New Amateurism

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NEW AMATEURISM

by: Michael A. McCann*

ABSTRACT

This Article proposes a new model for the legal and economic relationship between college athletes and their schools. The National Collegiate Athletic Association and its member conferences and schools are besieged with legal challenges over rules that restrain the capacity of athletes to earn compensation for their athletic labor and the commercial value of their identities. The legal challenges are extensive and scrutinize membership rules under labor, employment, and antitrust laws. The days of “amateurism” and the “student-athlete” enjoying judicial and administrative deference are over. For college sports to maintain a character distinct from professional leagues, university athletic programs that feature de facto pro teams and those that rely on students who play a sport should be formally separated.

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I. INTRODUCTION

The last decade has seen the National Collegiate Athletic Association ("NCAA") lose influence over college sports and, more broadly, higher education. Much of the transformation reflects fumbled decisions on enforcement, litigation, and lobbying. Other causes stem from policies that unwittingly incentivize corrupt recruiting and fraudulent admissions. The NCAA has nonetheless defended “amateurism,” which broadly envisions college sports as appealing to consumers because it features athletes who, because of NCAA rules saying they cannot be...

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paid, are unpaid.\textsuperscript{1} It has done so despite U.S. Supreme Court Justices, among other judges, bluntly concluding the definition is circular and exploitative.\textsuperscript{2}

As we move into the mid-2020s, the NCAA faces an existential crisis. Its attempt to distinguish college sports from professional sports by enforcing rules that deny compensation for athletes who resemble employees, while simultaneously allowing coaches and other university and conference figures to earn as much as they can, has been pilloried.\textsuperscript{3} Further, the NCAA’s efforts to convince judges and lawmakers of antiquated viewpoints have been puzzling, ineffectual, and counterproductive. In August 2023, a joint survey by Sportico and The Harris Poll found that 67\% of U.S. adults believe college athletes should be able to receive direct compensation from their university—a concept sometimes called “pay–for–play”—and 74\% support college athletes being able to use their right of publicity, which forbids the commercial use of another person’s identity without their consent, to sign endorsement and sponsorship deals.\textsuperscript{4} Put bluntly, people are no longer buying what the NCAA is selling.

This Article argues that the NCAA is on track to become extraneous unless it embraces transformative change—and does so quickly. College sports don’t need the NCAA anymore. Conferences have become sophisticated entities that negotiate television and media deals worth billions of dollars, adopt detailed rules for competition and collaboration, and craft policies for athletes that incorporate their voices.\textsuperscript{5}

\begin{enumerate}
\item In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1249 (9th Cir. 2020), aff’d sub nom. Nat’l Collegiate Athletic Ass’n v. Alston, 594 U.S. 69 (2021); see also Protecting the Integrity of College Athletics: Hearing Before the S. Comm. on the Judiciary, 116th Cong. 1 (2020) (statement of Dr. Mark Emmert, President, National Collegiate Athletic Association) (then-NCAA president Mark Emmert described the protection of amateurism as an “incredibly important” matter with “high stakes”).
\item Alston, 594 U.S. at 82–83; Id. at 109 (Kavanaugh, J., concurring).
\item Associate Justice Brett Kavanaugh of the U.S. Supreme Court recently dismissed as “circular and unpersuasive” the NCAA’s claim that “colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid.” Id. at 109 (Kavanaugh, J., concurring). He went as far as to say that “[t]he NCAA’s business model would be flatly illegal in almost any other industry in America.” Id.
NCAA ceased to exist tomorrow, those conferences would continue to operate. Some would likely even flourish. Conferences could also join hands to schedule national tournaments akin to the popular men’s and women’s basketball tournaments known as March Madness. Much of what makes the NCAA useful no longer requires the NCAA.

The NCAA must move away from incremental adjustments, bureaucratized decision-making, and hollow rhetoric and instead move toward a reality-based model. The NCAA needs a new amateurism that drops one-size-fits-all rules and separates top-tier programs from the rest. Recent conference realignment— including the migration of teams from the Pac-12 Conference to other conferences where member schools are located across the country— suggests that when left on their own, conferences and their members attempt to maximize profit regardless of impact on athletes’ studies. The NCAA should redesign Division I athletics so that the 30 or 40 major programs that effectively function as professional teams become a professional league, where the athletes are employees of athletic departments; the relationship between

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7. March Madness, the annual college basketball tournaments for men and women held in March, is a primary revenue generator for the NCAA. The men’s tournament accounts for about 75% of the NCAA’s budget. See Maureen A. Weston, COVID-19’s Lasting Impact on the Sports Industry: Financial, Legal, and Innovation, 61 Santa Clara L. Rev. 121, 126 (2020).

8. See Donald H. Yee, Opinion, What Is Purpose of the NCAA?, CLEVELAND (Sept. 9, 2011, 8:00 AM), https://www.cleveland.com/opinion/2011/09/what_is_purpose_of_the_ncaa_do.html [https://perma.cc/P3Y2-HTR5]. Donald Yee, a prominent sports attorney and agent to Tom Brady and other major sports figures, wrote that the NCAA’s “power is derived solely from the collective consent of college and university presidents” and argued that these presidents “should take back the power they’ve granted the NCAA.” Id.

9. See Thuc Nhi Nguyen, How Much Money Waits for UCLA and USC in the Big Ten Conference?, L.A. Times (July 3, 2022, 5:00 AM), https://www.latimes.com/sports/story/2022-07-03/how-much-money-waits-for-ucla-usc-in-the-big-ten [https://perma.cc/5B95-7928] (detailing the revenue appeal to colleges when contemplating whether to join a new conference); see also Michael McCann & Daniel Libit, Pac-12 Chaos May Boost USC Athlete Employee Charge, Enmesh Big Ten, SPORTICO (Aug. 16, 2023, 12:01 AM), https://www.sportico.com/law/analysis/2023/usc-athletes-employees-pac-12-chaos-1234734234/ [https://perma.cc/ZE4V-ZW43] (explaining that conferences are becoming national, meaning the players, who are full-time students, will be traveling across the country in the middle of the semester more often to play games).

those athletes and their school is both academic and transactional; and name, image and likeness (“NIL”) is expansively defined to include broadcast and other licensing revenues. Scholars, including this author, have proposed models for the recognition of some college athletes as employees.\(^{11}\) There is an ongoing antitrust class action, *In re College Athlete NIL Litigation*, that has advanced past a motion to dismiss and would compel the NCAA to allow the Power Five conferences,\(^{12}\) which are the most prominent and lucrative conferences and collectively include 65 member colleges,\(^{13}\) to share broadcast, video game, and other licensing revenue with college athletes.\(^{14}\) College sports could be reformed without destroying the qualities that make it special, such as historical rivalries and community building.\(^{15}\)

Separating the most remunerative layer of college sports could save important educational opportunities for the numerous college athletes whose experiences track the student-athlete model.\(^{16}\) These are the college athletes who are really students first and athletes second.\(^{17}\) They aren't turning pro.\(^{18}\) They weren't paid under the table by a booster or over the table by an NIL collective to attend a particular college or to remain at it.\(^{19}\) They’re college students who love their sport and their teammates, whose athletic activities shape their growth into adulthood, and who, like their classmates, hope to graduate and find a job. Their


\(^{16}\) William W. Berry III, *Educating Athletes Re-Envisioning the Student-Athlete Model*, 81 TENN. L. REV. 795, 802 (2014) (explaining how athletic participation in college sports can serve as an avocation or extra-curricular activity that furthers a student’s learning and growth).


\(^{19}\) See Tan Boston, *The NIL Glass Ceiling*, 57 U. RICH. L. REV. 1107, 1128−29, 1145−46 (2023) (discussing boosters and NIL collectives and how they compare and contrast).
schools are also not athletic powerhouses that play games aired on national TV; most likely, their school loses money on sports, as the vast majority of Division I athletic programs report net losses.\(^{20}\)

If the NCAA takes no action, it risks a federal judge issuing rules that effectively redefine Division I for all of its more than 350 member schools, not merely the top tier.\(^{21}\) Some colleges could face new employment expenses, including athlete salaries and accompanying workplace benefits, they’re unable to withstand.\(^{22}\) According to an amicus brief filed in 2022 by the American Council on Education, the Association of Public and Land-Grant Universities, the Association of Catholic Colleges and Universities, the Council for Christian Colleges & Universities, and nine similar associations, “only about 2% of the NCAA’s 1,100 member institutions had athletics departments that generated enough revenue to cover operating costs in 2019, and the overwhelming majority of the 500,000 student-athletes in the NCAA participate on teams that generate little or no revenue.” \(^{23}\) Some could eliminate varsity teams, with intercollegiate athletics at some institutions replaced by club and intramural teams.\(^{24}\)

Equally important, the NCAA should enforce rules that prohibit boosters who organize as collectives from disguising pay-for-play arrangements as NIL.\(^{25}\) Those arrangements do not contemplate the use of an athlete’s identity or require them to perform services related

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\(^{21}\) *Our Division I Members*, Nat’l Collegiate Athletic Ass’n, https://www.ncaac.org/sports/2021/5/11/our-division-i-members.aspx [https://perma.cc/TM88-W5NQ]; *see Alston*, 594 U.S. at 108–10 (Kavanaugh, J., concurring) (noting that the NCAA’s remaining compensation rules may violate antitrust law and that the issue could be resolved through litigation if the rules are not changed).


\(^{24}\) *See id. at 7 (arguing that schools who are forced to pay student athletes will choose to eliminate intercollegiate athletic teams); Tom Farrey, Colleges Are Cutting Varsity Sports, That Could Be a Good Thing*, N.Y. Times (Oct. 13, 2020), https://www.nytimes.com/2020/10/13/sports/college-sports-cuts.html [https://perma.cc/P94T-AM9C] (posing that most varsity sports that get cut from a university will become a club or intramural sport).

to NIL. The NCAA, long criticized as harsh or even tyrannical in prohibiting pay-for-play, has morphed into a sheepish hall monitor in attempting to regulate NIL. Meanwhile, colleges, through associated collectives, have exploited the vacuum by recruiting athletes with inducements that bear little relationship to NIL. The NCAA is supposedly afraid of antitrust litigation, but as this Article explains, those fears are exaggerated and empirically unsubstantiated. As I advocated in testimony before the U.S. Senate in 2021, the NCAA has a proper role in overseeing NIL and should not shy away from that role if it wants to remain a credible authority on college sports. The NCAA should also be willing to use favorable case precedents to challenge states that have recently erected barriers to NIL enforcement.

This Article has two parts. Part II addresses recent causes of the impending collapse of amateurism, as that word has been traditionally understood, and why the collapse is poised to detrimentally impact many colleges that are not “big time.” Part III offers strategies on how the NCAA can reconfigure amateurism so that it serves the needs of member institutions and is ethically, legally, and economically defensible.


27. See id. (explaining how the NCAA formerly punished pay-for-play harshly, but schools are no longer afraid to ignore the strict NCAA rules).


30. Texas is one of the states that has limited the NCAA’s legal authority to regulate NIL. See Joe Cook, Texas State Law Regarding NIL Finds Itself in the NCAA’s Crosshairs, Likely Setting Up a Legal Battle, On3 (June 28, 2023), https://www.on3.com/teams/texas-longhorns/news/texas-state-law-regarding-nil-finds-itself-in-the-ncas-crosshairs-likely-setting-up-a-legal-battle/ [https://perma.cc/7U8T-9XP7]. For a discussion on how the NCAA could challenge these state laws, see infra notes 297–312 and accompanying text.
II. The Collapse of Amateurism as We Know It

College sports have been around since the 19th century. They began with college students organizing their own competitions as a form of entertainment and an opportunity to build camaraderie. Even then, there was a commercial component. As Justice Neil Gorsuch wrote in *NCAA v. Alston*, a boat race involving Harvard and Yale students in 1852 was sponsored by a railroad executive who paid for the players’ travel and offered them prizes. Fifty years later, major institutions regarded college football as “both popular and profitable,” a status that continues to this day. Originally called the Intercollegiate Athletic Association, the NCAA was founded in 1906. It was created after President Theodore Roosevelt encouraged university leaders to form an association that could address safety issues and other pressing issues in college sports. The NCAA initially had 62 members and now has about 1,100 colleges, universities, and athletic conferences that are spread out across three divisions (Division I, Division II, and Division III).

The NCAA is a non-profit membership organization that, like other membership organizations, sets rules through membership voting and relies on members to follow the rules. The relationship between the NCAA and members is, therefore, contractual, with members assenting to follow rules they (and other members) design and approve. Members pledge to adhere to amateurism and the accompanying set of membership policies that supposedly distinguish college athletes

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from professional athletes. At the heart of amateurism is the idea that college athletes’ participation “should be motivated primarily by education and by the physical, mental and social benefits to be derived” and that member schools must protect those athletes “from exploitation by professional and commercial enterprises.” The NCAA isn’t the only national governing body for college sports, as about 250 schools are members of the National Association of Intercollegiate Athletics. However, the NCAA is the largest and most prestigious. In 2021, the U.S. Supreme Court described the NCAA as having “monopoly . . . control” over the labor market for college sports.

Over the first half of the 20th century, college sports grew in popularity and became more commercialized. Radio advertising, along with ticket sales and sponsorships, played key roles in turning games played by college students into moneymaking opportunities. Supportive alumni, called “boosters,” aided athletics programs. By the 1940s, it was common for an alumnus of a college to directly assist a high school athlete in their pursuit of a college and financially aid that athlete. As the money rolled in, there were scandals, including point-shaving schemes where college athletes were paid to change the final score of the game without losing it. The NCAA adopted the Committee on Infractions in the 1950s to investigate and punish member schools, as well as those affiliated with them, for wrongdoing.

In the 1950s, college athletes invoked workers’ compensation statutes to seek payments for lasting injuries that occurred while playing. Employee status is generally considered a prerequisite for eligibility

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46. Smith, supra note 37, at 11.
for workers’ compensation benefits. The NCAA adopted the term “student-athlete” as a way of signaling that college athletes were students first and athletes second. By classifying the athletes as students, the depiction also implied they were not employees. The term “student-athlete” therefore served as a defense in litigation where athletes argued they were university employees under workers’ compensation statutes. Significant variances among state employment statutes also clouded the legal landscape in ways that benefited the schools.

Meanwhile, the NCAA altered the language of rules to signal college sports involved amateur rather than professional games. For instance, the NCAA replaced the professional-sounding “football club” with “college football team” and “basketball club” with “college basketball team.” More consequentially, the NCAA limited athletic scholarships to what the organization termed a “grant-in-aid,” which includes the costs of tuition and fees, room and board, required course-related books, and select other expenses but does not reflect a player’s market value, labor, publicity, or merit pay. While the NCAA has defended the grant-in-aid as an essential means of preserving amateurism, it has significantly modified the term’s meaning over the years. For example, in 1976, the NCAA determined that grant-in-aid would no longer include cash for incidental expenses, such as laundry. In 2014, the NCAA permitted the Power Five conferences to expand the meaning of grant-in-aid to include compensation reflecting the full cost of attending a school. The fluidity of the definition suggests it is adaptive and not sacrosanct.

58. Byers & Hammer, supra note 54, at 69.
59. Id.
60. O’Bannon v. Nat’l Collegiate Athletic Ass’n, 7 F. Supp. 3d 955, 972, 974 (N.D. Cal. 2014), aff’d in part, vacated in part, 802 F.3d 1049 (9th Cir. 2015).
63. Id. at 1064; see also O’Bannon v. Nat’l Collegiate Athletic Ass’n (O’Bannon II), 802 F.3d 1049, 1054–55 (9th Cir. 2015) (explaining how the NCAA expanded the meaning of “grant-in-aid” in the wake of Ed O’Bannon’s litigation).
The depiction of college sports as “amateur” has attracted skepticism given the considerable revenues and generous salaries generated through college sports. In 2022, the NCAA generated $1.14 billion in revenue. That same year, the average compensation for Division I head football coaches was $1.75 million. In 40 of the 50 states, the highest-paid state employee is a football or basketball coach at a public university. For example, former West Virginia University head basketball coach Bob Huggins was the highest-paid public employee in West Virginia in 2022, a year before he would resign after making homophobic and anti-Catholic remarks and being arrested for driving under the influence. Meanwhile, college sports generate an estimated $12 billion a year in television contracts and ticket sales.

Amateurism has also come under fire for setting rules that are subject to exploitation and illicit acts. The NCAA is armed with a robust and detailed system to investigate and punish schools, coaches, and athletes that are found to have given or received inducements for the purpose of an athlete attending or remaining at a school in lieu of attending a

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different school. Enforcement rules, such as a rule that would punish an athlete for accepting a complimentary meal, have been criticized as rigid and overly strict. On the other hand, NCAA rules need to possess enough clarity and demand enough accountability that they deter the kinds of wrongful acts that unfairly advantage wrongdoers. The NCAA is also challenged by limited resources to probe schools, and it faces the inherent limits of private entity investigations, such as a lack of subpoena power, a reliance on witness cooperation, and an inability to compel sworn testimony or full disclosure of emails, texts, and other relevant evidence.

In pursuit of wrongdoing, the NCAA has sometimes been criticized as overly zealous, even abusive. And when the NCAA has uncovered forbidden inducements, it’s usually not bags of cash, luxury cars, or other stereotypically flashy items that have been found. Instead, it’s an athlete with limited financial means being given clothes or money to pay for a plane ticket to attend a family event. Yet sometimes there is substantial—even criminal—corruption that the NCAA doesn’t catch. In 2017, the Federal Bureau of Investigation and prosecutors from the Southern District of New York charged ten individuals, including four assistant men’s basketball coaches, with fraud and bribery for a scheme where recruits were paid to attend colleges affiliated with Adidas. Once they turned pro and entered the National Basketball Association (“NBA”), the recruits were expected to sign endorsement deals with Adidas. The government’s theory of crime centered on honest services fraud, with the colleges depicted as victims in that they enrolled and granted athletic scholarships to players who, because of their coaches’ actions, were ineligible.
to play under NCAA rules. Some commentators criticized the case for conflating criminal law with NCAA rules and revealing gaps in the NCAA’s ability to enforce its own rules.

Operation Varsity Blues similarly raised questions about the NCAA’s capacity to enforce rules supposedly intended to separate amateur from pro sports. In 2019, actresses Lori Loughlin and Felicity Huffman, along with 31 other well-to-do parents and 24 coaches and admissions professionals, were charged with fraud and related criminal offenses for allegedly financing an admissions scheme where high school seniors were admitted as college athletes at Stanford, Yale, Georgetown, the University of Southern California (“USC”), and other prestigious universities. The scheme centered on admissions consultant Rick Singer, who developed what he called a “side door”: affluent parents could pay him to ensure their children were admitted. In contrast, the “front door” would require admission based on actual merits, while the “back door” would necessitate a parent donating millions of dollars to the university to be certain of admission. Most of the parents were accused of partaking in one or more egregious acts, such as bribing SAT exam proctors to alter test scores, staging photos of their children playing a sport, inventing fictitious athletic records, lying that their children had learning disabilities to provide more time for taking a test, and funneling funds to college employees who had access to or influence over admissions decisions.

Of the 57 persons charged in Operation Varsity Blues, 53 were convicted, entered a guilty plea, or received deferred prosecutions. A jury found one parent, Amin Khoury, not guilty.

81. Brenton M. Smith, Note, Flagrant Foul or Flagrant Fraud? The Implications of Honest Services Fraud Prosecutions of College Basketball Coaches on Student-Athletes, 70 Ala. L. Rev. 813, 814–15 (2019).
process at elite schools tends to favor children of the affluent, thus suggesting his alleged bribe to Georgetown University tennis coach Gordon Ernst should not be considered a crime. The U.S. Court of Appeals for the First Circuit vacated the convictions of John Wilson and Gamal Abdelaziz, both of whom were accused of paying money to help their children secure admissions, on grounds the elements of fraud were not met. Commentators remarked that the scandal was facilitated by athletic administrators “exploit[ing] a little-known NCAA rule permitting universities to use more lenient admissions standards for incoming student-athletes.” The NCAA’s inability to detect and address the capacity of wealthy families to misuse NCAA rules to secure admissions into elite universities has been described as “embarrassing.”

The last 15 years have been particularly problematic for the NCAA. During this stretch, the organization has promoted a vision of college sports that doesn’t comport with reality. Judges, lawmakers, and regulators have openly mocked the NCAA, with some saying they no longer trust it. The NCAA has missed what I view as easy opportunities to relax rigid and unpopular restrictions on college athlete compensation. It has instead defended a model that is vulnerable prey for antitrust litigators and labor organizers.

Ed O’Bannon’s case is especially instructive because of how unwisely and illogically the NCAA handled it. As a disclosure, I have worked with O’Bannon for years. He is a friend, client, and business partner, and we collaborated to write a book on his life. I am not a neutral narrator on O’Bannon, but I’m not sure that matters in this context.

89. Id.
90. See McCann, supra note 87.
93. For example, U.S. Senator Chris Murphy (D-CT) said in 2021, “I just don’t trust the NCAA to do [right by college athletes on NIL], I don’t think they’ve shown that they are interested in putting students’ interests first.” Press Release, Sen. Chris Murphy, Murphy on NCAA Reform: It’s Time to See This as the Civil Rights Issue That It Is (Mar. 25, 2021), https://www.murphy.senate.gov/newsroom/press-releases/murphy-on-ncaa-reform-its-time-to-see-this-as-the-civil-rights-issue-that-it-is [https://perma.cc/BT3X-7XMT]. This has been a bipartisan problem for the NCAA, as well. U.S. Senator Marsha Blackburn (R-TN), has blasted the NCAA for a lack of transparency in how it conducts business. See Zachary Downes, Marsha Blackburn Calls Out NCAA President over James Wiseman Situation, ASSOCIATED PRESS (Feb. 11, 2020, 4:13 PM), https://wreg.com/news/marsha-blackburn-calls-out-ncaa-president-over-james-wiseman-situation/ [https://perma.cc/2NT5-MVY3].
It’s hard to imagine any credible portrayal of O’Bannon v. NCAA that doesn’t paint it as an unforced error by the NCAA. At the most basic level, O’Bannon sought for college athletes to enjoy a right they already had but had been suppressed by NCAA rules later deemed unlawful.96

In 2009, O’Bannon clearly had no plans to bring a historic case against the NCAA and Electronic Arts (“EA”). He was living comfortably as a retired NBA player in a Las Vegas suburb with his wife and three children.97 O’Bannon had earned millions of dollars over the course of a 12-year pro-basketball career that followed his dominant play at UCLA, which he led to a national championship in 1995.98 But in 2009, he was a 36-year-old who enjoyed being a dad to his children and valued having a private life after many years of facing cameras and journalists.99 Though he was (and is) critical of the NCAA’s treatment of athletes, O’Bannon was nearly 15 years removed from his college career.100 He was not looking for a fight with the organization that runs college sports, especially since two of his children were elite athletes at 11 and 13 and likely to be recruited to play collegiately.101

Then, a friend of O’Bannon, Mike Curtis, told him he was the star of a college basketball video game published by EA and that Curtis had paid $60 to buy it for his son.102 O’Bannon was surprised to learn he was in a college basketball video game, given that his college days had long since passed.103 O’Bannon visited Curtis and saw the avatar of him in the game, and saw avatars of his former UCLA teammates, most of whom never earned a dollar playing professional hoops.104 The avatars contained the correct heights, weights, races, jersey numbers, and skills.105 Although O’Bannon’s name was not included, video game players could “edit” each avatar to add a name, and an announcer would then say the player’s name.106 O’Bannon was initially flattered to see himself in a video game, but the more he thought about how neither EA nor the NCAA asked the players for their permission or paid them, the more bothered he became.107 O’Bannon also connected with college athlete advocate

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96. See O’Bannon II, 802 F.3d 1049, 1067–68 (9th Cir. 2015).
97. See id. at 22.
98. Id. at 22–23; see also Christian Dennie, Changing the Game: The Litigation That May Be the Catalyst for Change in Intercollegiate Athletics, 62 Syracuse L. Rev. 15, 32–33, 33 n.138 (2012).
99. See O’Bannon & McCann, supra note 95, at 22–24.
100. See Ed O’Bannon, EA Paying College Players Should Have Happened Years Ago, Sportico (May 22, 2023, 3:55 AM), https://www.sportico.com/leagues/college-sports/2023/ea-paying-college-players-should-have-happened-years-ago-
1234723581/ [https://perma.cc/3Y7M-DT6E].
101. O’Bannon & McCann, supra note 95, at 23.
102. Id. at 2, 6.
103. Id. at 2–3.
104. Id. at 3, 5.
106. McCann, supra note 41, at 193.
Sonny Vaccaro, who urged O’Bannon to meet with attorneys who regarded the video game as evidence of illegal conduct.\footnote{108}

O’Bannon’s case alleged the defendants unlawfully set the value available to former college players for the use of their identities at zero dollars.\footnote{109} The defendants, O’Bannon argued, illegally conspired under Section 1 of the Sherman Act to exclude these players from the commercial use of their names, images, and likenesses in video games, trading cards, apparel, and re-broadcasts of “classic games.”\footnote{110} O’Bannon also pleaded a right of publicity claim, which concerned legal protections under California law for individuals to have control over the commercial use of their image or identity.\footnote{111} Although the right of publicity varies by state in terms of which aspects of one’s identity it covers,\footnote{112} the elements of a claim are relatively consistent: “(1) the use of one’s identity; (2) for purposes of a commercial advantage; (3) without consent; and (4) in a manner that causes monetary harm.”\footnote{113} Athletes and celebrities have long used the right to protect endorsement opportunities and the wrongful exploitation of their fame.\footnote{114} College athletes, be they current or former, did not lose or forfeit their right of publicity by virtue of playing college sports.\footnote{115} Instead, they agreed, without any opportunity to negotiate a change (i.e., a contract of adhesion), to follow NCAA rules that instructed they could not utilize their right of publicity while playing college sports.\footnote{116} Stated differently, NCAA rules suppressed a right the athletes already had. O’Bannon successfully sought certification of his case as a class action.\footnote{117}

The NCAA denied wrongdoing, drawing largely from Justice John Paul Stevens’ opinion in \textit{NCAA vs. Board of Regents}, where he voiced that because the NCAA “plays a critical role in the maintenance of a revered tradition of amateurism in college sports[,] there can be no

\footnotesize
\begin{itemize}
  \item \textit{Id.} at 7,10–11.
  \item \textit{O’Bannon}, 7 F. Supp. at 973.
  \item \textit{Id.} at 985.
  \item Wesley Burrell, Note, I Am He as You Are He as You Are Me: Being Able to Be Yourself, Protecting the Integrity of Identity Online, 44 Loy. L.A. L. Rev. 707, 716 (2011).
  \item See Holden et al., supra note 4, at 18–22.
  \item \textit{Id.} at 279–80.
\end{itemize}
question but that it needs ample latitude to play that role.”\(^{118}\) As the NCAA saw it, O’Bannon relinquished potential claims for compensation by virtue of partaking in a system where college athletes can only receive reimbursement for tuition, room, board, books, and related costs of education.\(^{119}\) The NCAA argued this point despite the fact that O’Bannon was being featured in a video game published more than a decade after his college career had ended—indeed, several years after his pro-basketball career had concluded.\(^{120}\) The NCAA offered a consumer study that indicated consumers would lose interest in college sports if the players were paid.\(^{121}\) During cross-examination, however, the NCAA acknowledged the study failed to distinguish how players were paid, be it for NIL or a wage or other payment.\(^{122}\)

For some, the supposed nexus between a college sports video game that featured the identity of a 36-year-old adult and amateurism seemed too tenuous. ESPN’s Jay Bilas, who is an attorney and a former college basketball player, wrote in 2010, “How can the NCAA possibly explain” how the game featured avatars “that matched the body type and jersey number of those already famous player names[?]”\(^{123}\) Others wondered why pro athletes are paid to be in video games published by a video game company but college athletes are not.\(^{124}\) Pretrial discovery sparked additional questions on that front.\(^{125}\) EA admitted it had stripped the game of players’ names before publication—as if doing so would suggest that the avatars, which otherwise looked and acted like their real-life counterparts, were somehow not representations of their counterparts.\(^{126}\)

Likely sensing the risk of defeat in court was high, EA negotiated a settlement with O’Bannon in which the company agreed “to pay about $40 million to more than [29,000] current and former players” to compensate them for using their identities in video games.\(^{127}\) The NCAA refused to settle despite O’Bannon and his legal team being open to negotiations.\(^{128}\) The decision proved imprudent as a federal district court

\(^{120}\) See O’Bannon & McCann, supra note 95, at 3, 22.
\(^{121}\) See O’Bannon, 7 F. Supp 3d at 975–76.
\(^{122}\) See id. at 976; David A. Grenardo, The Blue Devil’s in the Details: How a Free Market Approach to Compensating College Athletes Would Work, 46 Pepp. L. Rev. 203, 218–19 (2019).
\(^{125}\) O’Bannon & McCann, supra note 95, at 3.
\(^{126}\) Id.
\(^{127}\) Id. at 167.
\(^{128}\) Ed O’Bannon, Mark Emmert Wouldn’t Change, but NCAA Must with New Leader, SPORTICO (May 2, 2022, 5:55 AM), https://www.sportico.com/leagues/college-sports/2022/
and later the U.S. Court of Appeals for the Ninth Circuit held the NCAA and its members had unlawfully conspired to use college players’ names, images, and likenesses in video games and other commercial products without their consent.\textsuperscript{129} Perhaps more significant than the legal outcome was what O’Bannon’s victory signaled to the college sports industry. In 2015, former Congressman and former NBA and college basketball star Tom McMillen warned of a “day of reckoning” for college sports professionals if they did not take seriously threats to the traditional model of intercollegiate athletics and genuinely consider reforms.\textsuperscript{130}

McMillen’s admonition captured more than O’Bannon’s case. In the early- to mid-2010s, other athletes had challenged amateurism through litigation and administrative proceedings, each chipping away at longstanding assumptions and forcing the NCAA to parry additional blows. For example, former Nebraska quarterback Sam Keller sued the NCAA and EA under similar theories as O’Bannon, arguing the defendants unlawfully used college athletes’ identities in photographs, archival footage, and video games.\textsuperscript{131} In 2010, U.S. District Judge Claudia Wilken consolidated O’Bannon and Keller’s cases into \textit{In re NCAA Student-Athlete Name & Likeness Licensing Litigation.}\textsuperscript{132} Three years later, O’Bannon and Keller amended their consolidated class action to add current student-athletes to the class and to demand a share of revenue generated by television contracts negotiated by the NCAA and conferences.\textsuperscript{133} Although O’Bannon and Keller’s class action proved the NCAA had violated the law, the courts did not authorize a remedy wherein the NCAA, conferences, and television networks were ordered to share revenue from live broadcasts with the athletes.\textsuperscript{134} Still, the seeds were planted for attorneys to seek that remedy in future cases with the ongoing \textit{In re College Athlete NIL Litigation,}\textsuperscript{135} a perfect example.\textsuperscript{136}

\textsuperscript{129.} O’Bannon v. Nat’l Collegiate Athletic Ass’n, 7 F. Supp. 3d 955, 1007 (N.D. Cal. 2014); \textit{O’Bannon II}, 802 F.3d 1049, 1075–76 (9th Cir. 2015).
\textsuperscript{136.} If the plaintiffs succeed in \textit{In Re College Athlete NIL Litigation}, the NCAA would be required to change amateurism rules so that Power Five conferences and their member schools are able to share broadcasting and potentially other licensing revenue with their athletes. The case is scheduled to go to trial in 2025. See Michael
Meanwhile, former Rutgers quarterback Ryan Hart sued EA under a right of publicity theory for its unlicensed video game depiction of him. A federal district court in New Jersey sided with EA, reasoning that the company’s First Amendment right to transform identity traits into creative works outweighed Hart’s right of publicity. However, the U.S. Court of Appeals for the Third Circuit reversed the ruling, concluding that the video game sought to make as realistic of a depiction as possible, with a replication of actual players as closely as technology allowed. That game design cut against EA’s argument that transforming real-world properties into new creative works ought to outweigh legal protection for players’ intellectual property.

EA responded to these cases in 2013 by no longer publishing college sports video games. Many video game players blamed the athletes, particularly O’Bannon, for what they construed as the athletes taking away their favorite games. This argument is flawed for at least a couple of reasons. First, the athletes successfully proved the games misappropriated their right of publicity by using their identities for a commercial purpose without permission or payment. In other words, the games would not have been made if the parties were following the law. It is selfish, if not worse, to criticize athletes for complicating the production of video games when those athletes were victims of tort law violations. Second, the complication was easy to solve. The NCAA could have simply allowed EA to pay the athletes without those athletes running afoul of amateurism rules. Specifically, the NCAA could have

138. Id. at 787.
140. Weston, supra note 133, at 92–93.
143. See supra note 134 and accompanying text.
144. The concept of a sports organization attempting to “own” player rights has a long history in the U.S. This concept was most powerfully seen in Curt Flood’s historic case against Major League Baseball for the right to free agency. See Michael Heller & James Salzman, Mine! How The Hidden Rules of Ownership Control Our Lives 194–95 (2021) (explaining the history of the “reserve clause,” which allowed Major League Baseball teams to “own” players’ employment and prevent them from changing teams and comparing it to the NCAA controlling college labor).
lifted restrictions on athlete compensation for NIL—the very thing the NCAA reluctantly did in 2021 after states adopted NIL statutes making it illegal for the NCAA, conferences, and schools to take away athletic eligibility for using a right they already had, the right of publicity.146

By not lifting those restrictions in the wake of O’Bannon’s case, the NCAA unwittingly invited the federal lawsuit, now a class action for at least injunctive relief, brought in 2020 by Arizona State swimmer Grant House, former Oregon and current TCU basketball player Sedona Prince, and former Illinois football player Tymir Oliver.147 These athletes argue the NCAA and Power Five conferences unlawfully conspired under Section 1 of the Sherman Act to deny athletes of NIL opportunities until 2021 and continue to unlawfully deny them of broadcast NIL, which reflects the billions of dollars in broadcast revenue paid to colleges and conferences as well as lost opportunities to appear in college video games that were never made.148

These athletes draw from O’Bannon and Alston, the latter of which made clear that NCAA rules are not owed special deference under antitrust law and are instead subject to ordinary scrutiny.149 Alston was emblematic of NCAA hubris on amateurism and its failure to read the room.150 The case concerned NCAA rules that denied athletes compensation for academic-related costs, including internship opportunities, study abroad, costs for computers, and scholarships to attend vocational schools.151 Despite some media coverage inaccurately conflating Alston with NIL or pay-for-play,152 Alston centered on whether the NCAA and its member schools could conspire to prevent a school from reimbursing


147. In re College Athlete NIL Litig., No. 209, slip op. at *6–7 (N.D. Cal. Nov. 3, 2023); McCann, supra note 136.


150. A business misunderstanding its situation, and that of those around it, is hardly a predicament unique to the NCAA. For a seminal work on corporate behavior in real-world settings, see Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: Some Evidence of Market Manipulation, 112 Harv. L. Rev. 1420 (1999).

151. Alston, 594 U.S. at 103–05.

athletes for costs related to academics. Until the U.S. Supreme Court ruled in Alston, the NCAA enjoyed deferential treatment under anti-trust scrutiny pursuant to NCAA v. Board of Regents, where Justice Stevens referred to the NCAA needing “ample latitude” in governing college sports. The NCAA nonetheless gambled by petitioning the U.S. Supreme Court to review the U.S. Court of Appeals for the Ninth Circuit’s ruling in Alston, and the Supreme Court granted certiorari.

The decision to petition the U.S. Supreme Court seemed disastrous for the NCAA during the oral argument for Alston in March 2021. After the NCAA's attorney, Seth Waxman, lauded the purity of college sports and the virtues of students as amateur athletes, the justices appeared flabbergasted. Chief Justice John Roberts wondered how colleges paying portions of multimillion-dollar insurance policies for college athletes’ future earnings signaled an amateur sports system. Justice Clarence Thomas questioned how Waxman’s romanticized depiction of college sports comported with the upsurge in coaches’ salaries. Justice Samuel Alito asked if “powerhouse” programs recruit athletes who face “constant pressure to put sports above study” and are often “used up” and “cast aside.” Justice Amy Coney Barrett expressed frustration with the NCAA’s definition of amateur, questioning if it was defined as someone who is unpaid. Justice Barrett further questioned whether asserting that consumers loved to watch unpaid individuals qualified as a legitimate procompetitive justification. The justice who most aggressively challenged the NCAA was Brett Kavanaugh.

156. Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 1231, 1231 (mem.) (2020) (granting certiorari); see also Sam C. Ehrlich, A Three-Tiered Circuit Split: Why the Supreme Court Was Right to Hear NCAA v. Alston, 32 J. LEGAL ASPECTS SPORT 1, 53, 59–61 (2022), https://doi.org/10.18060/24493 (opining that the Supreme Court was right to grant certiorari in Alston).
158. See id.
159. Id.
162. McCann, supra note 157; Transcript, supra note 161, at 38.
He bluntly declared, “schools are conspiring with competitors . . . to pay no salaries to the workers who are making the schools billions of dollars on the theory that consumers want the schools to pay the workers nothing.”

Many legal scholars and attorneys were stunned by the intensity and breadth of the justices’ verbal assault on amateurism, with one, Professor Marc Edelman, going so far as to predict the Court would rule 9-0 against the NCAA. It seemed the NCAA calculated that the majority-conservative Court would—in the spirit of conservatism—maintain the traditions of college sports, without anticipating that “conservative” can also mean libertarian and aversion to rules that restrict free competition and prevent efficient markets. In June 2021, the Court ruled 9-0 that the NCAA and its member schools and conferences violated Section I of the Sherman Act by conspiring to limit how much each can compensate athletes for academic-related costs and that NCAA rules are subject to ordinary, non-deferential scrutiny. Justice Gorsuch explained that “[p]ut simply, [the] suit involve[d] admitted horizontal price fixing in a market where the defendants exercise monopoly control.” Gorsuch was struck by “[t]he NCAA accept[ing] that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact do) harm competition.” He also rejected the premise that the NCAA ought to be judged in one snapshot of time. Although Waxman stressed the traditions of amateurism in college sports, Gorsuch found that at odds with “market realities.” Gorsuch highlighted how, since the 1980s, conferences have gained the “flexibility to set new and higher limits on

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163. Transcript, supra note 161, at 17–18, Nat’l Collegiate Athletic Ass’n v. Alston, 594 U.S. 69 (2021) (No. 20-512); McCann, supra note 157


168. Id. at 86.

169. Id. at 90.

170. McCann, supra note 157.

171. Alston, 594 U.S. at 93 (“Given the sensitivity of antitrust analysis to market realities—and how much has changed in this market—we think it would be particularly unwise to treat an aside in Board of Regents as more than that.”).
athletic scholarships,” and the NCAA has “dramatically increased the amounts and kinds of benefits [that] schools” can offer to athletes.\textsuperscript{172}

While Gorsuch’s opinion, which reflected the views of all nine justices, wounded traditional NCAA legal arguments for amateurism, Kavanaugh’s concurring opinion went for the kill. A devoted fan of Yale athletics\textsuperscript{173} and coach to his daughters’ basketball teams,\textsuperscript{174} Kavanaugh eviscerated the NCAA as a cartel.\textsuperscript{175} He warned that while the NCAA “couches its arguments for not paying student athletes in innocuous labels[,]” those labels “cannot disguise the reality [that] [t]he NCAA’s business model would be flatly illegal in almost any other industry in America.”\textsuperscript{176} Kavanaugh illustrated that point by hypothesizing that competing restaurants, law firms, hospitals, and news organizations illegally joining hands in agreement to not pay workers is analogous to competing colleges joining hands in agreement to not pay athletes.\textsuperscript{177} As Kavanaugh saw it, the NCAA and its member organizations are “price-fixing labor,” which is “ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work.”\textsuperscript{178} Kavanaugh went so far as to suggest that if the NCAA wishes to restrain athlete compensation, it should negotiate rules with the players as part of the kind of collective bargaining process used by pro leagues to negotiate salary caps and other restraints with players’ unions.\textsuperscript{179}

By repudiating amateurism in ways that went far beyond the relatively narrow and academics-oriented issues presented in Alston, the

\textsuperscript{172} Id.


\textsuperscript{176} Alston, 594 U.S. at 109 (Kavanaugh, J., concurring).

\textsuperscript{177} Id. at 109–10.

\textsuperscript{178} Id. at 110; see also Mark A. Lemley & Mark P. McKenna, Unfair Disruption, 100 B.U. L. Rev. 71, 99–100 (2020), http://dx.doi.org/10.2139/ssrn.3344605 (discussing how antitrust law has developed methods of analysis with a primary focus on ensuring economic competition).

\textsuperscript{179} Alston, 141 S. Ct. at 2168 (Kavanaugh, J., concurring); see also Sam C. Ehrlich & Neal C. Ternes, Putting the First Amendment in Play: Name, Image, and Likeness Policies and Athlete Freedom of Speech, 45 COLUM. J.L. & ARTS 47, 80–81 (2021), https://doi.org/10.52214/jla.v45i1.8954 (discussing how collective bargaining could “cure various legal ills” for the NCAA); Roberto L. Corrada, College Athlete Unionization, 11 Tex. A&M L. Rev. 864–67 (detailing the legal steps necessary for college athletes to successfully unionize).
Supreme Court has opened the door to a surge of legal challenges to amateurism. As of this writing, several major challenges are in play. In addition to *In re College Athlete NIL Litigation*, the NCAA is accused of violating the Fair Labor Standards Act (“FLSA”) in *Johnson v. NCAA* and the National Labor Relations Act (“NLRA”) in an unfair labor practice charge concerning the USC football and men’s and women’s basketball players. Although not a party to the dispute, the NCAA’s defense of amateurism is threatened by a petition by Dartmouth College men’s basketball players to form a union under the NLRA.

*Johnson* is led by former Villanova football player Ralph “Trey” Johnson and other current and former Division I college athletes. They argue the NCAA and member schools are joint employers of college athletes and are in violation of the FLSA, a federal law that guarantees minimum wage and overtime pay for qualified employees, as well as applicable state minimum wage and unjust enrichment laws. The gravamen of the case is that if work-study classmates who labor at games in food concessions, ticket taking, and event security are FLSA employees, why isn’t the same true of athletes who play in those games? It’s not as if the presence of a scholarship distinguishes these two sets of students—many work-study students are, like their athlete classmates, on scholarship.

*Johnson* advanced past multiple motions to dismiss in 2021, with U.S. District Judge John Padova reasoning “that the Complaint plausibly alleges that the NCAA is a joint employer of Plaintiffs for purposes of the FLSA and, accordingly, that Plaintiffs have standing to sue the NCAA.” He explained that the complaint properly alleged that, like an employer that controls recruitment of prospective employees, the NCAA regulates how

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183. *Complaint & Notice of Hearing at 1, Nat’l Collegiate Players Ass’n v. Univ. of S. Cal.*, No. 31-CA-290326 (N.L.R.B. May 18, 2023).


188. *Id.*

colleges recruit athletes, including by limiting the number of phone calls a coach makes to a recruit. The NCAA also resembles an employer, Padova reasoned, by obligating colleges to expel a player from a team if the NCAA deems him or her ineligible. Furthermore, Padova noted that the NCAA sets limits on work hours, called “Countable Athletically Related Activities” (“CARA”), for athletes at their schools. The judge additionally emphasized that plaintiffs properly alleged that, like work-study students engaged in employment at athletic games, college athletes play sports mainly “for the monetary benefit of the NCAA and the colleges and universities that those student athletes attend” instead of “for the benefit of the student athletes who participate in them.”

In 2021, Padova certified Johnson for interlocutory appeal to the U.S. Court of Appeals for the Third Circuit. The Third Circuit is considering whether, solely by virtue of their participation in Division I sports, college athletes are FLSA employees. In February 2023, a three-judge panel consisting of Judges Theodore McKee, David Porter, and L. Felipe Restrepo held an oral argument for attorneys representing the players and the NCAA. The three judges are from different ideological perspectives and were nominated by presidents with divergent outlooks on law and policy. Yet, each judge grilled NCAA attorney Steven Katz, including when Katz suggested that college athletes ought not to be viewed as employees because they play without an expectation for compensation. The judges thought the athletes aren’t expecting pay because they know colleges have agreed they can’t be paid. Similarly unpersuasive was Katz’s worrying that if college athletes were paid a wage, it might spark a Title IX problem since women athletes

190. Id. at 500–01.
191. Id. at 501.
192. Id. at 494.
195. Id. at *1; see also Michael McCann, NCAA Athletes-as-Employees Case Heads to Federal Appeals Court, Sportico (Jan. 5, 2022, 12:01 AM), https://www.sportico.com/law/analysis/2022/college-athletes-employee-case-1234657539 [https://perma.cc/T9U4-CGVX].
198. See McCann, supra note 196.
199. Id.
would also need to be paid.\textsuperscript{200} McKee noted there already appear to be inequities in how male and female college athletes are treated.\textsuperscript{201} The NCAA must also, of course, satisfy all applicable laws, including those providing labor and gender equity protections, \textit{at the same time}.

Although \textit{Johnson} could be years away from resolution, if the players prevail, colleges in states covered by the Third Circuit would be required to pay their athletes minimum wage and potentially overtime pay. There would also be a potential circuit split between the Third, Seventh, and Ninth Circuits since the Seventh and Ninth Circuits rejected joint employment arguments brought by college athletes in \textit{Berger v. NCAA}\textsuperscript{202} and \textit{Dawson v. NCAA},\textsuperscript{203} respectively. The NCAA has long maintained that it must rely on “nationally uniform rules under which teams can compete on an equal basis,” a position that suggests if college athletes are owed pay in the Third Circuit, the NCAA would allow the same in other circuits.\textsuperscript{204} The \textit{Johnson} plaintiffs also seek back pay for years within the applicable statute of limitations when the athletes would have been owed minimum wage and (if applicable) overtime pay.\textsuperscript{205}

As the NCAA battles college athlete employment status under the FLSA in the Third Circuit, it is simultaneously fending off recognition of college athletes as employees under the NLRA in California. Workers who are recognized as employees under the NLRA can form a union and demand their employer recognize and bargain with the union.\textsuperscript{206} In promoting the NLRA, which became law in 1935,\textsuperscript{207} Congress and President Franklin Delano Roosevelt believed that collective bargaining would be a more effective way for employees to negotiate the terms of their employment than if each employee negotiated individually.\textsuperscript{208} Mandatory subjects of bargaining include wages and other forms of compensation for services, hours, health and welfare benefits, and retirement plans.\textsuperscript{209} A union for college athletes could negotiate, for example,

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Berger v. Nat'l Collegiate Athletic Ass'n, 162 F. Supp. 3d 845, 849 (S.D. Ind. 2016), aff'd, 843 F.3d 285 (7th Cir. 2016).
\item Dawson v. Nat'l Collegiate Athletic Ass'n, 250 F. Supp. 3d 401, 403, 407–08 (N.D. Cal. 2017), aff'd, 932 F. 3d 905 (9th Cir. 2019).
\item Nat'l Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1484 (D. Nev. 1992), aff'd, 10 F.3d 633 (9th Cir. 1993).
\item See McCann, \textit{supra} note 195.
\item S. Barry Paisner & Michelle R. Haubert-Barela, \textit{Correcting the Imbalance: The New Mexico Public Employee Bargaining Act and the Statutory Rights Provided to Public Employees}, 37 N.M. L. Rev. 357, 368 (2007); see also Miriam A. Cherry & Antonio
\end{enumerate}
\end{footnotesize}
increased university funding for health care costs, including insurance deductibles incurred to treat injuries sustained as part of athletic pay and that require treatment after an athlete finishes college.\textsuperscript{210}

In 2023, Mori Rubin, the National Labor Relations Board (“NLRB”) regional director of Region 31 (Los Angeles), issued an unfair labor practice complaint that USC, the Pac-12, and the NCAA are joint employers of Trojans’ football and men’s and women’s basketball players.\textsuperscript{211} The complaint followed a review of an unfair labor practice charge filed by the National College Players Association (“NCPA”).\textsuperscript{212} The NCPA asserts that the NCAA, conference, and school all control the relationship between the athletes and the athletic participation and that the athletes function as workers whose time and energy are directed towards generating revenue for the NCAA, conference, and school.\textsuperscript{213} This argument draws from a memo issued in 2021 by NLRB general counsel Jennifer Abruzzo, who opined that college athletes are employees under Section 2(3) of the NLRA and common law tests for employment.\textsuperscript{214} Abruzzo reasoned that college athletes render

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\textsuperscript{210} See Michael McCann, \textit{Dartmouth Hoops Specifies Union Push Amid Unfair Labor Claims}, Sportico (Sept. 18, 2023, 1:40 PM), https://www.sportico.com/law/analysis/2023/dartmouth-mens-basketball-union-unfair-labor-claims-1234738966/ [https://perma.cc/EE9Q-39TH]. A union could also assist athletes on potential legal issues, such as risks related to influencing and promoting products on social media. See generally Alexandra J. Roberts, \textit{False Influencing}, 109 Geo. L.J. 81 (2020) (discussing potential drawbacks to social media influencing). It could also impart wisdom on the risks to their fame and potential fame from sharing personal information online. See generally Leah A. Plunkett, \textit{Sharenthood: Why We Should Think Before We Talk About Our Kids Online} (David Weinberger ed., 2019) (discussing potential drawbacks to sharing personal information online).

\textsuperscript{211} Id.

\textsuperscript{212} Id.

\textsuperscript{213} Id.


The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family
revenue-generating services to their schools, which compensate them via scholarships and stipends and control them through applicable NCAA, conference, and school rules.\textsuperscript{215}

USC, the Pac-12, and the NCAA counter Rubin’s complaint by contending First Amendment rights would be violated if a college were compelled to articulate a policy it rejects and by suggesting that NLRA employee recognition of college athletes would cause USC to violate state workers compensation laws, the FLSA, federal immigration laws, the Internal Revenue Code, and Title IX.\textsuperscript{216} It is worth noting that the common law definition of “employee” is imprecise and centers on “a person who performs services for another under a contract of hire, subject to the other’s control or right of control, and in return for payment.”\textsuperscript{217} This definition has been applied by courts in examining employee recognition under the NLRA.\textsuperscript{218} Commentators have observed U.S. courts have been frustrated by a lack of more precise guidance on how to apply the definition.\textsuperscript{219}

If USC, the Pac-12, and NCAA are deemed joint employers of USC football and basketball players and if that finding withstands appeals, it would open the door for not only other Trojans athletes to claim they too are employees but also athletes who play in similarly high-profile programs at private colleges.\textsuperscript{220} The potential repercussions extend beyond private colleges, too. On the one hand, state labor laws—and not the NLRA—would determine whether an athlete at a public university is an employee of their school.\textsuperscript{221} On the other hand, if conferences and the NCAA are joint employers of college athletes, athletes at private colleges could assert that even if their school is not their employer, their conference and the NCAA are their employers.\textsuperscript{222}

\textsuperscript{215} Abruzzo Issues Memo, infra note 214.
\textsuperscript{216} Michael McCann, NCAA, Pac-12, USC Resist NLRB Defining College Athletes as Employees, Sportico (June 5, 2023, 8:00 AM), https://www.sportico.com/law/analysis/2023/ncaa-pac-12-usc-nlrb-college-athletes-employees-1234724942/ [https://perma.cc/EAD2-XTVW].
\textsuperscript{218} See id.
\textsuperscript{220} The NLRB governs private employers. See 29 U.S.C. § 152(2); see also Introduction to the NLRB, Nat’l Lab. Rel’s Bd., https://www.nlrb.gov/about-nlrb/what-we-do/introduction-to-the-nlrb [https://perma.cc/8XDE-7C9Y].
\textsuperscript{222} See generally Jay D. Lonick, Note, Bargaining with the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an
Lastly, although the NCAA is not a party in a petition by Dartmouth men's basketball players to form a union, it has a profound interest in the petition's outcome. Stated bluntly, if college athletes at Dartmouth College—a school known far more for academics than athletics and one where the men's basketball team brought in just $26,000 in ticket sales in the most recent fiscal year—are employees, which Division I athletes would not meet that bar?

As a member of the Ivy League, Dartmouth does not pay athletic scholarships. That is a substantial distinction from other Division I conferences, which do allow athletic scholarships. The Dartmouth players insist, however, that they receive other forms of compensation, including equipment, apparel, tickets to games, footwear, and access to a nutritionist, that are not available to other Dartmouth students. They also detail how the university controls much of their time and note that some of their classmates are Dartmouth employees, including dining hall student workers who have unionized.

The players also contest Dartmouth's argument that its men's basketball team is a money-loser. The team lost $855,000 on total expenses of $1.31 million in the most recent financial year—data which suggests the university does view the team as part of a commercial enterprise. Yet the players maintain that the university uses the team and its players for fundraising purposes, including to help secure a recent $50 million gift. Also, although Dartmouth men's basketball is not among the nation's top programs and is not a feeder school for the NBA, there is still interest in Ivy League sports, as evidenced by the conference securing a 10-year contract with ESPN.


225. Id.


228. Dartmouth Basketball Players, supra note 223.

229. McCann, supra note 226.

NLRA that employment recognition hinges on the would-be employer being profitable or that if would-be employees form a union, their bargaining unit would have to establish it generates more revenue than it incurs expenses. Laura Sacks, director of the NLRB’s regional office in Boston, Massachusetts, will decide whether the players are employees, a decision that could be appealed to the NLRB and eventually to federal court.231

The NCAA and its members have vested stakes in the outcome of the Dartmouth petition. It’s not an exaggeration to intuit that, should the Dartmouth players prevail, Division I colleges where athletics are not central to revenue generation would seriously entertain reclassifying some of their varsity sports teams as club teams or intramurals. As members of club teams, the players typically do not receive athletic-based financial aid and their team usually plays a schedule in a smaller geographic region with travel costs minimized.232 Club teams are funded in varying ways, including by the university, participating players paying fees, or alumni chipping in with donations.233 Club athletes still enjoy a college sports experience, and one where the benefits, Professor Stephen Ross has written, “almost exclusively accrue to the participating student-athletes: fitness, teamwork, dedication to competition, rewards for success, etc.”234 Still, many would consider club sports inferior to varsity sports, and the current paradigm for club sports lacks centralization, with schools handling them quite differently in terms of funding and supervision.235

III. DESIGNING A NEW AMATEURISM

The preceding Part argued that if the NCAA continues to repel change, amateurism will collapse. Within a handful of years, college athletes at Division I schools—from the “big time” programs of the Power Five conferences to humbler settings where athletes are students who play a sport—will be recognized as employees of the NCAA, their conference, and, for at least those at private universities, their school. Some universities will likely terminate varsity teams and reconstitute them as club sports. All of this would have been avoidable had the NCAA not

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231. McCann, supra note 226.
234. See Ross, supra note 232, at 943–44.
anchored to positions that were exposed as illogical and antiquated. Imagine if the NCAA had settled with Ed O’Bannon in 2009 and simply allowed players to be paid to be in video games and sign endorsement deals without endangering their eligibility. Much of what followed O’Bannon would have not happened or at least not happened so quickly.

NCAA president Charlie Baker, who took over as president in March 2023, could boldly take his organization in a new direction. A former governor of Massachusetts, Baker is known for pursuing pragmatic and non-ideological solutions to complex problems. In an interview with Sportico in February 2023, Baker revealingly distinguished the approximately 520,000 active college athletes who he says fit the amateur model from the roughly 10,000 who play in “big-time college sports.” Baker also remarked, “You don’t have to treat everybody the same and you probably shouldn’t.” Taken together, these statements suggest a more realism-based philosophy for the NCAA, which has traditionally tried to treat all colleges the same, regardless of whether one has a budget of $2 million and the other has a budget of $200 million. Whether a change in thinking will lead to a change in action remains to be seen.

One change that would capture Baker’s distinction of “big-time college sports” is to separate “big-time college sports” from the rest. Division I could be restructured to recognize that elite teams and their players are not “amateurs” in any logical interpretation of that word. The Power Five is a good starting place to mark that division. These conferences and their members are distinguishable in many ways, most obviously in terms of money. In fiscal year 2022, Power Five conferences collectively earned more than $3.3 billion in revenue. Individual colleges reaped the benefits; each school in the SEC, for example, was paid $49.9 million. The commissioners of these conferences also earned several million dollars a year, including SEC Commissioner Greg Sankey, who earned $3.7 million in the 2021 calendar year. These conferences also generate billions of dollars in TV revenue. The Big Ten, for example, is poised to soon receive $100 million annually

238. Id.
239. Id.
241. Id.
242. Id.
through media-rights deals. Other Division I conferences often feature dramatically more modest economic profiles. Take the Atlantic 10 Conference, which includes such schools as George Washington University, Fordham University, the University of Richmond, and the University of Rhode Island. It generated $20.5 million in revenue in 2021 against $24.6 million in expenses.

The Power Five is also consolidating in ways that suggest the “five” will soon become “four” and that further consolidation will happen not long thereafter. Most imminently, the Pac-12 is on the verge of collapse, with 10 of its member schools set to join other Power Five conferences by 2024. Meanwhile, some observers believe the Big Ten and SEC are forming a Power Two, and by 2025, 32 of the “glitziest athletic programs” in college sports will “live” in those two leagues. Others have suggested a Power Three, with the Big Ten and SEC joined by a “best-of-the-rest” conference. These realignments have already created conferences that are national in geographic scope. To illustrate, the Atlantic Coast Conference (“ACC”) now has member schools in California, Texas, Florida, New York, and Massachusetts. This means, among other things, that athletes in the ACC will need to travel far and wide to play intraconference games during the academic semester.

The NCAA could recognize what has become increasingly obvious: the Power Five functions as professional sports leagues, except the labor is not paid. The NCAA could determine that amateurism rules, which currently block schools from paying the athletes and exclude

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those athletes from television and other licensing deals, no longer apply to these conferences. The conferences, in turn, could recognize the athletes as employees, who might then form unions and negotiate wages, health care, and other employment benefits.\textsuperscript{251} It’s not as if college students as college employees are unprecedented, nor are college students being unionized employees who bargain employment terms with their schools.\textsuperscript{252}

The NCAA and the nearly 300 Division I colleges (and accompanying conferences) outside of the Power Five would also gain a powerful legal argument if Power Five athletes were classified as employees. These colleges could argue that since Power Five schools dwarf them in terms of revenue and economic profiles, and since their athletes have a less commercialized and more extracurricular experience than those at Power Five schools, their athletes should not be considered employees. This type of reasoning might not prove sufficiently persuasive, as evidenced by arguments brought forth on behalf of Dartmouth men’s basketball players in their NLRB petition.\textsuperscript{253} Still, a clear and defined separation between—as Baker put it—“big-time college sports” and everyone else would probably have some suasion with judges.

There would be complications and concerns, to be sure. For instance, would all the athletes at a school be employees or only some? There is no requirement under labor or employment laws that if any player on a college’s sports team is an employee, every player on every team at that college must also be an employee. There is also no legal requirement that a student cannot receive a scholarship and a wage from their school. Indeed, many students on work-study also receive a scholarship or grant from their college.\textsuperscript{254} Along those lines, a college athlete could (assuming the NCAA changed its rules) receive an athletic scholarship and a wage, along with other compensation, from their school.

Compensation based on employment would be subject to federal income taxes and, if applicable, state income taxes, though any taxes paid would mean the athlete earned enough income to have to pay taxes.\textsuperscript{255}

\textsuperscript{251} The capacity of a union to negotiate health care benefits for college athletes does not attract the same media attention as does a union’s capacity to negotiate wages but is arguably most important. See generally Jessica L. Roberts et al., Evaluating NFL Player Health and Performance: Legal and Ethical Issues, 165 U. Pa. L. Rev. 227 (2017) (discussing the role of health care policies and their impact on NFL players’ capacity to afford costs related to long-term neurological, cardiovascular, and other health problems related to play).

\textsuperscript{252} See supra note 227 and accompanying text (noting Dartmouth college student employees who have unionized).

\textsuperscript{253} See supra notes 226–30 and accompanying text.


\textsuperscript{255} In 2022, a single person only had to file a federal income tax return if they earned at least $12,950. How Much Do You Have to Make to File Taxes — What Is the Minimum Income to File Taxes?, H&R Block, https://www.hrblock.com/tax-center/
Athletic departments might also face a larger tax bill, as those at private universities are eligible for federal tax exemption under the education requirements of § 501(c)(3) of the Internal Revenue Code. The same is true for athletic departments at some public universities, which can alternatively rely on an exemption under § 115. The interplay between college athlete employment recognition and tax implications for schools would benefit from the IRS Office of Chief Counsel providing an advisory memorandum, as it did in 2023 for NIL collectives.

Title IX of the Education Amendments of 1972 could complicate the analysis. It guarantees that male and female students and employees in college are treated equally and fairly. But as Professor Marc Edelman has observed, “Title IX does not directly touch upon whether there is a requirement of equal financial terms for all student-athletes, above and beyond their athletic scholarships.” Other commentators have suggested that, to the extent athlete pay could trigger claims based on sex discrimination, the Equal Pay Act of 1963, which governs employer-employee wages, would be a more appropriate vehicle since the college would be an employer. The Act prohibits sex discrimination in the paying of wages for equal work. In applying the Act to wages for college athletes, the unique qualities of a team in terms of revenue generation and publicity demands could be considered justifications for pay disparities.

income/other-income/how-much-do-you-have-to-make-to-file-taxes/ [https://perma.cc/SA7M-W42R].


257. Nettleton, supra note 256, at 120–21.


262. See, e.g., Neal Newman, Let’s Get Serious — The Clear Case for Compensating the Student Athlete — By the Numbers: A University of Michigan Athletic Program Case Study, 51 N.M. L. Rev. 37, 62–63 (2021); Erin E. Buzuvis, Athletic Compensation for Women Too? Title IX Implications of Northwestern and O’Bannon, 41 J. Coll. & U. L. 297, 325 (2015) (“Consistent with this reasoning, judicial and regulatory interpretations of Title IX’s equal treatment mandate foreclose an institution from defending a disparity on grounds tracing back to third-party or market-based sexism.”).


Courts have also reasoned that colleges can pay male coaches more than female coaches and remain in compliance with Title IX when the higher pay reflects justifiable reasons. In *Stanley v. University of Southern California*, a former head women's basketball coach argued that she should have been paid as much as the men's head basketball coach, given that the two jobs were very similar in terms of necessary skill, effort, and working conditions. The Ninth Circuit wasn't persuaded, noting the men's team generated substantially more revenue, and the men's coach both had additional external duties and was more experienced.

It's honestly unknown how Title IX would apply to paid college athletes since the NCAA has forbidden colleges from paying those athletes. However, a college paying only the football team would not necessarily run afoul of Title IX and, arguably, would reflect the unique qualities of a football program. Also, even if a school doesn't “have to” pay women athletes, it might “ought to” if it values equality or is aware that women's college sports are rapidly growing in popularity.

Would all the players be paid the same? The short answer is almost certainly not. Wages in the U.S. vary widely by occupation, education, experience, skills, and geographic region; they also, unfortunately, vary on account of race and sex. Professional athletes' wages vary widely, too, depending on the league they play in, their success, experience, position, and numerous other factors. Whether the college players were in a union would play a key role, since a union would bargain terms of employment with the school and potentially also the conference and NCAA.

According to *Who Profits from Amateurism? Rent-Sharing in Modern College Sports*, a National Bureau of Economic Research study released in 2020, starting quarterbacks in the Power Five would be paid about $2.4 million in a market system, while backup running backs would receive $140,000 and starting basketball players in the range of $800,000 to $1.2 million. They calculate these figures by

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265. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994).
266. Id. at 1321–22.
270. See supra notes 206–10 and accompanying text.
272. Id. at 6, 32.
drawing largely from ticket sales and media contracts. The authors also find that while pro football and basketball players receive about 50 percent of revenues from their sports, college football and basketball players receive less than seven percent of the revenues they generate.

Would colleges in the Power Five cut non-revenue-generating sports to pay for football and basketball players’ wages and other employment benefits? Possibly, but given the enormous amount of revenue colleges in this elite club take home, some or most would probably not take that approach. Schools are also aware that even teams that are “unprofitable” on a balance sheet can supply a non-quantifiable value for purposes of cultivating the campus community, maintaining good relations with alumni and boosters, and advertising to high school students and their parents when they make their college decisions. There are other ways they could save money too, such as by paying coaches less, hiring fewer staff, and building less opulent facilities.

What about other legal issues, such as immigration ones for foreign players? Most international college athletes are in the United States on an F-1 student visa. This visa greatly limits opportunities for off-campus employment and is regarded as incompatible with most NIL activities, which typically involve sponsorship or influencing work on behalf of third parties.

However, an F-1 visa might prove more compatible with athlete employment. For starters, universities possess institutional knowledge and longstanding practices for the employment of workers from other countries. The F-1 visa also permits on-campus employment of up to 20 hours per week during the semester and more hours during other periods. There’s a sound legal argument that the visas of international players would not be affected by employee recognition or by their team forming a union. The limitation of F-1 holders to 20 hours a week on campus lines up well with CARA hours, which are generally limited to 20 hours as well. Universities also have detailed student employment handbooks that provide structure and guidelines for all students,

273. Id. at 2–6.
274. Id. at 1–2.
278. Id. at 919–20.
including international ones and those who work in the athletics department, to comply with relevant federal and state laws in terms of eligibility, hours, and other aspects of employment. Also, should players form a union and negotiate a collective bargaining agreement with the NCAA, conference, or school, the status of international players could be specifically addressed and potential concerns extinguished.

Separating the Power Five is not the only transformation Baker ought to consider. Many of the NCAA’s member institutions are frustrated by NIL collectives, which consist of boosters who arrange NIL deals for recruits in hopes of inducing them to attend the aligned school. Collectives are criticized for facilitating so-called “NIL” deals for recruits when these deals are “clearly disconnected from the value of the actual use of an athlete’s publicity rights” and are instead a “back-door form of pay for play.”

The NCAA has been passive in enforcing rules that bar pay-for-play, reportedly due to fears of antitrust litigation. The organization has aggressively lobbied Congress to pass a bill creating a federal NIL standard that would preempt state NIL laws and might assist the NCAA in regulating NIL. Those lobbying efforts have thus far failed, as not one of the more than a dozen NIL bills introduced in recent years has made it out of committee. With a divided Congress and a looming presidential election, the near-term prospects for passage appear dismal.

It’s also unclear how a federal NIL standard might interact, or conflict, with the right of publicity, which has no federal statute, varies by state, and is central to an adjacent sector, the entertainment industry. Enforcement of a federal NIL standard is also problematic. The Federal Trade Commission (“FTC”) has been suggested for such a role, but it

284. Id. at 250–51.
285. McCann et al., supra note 146.
has a poor track record for enforcing college sports law. The agency has not meaningfully enforced the Sports Agent Responsibility and Trust Act of 2004, which makes it illegal for agents to jeopardize college athletes’ NCAA eligibility, as there is no record of an FTC warning letter or litigation involving it.  

One way that Baker could address NIL concerns would be to enforce existing rules that prohibit pay-for-play. Fear of antitrust litigation is not a persuasive reason to refrain from acting, particularly since those fears appear unfounded.

The NCAA recently adopted Bylaw 19.7.3, titled “Violations Presumed in Select Cases,” which authorizes the NCAA to rely on circumstantial evidence of pay-for-play in reviewing NIL deals. Yet the NCAA has been passive in enforcing rules to restrict NIL, leading boosters to test the limits of what counts as “NIL.” In October 2023, the Crimson Collective, the NIL group supporting University of Utah athletics and chaired by a co-owner of a car dealership, presented a leased Ram 1500 Big Horn truck (retail value $61,000) to each of the 85 scholarship players on the football team. The nexus between any commercial use of all 85 players’ names, images, or likenesses and trucks the players can drive while members of the team is, not surprisingly, unclear.

Even when the NCAA has attempted to regulate NIL, it has done so via indirect measures. In February 2023, the NCAA Committee on Infractions announced a settlement with the University of Miami concerning impermissible contact with women’s basketball team recruits and a free meal. Miami alumnus John Ruiz, who has signed Miami athletes to NIL deals, allegedly provided a “chef-prepared dinner” to the Cavinder twins, Haley and Hanna, who reportedly are on pace to earn more than $1 million in NIL. Noticeably, the infraction involved not an NIL deal but rather a free meal.

The only way the NCAA will deter pay-for-play cloaked as NIL will be to seriously enforce its rules. It’s true that enforcement might spark

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antitrust lawsuits against the NCAA and its members (which are competing businesses), with the basic argument that association members have conspired, through the NCAA, to interfere with athletes’ right of publicity in anti-competitive and economically harmful ways. But the NCAA would be poised to prevail. NCAA restrictions on competition are evaluated under the “rule of reason,” where the court evaluates the facts and balances the pro-competitive and anti-competitive aspects of a restraint.\(^{294}\) Despite the NCAA’s recent track record with antitrust law, most antitrust lawsuits analyzed under the rule of reason fail. According to Professor Maurice Stucke, an antitrust law scholar, “[t]he empirical evidence reflects that most rule-of-reason claims never reach juries; rather, most are decided on motions to dismiss or summary judgment, and most (and in some surveys nearly all) antitrust plaintiffs lose.”\(^{295}\) Stucke cites one empirical study finding antitrust defendants prevailed 97 percent of the time.\(^{296}\)

Remember, the NCAA lost *O’Bannon* and *Alston* because the NCAA and its member institutions crafted policies that consisted of blanket and facially preposterous prohibitions on athlete compensation. O’Bannon merely wanted college athletes to be treated like other human beings who appear in video games, and Alston asked that schools be able to help athletes more with education-related expenses. Neither decision held the NCAA can’t prohibit pay-for-play. Just the opposite. In *Alston*, Justice Gorsuch explicitly stated the NCAA can craft rules that regulate compensation of athletes so long as they are reasonable—tellingly, he wrote a “no Lamborghini rule” would be perfectly acceptable.\(^{297}\) The NCAA applying membership rules to punish schools, coaches and players for engaging in prohibited pay-for-play under the thinly-veiled guise of NIL should withstand antitrust scrutiny. And to the extent the NCAA is afraid of that scrutiny, despite its heavy deference to defendants, the NCAA only invites suspicions about the reasonableness of its rules.

Similarly, the NCAA would be on solid legal grounds to challenge new laws adopted by states that limit how the NCAA can enforce NIL-related policies. In 2023, Texas, Missouri, and Oklahoma were among the states adopting laws that restrict or limit the NCAA from prohibiting schools from using associated fundraising groups to raise money for NIL.\(^{298}\) These laws make it unlawful for the NCAA to fully ensure

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\(^{296}\) Id. at 1423–44; see also Carrier, supra note 294, at 829–30, 837.


that member schools are not using NIL as a ruse for pay-for-play. The NCAA could seek injunctions to block enforcement of these laws on grounds they unlawfully interfere with two provisions in Article I of the U.S. Constitution: the Commerce Clause and the Contract Clause.\footnote{299} The Commerce Clause vests Congress with the exclusive power to regulate interstate commerce and, as interpreted by courts, prohibits states from affecting the economy in ways that substantially interfere with other states’ economies.\footnote{300} The Contract Clause, in turn, forbids states from impairing a contractual obligation unless there is a substantial connection to a public value.\footnote{301}

This playbook is not new to the NCAA. In the early 1990s, the NCAA successfully petitioned courts to restrain a Nevada statute that had required an impartial hearing officer to determine if a member school violated an NCAA rule.\footnote{302} The statute was enacted in the aftermath of the NCAA investigating and punishing UNLV and its men’s basketball coach, Jerry Tarkanian, for pay-for-play allegations.\footnote{303} The statute interfered with NCAA membership rules, which contemplated the NCAA’s committee on infractions—not an impartial body—having jurisdiction.\footnote{304}

In *NCAA v. Miller*, a U.S. District Judge and the Ninth Circuit sided with the NCAA.\footnote{305} The statute conflicted with the Commerce Clause because it prevented the NCAA, a national membership association, from applying the same membership rules in every state unless it adopted Nevada’s statute in those 49 states.\footnote{306} From that lens, Nevada would effectively coerce the NCAA to alter its operations (and resulting economic activity) in other states.\footnote{307} The statute was also problematic to the courts since it might have spawned a potential patchwork problem: other states could adopt their own statutes regarding NCAA

\footnote{299} *Id.*; U.S. CONST. art. I, §§ 8 cl. 3, 10 cl. 1.


\footnote{302} Nat’l Collegiate Athletic Ass’n v. Miller, 795 F. Supp. 1476, 1488 (D. Nev. 1992), aff’d, 10 F.3d 633 (9th Cir. 1993).


\footnote{304} McCann, *supra* note 298.

\footnote{305} Nat’l Collegiate Athletic Ass’n v. Miller, 10 F.3d 633, 640 (9th Cir. 1993).

\footnote{306} *Id.* at 639–40.

\footnote{307} *Id.*
investigations and due process, thus making it impossible for the NCAA to apply a uniform, national standard.\textsuperscript{308}

The statute was also incompatible with the Contract Clause since it impaired the contractual relationship between the NCAA and member schools in Nevada.\textsuperscript{309} U.S. District Judge Howard McKibben noted that “[e]very NCAA member has voluntarily and contractually agreed to abide by [NCAA] rules and regulations.”\textsuperscript{310} If Nevada colleges were given an “unfair competitive advantage over other members,” McKibben explained, the result would prove “both inconsistent with the core purpose of the NCAA and indirectly allow[] Nevada institutions to circumvent the central substantive requirements it contractually agreed to honor.”\textsuperscript{311}

The NCAA could rely on \textit{Miller} to argue that states that attempt to prevent the NCAA from enforcing pay-for-play rules are interfering with the commerce of other states, risking a patchwork problem and, by altering the rights and responsibilities of contracting parties, impairing the contractual relationship between the NCAA and member schools. States would have defenses, including pointing out that while \textit{Miller} concerned the methods by which the NCAA determines if a member school partook in wrongdoing, NIL is fundamentally about the athlete and the commercial use of their identity. To that point, McKibben criticized Nevada for passing a law “specifically target[ing] the NCAA” rather than one that “attempt[ed] to alleviate a broad societal problem.”\textsuperscript{312} States protecting athletes’ right of publicity could be construed as addressing a “broad societal problem”—namely, the long history of the NCAA suppressing athletes’ right of publicity. Still, the NCAA enjoys a logical line of reasoning to take on states and their NIL statutes.

As a final way the NCAA could reform amateurism, it might wish to settle the lawsuits and turn the page from the past. The NCAA has thus far struggled in \textit{Johnson} and \textit{In re College Athlete NIL Litigation}. The presiding judges have bluntly expressed doubts about the NCAA’s legal arguments, particularly in the aftermath of Justices Gorsuch and Kavanaugh’s opinions in \textit{Alston}, where they essentially lampooned amateurism. \textit{In re College Athlete NIL Litigation} likely could be settled if the NCAA agrees to pay former players for the denial of NIL until 2021 and lets the Power Five negotiate the sharing of broadcast revenue with the players. \textit{Johnson} is trickier to resolve out of court since it is about employment recognition of Division I athletes under the

\textsuperscript{308} The patchwork problem has been cited as grounds to find a violation of the Commerce Clause. \textit{See}, e.g., Jack L. Goldsmith & Alan O. Sykes, \textit{The Internet and the Dormant Commerce Clause}, 110 \textit{Yale L.J.} 785, 792 (2001) (explaining that a patchwork of states’ Internet regulations violated the Commerce Clause).

\textsuperscript{309} Nat’l Collegiate Athletic Ass’n v. Miller, 795 F. Supp. 1476, 1488 (D. Nev. 1992), aff’d, 10 F.3d 633 (9th Cir. 1993).

\textsuperscript{310} Id. at 1486.

\textsuperscript{311} Id. at 1487.

\textsuperscript{312} Id. at 1488.
FLSA—a position the NCAA might find unacceptable for athletes outside of the Power Five—but if the NCAA is willing to let schools compensate current and former players at greater levels, perhaps there’s a way the NCAA could negotiate a solution without having to recognize numerous Division I athletes as employees.

IV. Conclusion

The time for the NCAA to reimagine amateurism is past due. The longer the NCAA waits to embrace disruptive transformation, the greater the risk the organization will be rendered irrelevant and the more likely courts will profoundly change college sports, with unintended consequences for schools and athletes.

The NCAA should ask itself if it wants to control fate or let judges, who will be focused on resolving technical legal questions rather than broader policy considerations, decide the future. As an organization with fiduciary duties to its members, including hundreds of thousands of college students whose voices matter, the choice seems clear.

This Article offers a series of recommendations for a new amateurism that proposes the upper echelon of colleges and athletes in college sports be separated as professional sports, ends romanticized notions of college sports that neither conservative nor liberal judges find believable, and, above all, advocates reality. The recommendations are simultaneously radical and obvious. They are radical in that they envision an NCAA that accepts times have changed and obvious in that they recognize times have changed.

I hope the NCAA is listening.