *New Georgia Law Allows Direct NIL Payments to* Athletes, SPORTS ILLUSTRATED (September 18, 2024), https://www.si.com/fannation/name-image-likeness/nil-news/new-georgia-law-allows-direct-nil-payments-to-athletes#:~:text=Eli%20Henderson%20%7C%20Sep%2018%2C%202024&text=Georgia%20Governor%20Brian%20Kemp%20signed,%2C%20and%20likeness%20(NIL).

Although each order is the step in the right direction, I believe a more direct approach is needed: a uniform, federal NIL bill.

There are currently seven pieces of proposed NIL legislation in Congress.[72] Out of these seven, the NCAA would benefit most from the Level Playing Field Act.[73]

A. Student Athlete Level Playing Field Act

Introduced by Representative Anthony Gonzalez, the Student Athlete Level Playing Field Act involves banning recruitment inducements and ensuring that student athletes are not considered to be employees.[74] This proposed act includes a very important clause that would preempt state NIL laws: "No State may enforce a State law or regulation with respect to permitting or abridging the ability of a student[-]athlete attending an institution of higher education to enter into an endorsement contract or agency contract pursuant to this Act or by an amendment made by this Act."[75]

This proposed legislation is missing a key component: an antitrust exemption clause. When asked why the act did not have this clause, Representative Gonzalez stated, "I would say, through the course of talking through a piece of legislation and trying to balance all the different priorities, we felt the right thing to do was leave as it is on the antitrust front."[76]

It is a possibility that some states will try to argue that NCAA regulation preempting state law is unconstitutional. If this were to occur, the states would most likely state that preemption violates the Tenth Amendment.

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[72] Ben Pope, Ben McMichael, & James Fielding, *Highlights of the Federal Proposals to Regulate NIL Deals*, LITTLER (Feb. 6, 2024), https://www.littler.com/publication-press/publication/highlights-federal-proposals-regulate-nil-deals.

[73] *Id.*

[74] Kristi Dosh, *4 New Federal NIL Bills Have Been Introduced In Congress*, FORBES, (Jul. 29, 2023), https://www.forbes.com/sites/kristidosh/2023/07/29/4-new-federal-nil-bills-that-have-been-introduced-in-congress/.

[75] Anthony Gonzalez, *Student Athlete Level Playing Field Act*, ANTHONY GONZALEZ HOUSE (Sept. 14, 2020), at § 6, https://anthonygonzalez.house.gov/uploadedfiles/the_student_athlete_level_playing_field_act.pdf.

[76] Dennis Dodd, *Bipartisan Name, Image, Likeness Bill Introduced to U.S. House Would Supersede State Laws for College Athletes*, CBS SPORTS (Sept. 25, 2020), https://www.cbssports.com/college-football/news/bipartisan-name-image-likeness-bill-introduced-to-u-s-house-would-supersede-state-laws-for-college-athletes/.

While this may seem like a roadblock for the NCAA, the states will most likely lose on this challenge because the preemption clause does not regulate the actions of the state. The clause is allowable under the Supremacy Clause of the Constitution.

The NCAA has developed an interim policy to provide guidance to institutions and student-athletes regarding NIL opportunities[77] and has implored Congress to create national NIL guidelines that will protect student-athletes from exploitation. We continue to see evidence of dysfunction in today's NIL environment, including examples of promises made but not kept to student athletes…Just as anyone that owns stock or buys a house is afforded basic consumer protections, it's clear that student-athletes entering NIL contracts should be too.[78]

There are a number of competing proposals in Congress that seek to create regulations for NIL deals that would apply uniformly across the country, but none have been passed into federal law yet. [79] The Student Athlete Level Playing Field Act would preempt all state NIL laws and would create both a Federal Trade Commission Clearinghouse and the Covered Athletic Organization Commission that would regulate NIL deals.[80] Each of the proposals in Congress has unique features offered in the spirit of protecting student athletes.

Some aspects of these proposals may prove particularly contentious, such as the plan in the PASS Act to make it illegal for a college athlete to transfer without sitting out a year until he or she has used at least three years of their college eligibility—except for extreme circumstances, such as the death of a family member.[81] Coaches and athletic directors have complained that the

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[77] Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx.

[78] Paul Kasabian, *NCAA's Charlie Baker Urges Congress to create National NIL Rules amid 'Dysfunction'*, BLEACHER REPORT (Sep. 27, 2024), https://www.bleacherreport.com/articles/10137065-ncaas-charlie-baker-urges congress-to-create-national-nil-rules-amid-dysfunction.

[79] *NIL Legislation Tracker*, SAUL EWING, https://www.saul.com/nil-legislation-tracker.

[80] Pope, McMichael, & Fielding, *supra* note 72.

[81] Dan Murphy, *Pass Act aims to protect athletes, 'integrity' of college sports*, ESPN (July 25, 2023), https://www.espn.com/college-sports/story/_/id/38070433/pass-act-aims-protect-athletes-integrity-college-sports.

combination of NIL money and a relatively new NCAA rule that allows players to transfer without penalty has made it difficult to maintain a steady roster.[82]

Features from other proposals would serve to protect student athletes in various ways and would add expanded protection if combined with components of other proposals such as those in the Student Athlete Level Playing Field Act. The Compensation Protection Act would require that student athletes take financial literacy and lifestyle development courses that include lessons in personal budgeting, debt, credit, interest rates, contracts, tax, and other issues relating to their endorsements and income.[83]

The Economic Freedom Act would bar institutions from colluding to cap the compensation student athletes can earn from NIL deals.[84]This feature would not only protect student athletes from being taken advantage of by entities seeking to use their NIL. It would also protect them from being exploited by institutions conspiring to artificially decrease the value of student athletes' worth. In the Clearinghouse Act, schools would possess the power to prohibit their athletes from entering into agreements that would violate state law or the student conduct code.[85]

A review of the federal NIL proposals shows that lawmakers see the creation of an NIL reporting system as a priority.[86]Also, future NIL legislation may not only seek to protect student-athletes rights in regard to NIL deals but may also impact the institutions use of its students' likeness in marketing materials.[87] Many of the proposed federal NIL laws do not address the issue of the employment status of student-athletes.

Two of the proposals – the Level Playing Field Act and Cruz's Act – would clarify that student-athletes are not employees of their institution yet the Economic Freedom Act would prohibit institutions from interfering with student-athlete efforts to form

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[82] *Id*.

[83] Olafimihan Oshin, *Senators Announce Push to Reform College Athletics*, THE HILL (July 20, 2023), https://thehill.com/homenews/senate/4108518-senators-announce-push-to-reform-college-athletics/.

[84] Pope, McMichael, & Fielding, *supra* note 72.

[85] *State and Federal Legislation Tracker,* TROUTMAN PEPPER LOCKE (Sep. 26, 2024), https://www.troutman.com/state-and-federal-nil-legislation-tracker.html.

[86] Pope, McMichael, & Fielding, *supra* note 72.

[87] *Id*.

unions or engage in collective bargaining.[88] The proposals put forth so far involve a myriad of possibilities that, no doubt, will be discussed and fine-tuned in the future.

B. Drawbacks of the Student Athlete Level Playing Field Act

Passage of the Student Athlete Level Playing Field Act would not solve all issues associated with student NIL considerations and could introduce additional problems and legal challenges. In addition to prohibiting institutions from restricting the ability of student athletes to receive payment for use of their NIL, it establishes a clearinghouse for student endorsement contracts to be overseen by the Federal Trade Commission (FTC) and creates the Covered Athletic Organization Commission.[89]

Transparency created by data from a national clearinghouse of student athlete endorsement contracts would provide students with valuable information to help them secure fair payment amounts and help them avoid conflicts of interests with other entities.[90] Distributing this data also raises the possibility of privacy violations given that this is public disclosure of sensitive student information.

A stringent mechanism that removes personal identifying information from clearinghouse records is required to protect student-athletes and give them the freedom to fully pursue NIL deals. Unlike other bills and proposals that have been submitted, The Student Athlete Level Playing Field Act does not include provisions that would implement privacy safeguards regarding personal and financial disclosures.[91]

Privacy issues notwithstanding, another concern regarding transparency of the clearinghouse data is that this legislation does not specifically provide any instrument for access of this data for public review. Access to clearinghouse data should be available to

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[88] *Id.*

[89] *Id.*

[90] Sanjay Reddy, *NIL and Date Transparency: Implications for Student-Athletes, ,* GEO. L. TECH. REV. (May 2024), https://georgetownlawtechreview.org/nil-and-data-transparency-implications-for-student-athletes/GLTR-05-2024/.

[91] The U.S. House NIL Bill, *Student Athlete Level Playing Field Act, Is Improved but Still Needs Further Specification*, THE DRAKE GROUP (May 7, 2021), https://www.thedrakegroup.org/2021/05/06/college-athletes-should-give-u-s-house-nil-bill-a-c-grade-kudos-and-criticism-of-the-student-athlete-level-playing-field-act/.

non-interested parties to facilitate impartial review of student athlete endorsement activity as a way to expose infractions of the rules that may occur.

The bill should define requirements regarding disclosure for public viewing and implement a publicly accessible database that provides pertinent student data from which personal identifying information has been removed.

The Student Athlete Level Playing Field Act may not go far enough to protect student athletes' rights to financial compensation. Although it allows student athletes to enter into an endorsement or agency contract or otherwise receive consideration for their name, image, or likeness, it does not legislate other types of employment that may be afforded to them in the future that may not fall specifically under the category of endorsements.[92]

For example, athletes who are self-employed would not execute endorsement agreements with themselves. More clarification is required to ensure that college athletes have the right to engage in all forms of outside employment with the exception of professional sports or endorsements related to prohibited product categories.

There are issues that need to be addressed regarding the logistics of the proposed Covered Athletic Organization Commission. This Commission will be temporary with its mandate only lasting 3 years. The assigned duties of the Commission are to make recommendations to Congress and other governance organizations regarding NIL rules.

With no authority to establish rules or resolve disputes, this Commission will in no way provide direct support to the administration of NIL policy as its recommendations will only be acted on by the slow machinations of Congress. The Student Athlete Level Playing Field Act is also nonspecific regarding the composition of the Commission. This opens the door to the possibility that the Commission could be loaded more heavily with members from a particular group to the exclusion of other perspectives.

It would also be better served by requiring more specific expertise, such as requiring an expert on Title IX considerations.

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[92] *Id.*

One recommendation is that a permanent NIL Commission be established that consists of independent experts who possess the authority to establish rules and standards, monitor implementation, and resolve disputes.[93]

C. Benefits of the Student Athlete Level Playing Field Act

While the Level Playing Field Act may have some technical difficulties, it is still very beneficial to the NCAA. Specifically, the Act has three proponents that align with the goals of the NCAA: the preemption of all state NIL laws, banning institutions from paying their players directly, and ensuring that student athletes are not considered employees at their academic institutions.

As previously stated, any rules the NCAA imposes have the possibility of being domineered by state law. This makes the rules of the NCAA almost impossible to enforce.

The preemption would provide a legal shield that would allow the NCAA to enforce rules around recruiting, eligibility, and financial aid without the risk of legal challenges, thereby preventing a chaotic and fragmented system.

It would help maintain uniform rules across the NCAA's hundreds of schools. Without the regulations of the NCAA, the competitive power balance could be thrown off, especially for smaller or less wealthy schools that would struggle to compete with big-budget programs in schools with larger athletic departments or wealthy boosters.

Without state NIL laws, the NCAA's rules will be the primary authority. This being said, they would still be subject to federal rules and influence. The NCAA's cooperation and support of the Act could potentially garner congressional support in favor of the NCAA and help avoid more restrictive federal legislation.

A state NIL preemption could also be beneficial for institutions and student-athletes. Multiple state laws that contradict each other are not productive for the nation as a whole. The NCAA's member schools stretch all over the country with each school having a different financial situation than the previous. One uniform set of regulations would give clarity to members. Although state NIL preemption would not entirely stop the flow of antitrust litigation

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[93] *Id.*

towards the NCAA, it would still be a game changer. The NCAA would regain some of its power.

Another benefit of the Level Playing Field Act is banning pay-for-play. As previously stated, the NCAA has made a deal with Power Five Conferences, but only for optics. If this Act was instated tomorrow, the NCAA would gladly turn their back on the deal.

The Act is a solid compromise between the NCAA and student athletes. The students are still allowed to receive NIL deals and the NCAA does not have to worry about pay-for-play turning into direct salary payments. It allows for collegiate athletes to profit off their work without completely undermining amateurism.

The third benefit of the Level Playing Field Act is the provision of ensuring that student athletes are not considered employees of their institution. Student athletes being considered employees is dangerous for a few reasons, the first being the restructure of governance.

State and federal employment laws would take effect which would put the NCAA right back to where it is now. Those laws would take priority over NCAA regulations and different states could have different laws governing intercollegiate sports.

The second possible drawback to viewing student athletes as employees is the financial burden it would pose to member schools. If the student is an employee of a state school, the school may have to provide benefits, such as health insurance, depending on the number of hours the student athlete "works" per week. This could be a devastating blow to smaller institutions with less money to spend on athletics.

Many people argue that because student athletes are now receiving money through NIL and possibly their universities, they should be treated as employees and subject to the same constraints as professional athletes. They argue that their university should have the right to fine them after a mistake.

This means that institutions would also have the power to fine non-athlete students. Therefore, universities could charge a football player for an obscene gesture on the field and charge a regular student for an obscene gesture in the classroom. This is far too much power and could possibly result in a blatant violation of a student's First Amendment right.

Lastly, student athletes being treated as employees completely goes against the importance of amateurism in the NCAA. Employing student-athletes is essentially pay-for-play. A foundational belief of the NCAA is that student athletes are amateurs who play for the love of the game. While that might be intercollegiate sports seen through rose-colored lenses, amateurism is still important.

IV. DEEP DIVE INTO THE POSSIBILITY OF STUDENT ATHLETE EMPLOYMENT

It is now common to check social media and find that a student -athlete has made a "deal" with a college or university to play there for however many years for however much money. Student-athletes have increasingly sought additional compensation and benefits during their time at university.[94] These requests range from coverage of traveling expenses to ongoing minimum wage compensation.[95]

In *Berger v. NCAA*, the Seventh Circuit Court of Appeals held that although employee status can be defined broadly, it is not an error to dismiss a claim on the grounds that a student athlete is not considered to be an employee of their institution under the Fair Labor Standards Act (FLSA).[96] This holding affirmed the dismissal by the District Court for the Southern District of Indiana of a University of Pennsylvania student-athletes' action arguing that student athletes are employees who are eligible for minimum wage compensation under the FLSA.[97]

The Seventh Circuit Court of Appeals concluded that "as a matter of law, student-athletes are not employees under the FLSA. "[98] Specifically, the Seventh Circuit Court of Appeals noted:

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[94] Bridget Whan Tong, *To Be or Not to Be: Student-Athlete Employees*, THE JEFFREY S. MOORAD CENTER FOR THE STUDY OF SPORTS LAW, https://www1.villanova.edu/villanova/law/academics/sportslaw/commentary/mslj_blog/2017/0213.html.

[95] *See* Sarah L. Holzhauer, *To Educate or to Make a Profit: Compensating College Athletes' Families for Travelling Expenses*, 23 JEFFREY S. MOORAD SPORTS L.J. 509, 510 (2016).

[96] Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 294 (7th Cir. 2016).

[97] *Id.* at 843.

[98] *Id.* at 294.

Moreover, the long tradition of amateurism in college sports, by definition, shows that student athletes—like all amateur athletes—participate in their sports for reasons wholly unrelated to immediate compensation. Although we do not doubt that student athletes spend a tremendous amount of time playing for their respective schools, they do so—and have done so for over a hundred years under the NCAA— without any real expectation of earning an income. Simply put, student-athletic "play" is not "work," at least as the term is used in the FLSA. We therefore hold, as a matter of law, that student athletes are not employees and are not entitled to a minimum wage under the FLSA.[99]

The court held that the "tradition of amateurism in college sports" defined the relationship between student-athletes and their respective schools, distinguishing it from a traditional employee-employer relationship.[100] This ruling enforced the notion that the NCAA's rules and regulations are essential to the nature of college athletics.[101]

The foundation of the NCAA's objection to NIL transactions is the idea that the status of student athletes will shift from amateur student-athlete to professional student-athlete. In fact, for its first 50 years, the NCAA prohibited college athletes from receiving "compensation" of any kind, including scholarships.[102]

It was only in 1956 that schools were first allowed to offer 'grants-in-aid' to students for playing specific sports, but with a condition: the grants could be given only for a student's educational expenses (tuition, room, board, and books) and a small amount for incidental expenses (such as laundry).[103]In 1976, the NCAA disallowed even incidental expenses.[104] That restriction didn't apply to the athletes' schools, teams, or leagues, which were able to capitalize not only on the popularity of a particular team but also on that of individual athletes.[105]

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[99] *Id.* at 293.

[100] *Id.* at 291.

[101] *Supra*, note 94.

[102] Robert Litan, *The NCAA's Amateurism Rules,* MILKEN INSTITUTE REVIEW (Oct. 28, 2019), https://www.milkenreview.org/articles/the-ncaas-amateurism-rules.

[103] *Id.*

[104] *Id.*

[105] Greg Daugherty, *NIL and the NCAA: What Are the Rules?*, INVESTOPEDIA (May 29, 2024), https://www.investopedia.com/nil-and-the-ncaa-8599762.

This position has resulted in millions of dollars in revenue being withheld from those providing the services and has allowed the bulk of earnings from NIL-related transactions to be funneled to people and institutions that contribute, at best, a fraction of the value created by student-athletes. The NCAA has defended their position by insisting that student athletes are amateurs and should not be allowed to be financially compensated for student activities sponsored by the schools. The NCAA long held the idea that it could best promote competition amongst its member institutions by barring all athletes, no matter the level, from receiving compensation related to their participation in athletics, even tangentially.[106]

The concept of the value of athletic pursuits of student athletes is not lost on the NCAA because they have profited from financial transactions with corporations for the use of the NIL of the very students that they have been mandated to protect. The NCAA earns, on its member colleges' behalf, roughly $1 billion a year from the March Madness basketball tournament and signed a $19.6 billion contact with CBS and TNT for TV broadcast rights through 2032 for the men's tournament alone while athletes can collect compensation only up to the full cost of attendance.[107]

Not only were student athletes not compensated in deals that the NCAA made to profit from their NIL, but some student athletes also had no knowledge that their NIL were being used in these transactions. In 2009, former Nebraska football student-athlete Sam Keller filed a lawsuit objecting to the use of the likenesses of former and current student-athletes in archival footage, as avatars (in video games), in photographs and promotions.[108]

Also in 2009, Ed O'Bannon sued the NCAA and others over their use of former players' images in DVDs, video games, photographs, apparel, and other material.[109] The game didn't have

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[106] *When One (NCAA) Door Closes, Another (NIL) Door Opens: What Pre-Collegiate Enrollment NIL Deals Mean for Schools & NIL Collectives*, MONTGOMERY MCCRACKEN (Mar. 13, 2024), https://www.mmwr.com/when-one ncaa-door-closes-another-nil-door-opens-what-pre-collegiate-enrollment-nil-deals-mean-for-schools-nil-collectives/.

[107] *Supra*, note 107.

[108] *Student-athlete likeness lawsuit timeline*, NCAA (Dec. 12, 2013), https://www.mmwr.com/when-one-ncaa-door-closes-another-nil-door-opens-what-pre-collegiate-enrollment-nil-deals-mean-for-schools-nil-collectives/.

O'Bannon's name, but its depiction of his likeness had everything else, including race, height, and jersey number.[110] The same was true of O'Bannon's teammates.[111] "I thought it was strange EA or the NCAA hadn't contacted my teammates or me," O'Bannon recalled.[112]

Kansas stars Mario Chalmers and Sherron Collins are among 16 former men's college basketball players who have sued the NCAA and multiple conferences, alleging that they have profited from the unauthorized use of their names, images, and likenesses in promoting and monetizing the March Madness tournament.[113]

Issues regarding NCAA ownership of and profit from images and other media captured from student athlete activities did not originate with NIL concerns. In 1952, NBC negotiated a one-year football contract with the NCAA.[114]The deal allowed NBC to select one game a week to broadcast on Saturday afternoons, with the assurance that no other NCAA college football broadcast would appear on a competitive network.[115]

About 30 years later, in 1984, the U.S. Supreme Court declared that the NCAA's control of college football television broadcast rights violated the Sherman and Clayton Antitrust Acts. [116] The ruling gave member schools more autonomy to negotiate broadcast rights agreements.[117] The evolution of NCAA ownership and control of television rights is illustrative of the fact that modification of NCAA ownership and rights have been successfully

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[109] Jon Solomon, *Timeline: Ed O'Bannon vs. NCAA*, CBS SPORTS (June 6, 2014), https://www.cbssports.com/college-basketball/news/timeline-ed-obannon-vs-ncaa/.

[110] Michael McCann, *Ed O'Bannon Stands Tall Over NCAA Antitrust Settlement*, SPORTICO (May 29, 2024), https://www.sportico.com/law/analysis/2024/ed-obannon-ncaa-antitrust-settlement-1234782098/.

[111] *Id.*

[112] *Id.*

[113] *Ex-Kansas stars Chalmers, Collins file class-action lawsuit vs. NCAA, others over March Madness*, THE ASSOCIATED PRESS (July 13, 2024), https://apnews.com/article/march-madness-lawsuit df283cf473400c0cbf739ae1bff22486.

[114] *Our NBC Sports History*, INTERNET ARCHIVE, https://web.archive.org/web/20170806140431/http://www.nbcsports.com/our-history#decade_3.

[115] *Id.*

[116] Anthony M. Dalimonte, *NIL Timeline: The Events That Transformed College Sports*, FOSTER SWIFT COLLINS & SMITH, (Apr. 21, 2023), https://www.fosterswift.com/communications-timeline-NIL-cases-transform-college-sports.html.

[117] *Id.*

achieved in the past and that successful adaptation of current NIL rules can be achieved.

The discussion of employment of student athletes relative to NIL issues is often associated with the possibility of employment by the school they attend. Another perspective to consider is the possibility of designating student athletes as employees of the entities that would pay for use of their NIL.

Many college students are hired by people or organizations that are unaffiliated with the institution they attend. The details of the employment arrangements are determined by the student and the employer, with no intervention by the school unless the school is the employer. The U. S. Department of Labor, under the rules of the Fair Labor Standards Act, enforces legislation concerning employment of full-time students.[118]

The employer that hires students can get a certificate from the U.S. Department of Labor which addresses, among other issues, student pay and work hours.[119] There are also accepted guidelines for contract employees. These employees, also called independent contractors, contract workers, freelancers, or work-for-hire employees, are individuals hired for a specific project or a certain timeframe for a set fee.[120]

Often, contract employees are hired due to their expertise in a particular area for specific projects.[121] Many students work at least part time while they are in college.[122]The percentage of full-time undergraduate students who were employed in 2020 was 40

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[118] *Pay for hours worked*, U.S. DEPARTMENT OF LABOR, https://www.worker.gov/pay-for-hours-worked/.

[119] Fair Labor Standards Act Advisor, U.S. DEPT OF LABOR, https://webapps.dol.gov/elaws/whd/flsa/docs/ftsplink.asp#:~:text=The%20certificate%20also%20limits%20the,hour s%20when%20school%20is%20out.

[120] Kirsten Capunay, *What Is a Contract Employee?*, U.S. CHAMBER OF COMMERCE (Mar. 08, 2023), https://www.uschamber.com/co/run/human-resources/what-are-contract employees#:~:text=These%20individuals%20are%20typically%20hired,a%20contract%20basis%20for%20clients.

[121] Indeed Editorial Team, *What Is a Contract Employee?*, INDEED (Aug. 18, 2024), https://www.indeed.com/career advice/finding-a-job/contract-employee#:~:text=Contract%20employees%2C%20also,short-term%20project.ng-a job/contract-employee.

[122] *Working during College*, URBAN INSTITUTE, https://collegeaffordability.urban.org/covering-expenses/working during-college/#/.

percent.[123] Colleges and universities also sometimes enter into contracts with the organizations that offer employment to students, particularly students involved in work study opportunities.[124]This allows stipulations to be in place to protect student interests.[125]

It is already established that students have the right to pursue part-time employment while enrolled in college and can engage in a contractual work agreement that outlines the rules of engagement. Considering the fact that students who are not involved in athletics would be free to participate in employment positions similar to those denied student athletes, the rights of student athletes are being curtailed regarding chances to take advantage of employment opportunities.

In a modification of their stance on amateurism, the NCAA has initiated a program of amateurism certification.[126] To be eligible to compete in NCAA sports, student-athletes must be considered an amateur, meaning they cannot accept payment for athletic performance.

Student-athletes with approved NIL deals are still able to participate in the NCAA and are not considered professionals.[127] The NCAA Amateurism Certification is a process that verifies your amateur status as a student-athlete.[128]T he NCAA has continued to defend "amateurism," but only as it defines the term.[129]

Under the NCAA's rules, college athletes on scholarship are "amateurs" only when playing the sports for which they were recruited, which allowed Clemson's former quarterback, Kyle Parker, to accept a $1.4 million signing bonus in 2010 to play baseball.[130]

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[123] *College Student Employment*, NATIONAL CENTER FOR EDUCATION STATISTICS (May 2022), https://nces.ed.gov/programs/coe/indicator/ssa/college-student-employment.

[124] *Student Employment*, DUKE, https://duke.studentemployment.ngwebsolutions.com/cimages/JobX%20AY22-23%20Non-Profit%20Employer%20Agreement.pdf.

[125] *Model Off-Campus Agreement*, FEDERAL STUDENT AID, https://fsapartners.ed.gov/sites/default/files/2021-03/Model-Off-Campus-Agreement.

[126] *Amateurism*, NCAA, https://www.ncaa.org/sports/2014/10/6/amateurism.aspx.

[127] Joyce Anderson, *NCAA Amateurism Certification: Why It Matters and How to Request It*, HONEST GAME (Apr. 8, 2024), https://honestgame.com/blog/ncaa-amateurism-certification/.

[128] *Id.*

[129] *Supra*, note 102.

[130] *Id.*

The NCAA has also carved out an exception to its amateurism rules for payments to Olympians, even for competing in the same sport for which they have a college scholarship.[131]The NCAA defense of any amateur student status requirements has been slowly eroded by recent court decisions. In one of the more recent decisions from July 11, 2024, the Third Circuit in *Johnson v. NCAA* discussed that student athletes are not barred from being considered employees under the FLSA.[132]

The Third Circuit Court of Appeals began its opinion by signaling in no uncertain terms that the days of the NCAA's long-successful "amateurism" argument are over.[133] The court retorted: "Do efforts that provide tangible benefits to identifiable institutions deserve compensation? In most instances, they do."[134]

The Third Circuit decided that "college athletes ***may*** be employees under the FLSA when they (a) perform services for another party, (b) 'necessarily and primarily for the [other party's] benefit' … (c) under the control or right of control … and (d) in return for 'express' or 'implied' compensation or 'in-kind' benefits.'" [135] This decision has the power to redefine amateurism and greatly impact the current employment status of intercollegiate athletes.[136] Judge Padova of the Third Circuit Court of Appeals giving the term "employer" a broader scope is indicative of him eventually ruling that intercollegiate athletes are employees under the FLSA.[137]

The NCAA, several athletic conferences and plaintiff student athletes have received preliminary judicial approval for a proposed settlement in the consolidated antitrust litigation of three class action lawsuits filed by former student athletes.[138] If finalized, the

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[131] *Id*.

[132] Jeffrey M. Weimer, Christopher S. Bouriat, Cori Mishkin, & Ken D. Nakajima, *Third Circuit holds that NCAA athletes can be considered employees under FLSA*, REED SMITH (July 12, 2024), https://www.reedsmith.com/en/perspectives/2024/07/third-circuit-holds-that-ncaa-athletes-employees-under%20flsa#:~:text=NCAA%20held%20that%20student%20athletes,Labor%20Standards%20Act%20.

[133] *Id*.

[134] *Id*.

[135] *Some Student Athletes May Now Be Considered "Employees" Entitled to Protections Under the Fair Labor Standards Act*, MCCARTER & ENGLISH (July 18, 2024), https://www.mccarter.com/insights/some-student-athletes-may-now-be-considered-employees-entitled-to-protections-under-the-fair-labor-standards-act/.

[136] *Id*.

[137] *Id*.

settlement will enable former and future student athletes to receive compensation from schools and will revamp the current landscape of collegiate athletics.[139]

The option to receive a legislative exemption from antitrust liability has long been sought by the NCAA. For decades, the NCAA trusted that it was effectively exempt from antitrust scrutiny; it understood the U.S.Supreme Court's 1984 ruling in *NCAA v. Board of Regents of the University of Oklahoma* as allowing its members to agree to otherwise anti-competitive rules in the name of amateurism.[140] In *NCAA v. Alston*, the Supreme Court upheld a district court ruling that the NCAA rules limiting education-related compensation violated section 1 of the Sherman Act.[141]

The NCAA argued that its rules are largely exempt from antitrust laws because they are aimed at preserving amateurism in college sports and because the rules "widen choices for consumers by distinguishing college sports from professional sports."[142] In the wake of the *Alston* holding, the NCAA chose not to regulate NIL, but to invoke an interim policy that deferred to the laws of individual states and implemented certain guidelines for college athletes, recruits, their families and member schools to follow.[143]

If the NCAA and its member schools come to terms with treating athletes as employees, one of the very few positives would be that it is a path to exemption from antitrust liability exists.[144] Part of the movement to empower athletes has also involved a push for recognition of athletes as employees of schools. In September 2021, Jennifer Abruzzo, the general counsel of the National Labor

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[138] Erica L. Han, Tatum Wheeler, & Parv Gondalia, *NCAA Proposed Settlement Receives Preliminary Approval*, ROPES & GRAY (Nov. 13, 2024), https://www.ropesgray.com/en/insights/alerts/2024/11/ncaa-proposed-settlement receives-preliminary-approval.

[139] *Id*.

[140] *How NCAA Can Avoid Athlete Compensation Antitrust Issues*, MILLER NASH LLP (Feb. 15, 2022), https://www.millernash.com/firm-news/news/how-ncaa-can-avoid-athlete-compensation-antitrust-issues (hereinafter *Antitrust Issues*).

[141] *Alston*, 594 U.S. at 80.

[142] Nina Totenberg, *The Supreme Court Sides With NCAA Athletes In A Narrow Ruling*, NPR (June 21, 2021), https://www.npr.org/2021/06/21/1000310043/the-supreme-court-sides-with-ncaa-athletes-in-a-narrow-ruling.

[143] Hosick, *supra* note 77.

[144] *Antitrust Issues*, *supra* note 140.

Relations Board, issued a memo outlining her position that athletes are employees under the National Labor Relations Act.[145]

Although schools and the NCAA have long resisted that recognition, employee status for athletes may be the key to solving the NCAA's antitrust problem and paving the way for national NIL rules.[146] If athletes are employees, the NCAA can choose to take advantage of an exemption to federal antitrust laws that would otherwise not be available. Federal courts recognize an implied non-statutory exemption to federal antitrust laws for restrictions contained in collective bargaining agreements and certain other actions that arise out of federal labor laws.[147]

Although the non-statutory labor exemption was not developed specifically for sports, professional sports leagues have found that it provides a useful shield against liability for a variety of restrictions that would otherwise violate federal antitrust law, such as the NFL requiring players to be at least three years removed from high school graduation to enter the NFL draft.[148]

V. DETAILED ANALYSIS OF THE BENEFITS OF AN ANTITRUST EXEMPTION

The easiest way to escape this perpetual cycle of college sports litigation is through an antitrust exemption. The legislative branch can levy an antitrust exemption for the NCAA and allow their revenue-sharing cap to be immune from challenge. In this section, I will explain how an exemption would benefit the NCAA's objective of amateurism and could be integral to keeping the integrity of college sports.

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[145] *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, NATIONAL LABOR RELATIONS BOARD (Sep. 29, 2021), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of#:~:text=Today%2C%20National%20Labor%20Relations%20Board,Act%2C%20and%2C%20as%20such%2C.

[146] *Supra*, note 140.

[147] Loc. Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co., 381 U.S. 676, 689 (1965).

[148] *Antitrust Issues*, *supra* note 140.

A. Antitrust Exemption in Relation to Amateurism

An antitrust exemption would be a game changer for helping the NCAA to preserve amateurism. This quality of intercollegiate athletics is what distinguishes college athletics from professional sports.

An antitrust exemption would release the NCAA from the constant antitrust litigation. Many of these lawsuits are strictly for the purpose of changing their regulations. With the exemption, the NCAA would be able to enforce their rules and regulations. The main goal of the association has always been to maintain amateurism: "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental, and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."[149]

An antitrust exemption is another way for the NCAA to stop pay-for-play from turning intercollegiate sports into a professional league. It would allow for the NCAA to continue its mission of putting scholarships above salaries and emphasize the importance of the student athlete's education.

The NCAA would be able to set proper NIL guidelines in accordance with their amateurism rules while still providing the student athlete with financial gain. Secure amateurism regulations are not only beneficial to the NCAA, but they also help protect the student-athlete by helping players not become victims of NIL abuse. This is a win-win for both the NCAA and student-athletes.

B. How an Antitrust Exemption Would Be Beneficial to the Integrity of College Sports

Many people argue that if the NCAA were to have both state preemption and a federal antitrust exemption, there would be no one to hold the association accountable. They also argue that the integrity of intercollegiate sports will remain in place regardless. I disagree.

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[149] William W. Berry III, *Enhancing "Education": Rebalancing the Relationship Between Athletics and the University*, 78 LA. L. REV. 197, 202 (2017).

We have already seen state officials give the academic institutions within their borders permission to pay-for-play. There is no integrity in recruiting players based on how much money there is to offer.

Between conference realignments and major television network deals, completed without the NCAA, many people find the current state of intercollegiate sports to be upsetting.[150] Fans of college sports are noticing how players are caring less about the loyalty to their team, and more about the cash flow.[151]

The exemption provides a legal safe harbor for the NCAA. Without the constant antitrust litigation, the association would be able to spend more time regulating NIL negotiations to make sure there is no NIL abuse by companies.

CONCLUSION

The landscape of intercollegiate athletics is continuously changing. Each day brings a new opportunity for a new antitrust case against the NCAA, which has very little power right now. The two biggest options for the NCAA to regain some of its lost powers are to receive an antitrust exemption from Congress or plead with the federal government to create a law controlling intercollegiate athletics in regard to name, image, and likeness.

Although the NCAA has agreed with Power Five Conference schools to allow pay-for play, a federal law may still be able to preserve the NCAA's main goal of amateurism. An NCAA antitrust exemption would allow the NCAA to implement its regulations without fear of a lawsuit every 2 years.

On the other hand, a federal NIL law could greatly help the NCAA concerning financial regulations. There are a few competing proposals that seek to create uniformity across the nation. The NCAA would most benefit from the Student Athlete Level Playing Field Act because of the bill's preemption of state NIL laws and the

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[150] Cole Walker, *Opinion | Money and conference realignment are ruining college sports*, DAILY IOWAN (Sep. 12, 2024), https://dailyiowan.com/2024/09/12/opinion-money-and-conference-realignment-are-ruining-college-sports/.

[151] David Hughes, *Cashing Out The Spirit: How Money is Ruining College Sports*, THE WARRIOR WIRE (Feb. 3, 2024), https://www.thewarriorwire.org/13682/sports/cashing-out-the-spirit-how-money-is-ruining-college-sports/.

requirement that student-athletes be enrolled at their institution prior to entering into an NIL deal.

The NCAA dug itself into this hole with its regulations and is now reliant on the federal government for help. Only time will tell if the NCAA survives. In the words of Ed O'Bannon, "What " student-athlete" really means is: everyone is making money except for the college student doing the playing. This was never about a video game. It was about starting the conversation about a broken NCAA system."[152]

[152] Ed O'Bannon (Ed_OBannon), X (Feb. 26, 2018, 12:51 PM), https://x.com/ed_obannon/status/968196738984026112?s=.