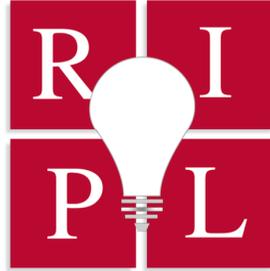


UIC REVIEW OF INTELLECTUAL PROPERTY LAW



NCAA DOWN FOR THE COUNT? NEW STATE LEGISLATION THREATENS COLLEGIATE SPORTS AS WE KNOW IT

JOE NELSON

ABSTRACT

Since the 1950s, the NCAA's amateurism shield has served as a stalwart protector in combatting litigation from athletes and coaches within its purview. They have faced many lawsuits since that time, with the overwhelming majority failing. As this comment shows, complaints have been of a wide variety such as antitrust, employment, and state action litigation. The amateurism principle was their defense in each of those situations. But now, many states have recently begun passing legislation that would allow student athletes to obtain compensation, in more ways than one. These statutes are a shot through the heart of the amateurism principle, leaving the NCAA's authority hanging on by a thread. This comment will analyze the fall out from the proposed statutes and the consequences that will result. It will look at possible options in resolving this dispute and ultimately will come to a conclusion on the best possible resolution for both parties.

**UIC JOHN MARSHALL
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I. INTRODUCTION.....	346
A. Protection from Commercial Exploitation?	346
II. BACKGROUND	348
A. Establishment of the NCAA.....	348
B. Antitrust Litigation	352
III. ANALYSIS	355
A. State Action.....	355
B. Athletes as Employees.....	356
C. Endorsement Compensation	357
1. Olympic Endorsement Model	358
IV. PROPOSAL.....	360
A. State Action.....	360
B. Athletes as Employees.....	361
C. Endorsement Compensation	362
1. Olympic Endorsement Model	362
V. CONCLUSION.....	363

NCAA DOWN FOR THE COUNT? NEW STATE LEGISLATION THREATENS COLLEGIATE SPORTS AS WE KNOW IT

JOE NELSON*

I. INTRODUCTION

This comment will focus on the development of the NCAA and its procedures with an emphasis on the effect of these procedures on student-athletes and how new legislation may change that. Further, this comment will aim to answer the looming question the NCAA is currently attempting to resolve: what is the best way to allow compensation for student-athletes? It seems like a very simple question, but the history and background of the organization that this comment provides will show the reader that it really is not as simple as it sounds. Part I of the of the comment gives an example of a former NCAA student-athlete and highlights how college sports impacted his life. Part II provides the storied history of the NCAA and walks the reader through how it got to where it is today, and more importantly, how its amateurism concept became the shield it is now. Part III discusses in depth the many proposed resolutions to the above question, that is, how to compensate student-athletes. Part IV goes through each of those same resolutions and states why or why not they are a feasible option and finishes with which resolution is likely the best as well as most-probable to occur.

A. Protection from Commercial Exploitation?

The National Collegiate Athletic Association's ("NCAA") most fundamental principle is the idea of amateurism.¹ Their by-laws maintain that this principle is for the athletes' protection "from exploitation by professional and commercial enterprises."² Ironically, the NCAA has been challenged for years for doing just that—exploitation. The NCAA has been able to use the ideologies of "student-athletes" and

* © Joe Nelson 2020. Juris Doctor Candidate, May 2021, at UIC John Marshall Law School, B.S. in Marketing, Carthage College (2018).

¹ NCAA, DIVISION I MANUAL § 2.9 (Aug. 2019) ("Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.").

² NCAA, *supra* note 1.

“amateurism” as its shield for quite some time.³ Many states are now attempting to stand up to the NCAA, in defense of the athletes and their interests.⁴

In 2009, Kyle Hardrick established himself as a top basketball prospect.⁵ He played for one of the best high school travel teams in the nation, with many athletes from these teams now playing professionally.⁶ Kyle worked endlessly to achieve his lifelong dream of playing professionally. He stated, “[c]ause that’s what I wanna do when I grow up—I wanna pay for my family, so they don’t have to work anymore”⁷ Kyle committed to play at The University of Oklahoma at age fourteen.⁸ His mother was relieved when his new coach told her “[h]ey, we’re gonna take care of your son.”⁹

At a practice his freshman year, his teammate Keith Gallon fell on Kyle’s leg and injured his knee.¹⁰ Kyle stated, “I remember the trainers and the managers were like, ‘Oh, god. what happened?’ Sound like a shotgun.”¹¹ He was informed that the injury was not serious.¹² The coaches made Kyle continue doing drills and practice through the pain.¹³ When the pain never subsided, his mother took him to see a family doctor.¹⁴ The results of the test showed a torn meniscus.¹⁵ Kyle had the surgery to repair his knee, but there was permanent damage.¹⁶ The doctor said, “if this would’ve been taken care of a year ago, he wouldn’t have been in this situation he’s in.”¹⁷

Interestingly, the university disputed the finding of the torn meniscus and would not pay for the surgery.¹⁸ Kyle had to pay for the surgery with his family’s insurance.¹⁹ To make matters even worse, that summer Kyle learned he was losing his scholarship.²⁰ Kyle attempted to transfer to continue playing basketball, but the pain

³ Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 86 (2006) (“The NCAA purposely created the term ‘student-athlete’ as propaganda, solely to obscure the reality of the university-athlete employment relationship and to avoid universities’ legal responsibilities as employers.”).

⁴ Charlotte Carol, *Tracking NCAA Fair Play Legislation Across the Country*, SPORTS ILLUSTRATED (Oct. 2, 2019), <https://www.si.com/college/2019/10/02/tracking-ncaa-fair-play-image-likeness-laws>. To date, California, Colorado, Florida, Illinois, Kentucky, Minnesota, Nevada, New York, Pennsylvania, and South Carolina have all either adopted legislation, proposed legislation, or circulated a bill for proposal. These pieces of legislation would serve to provide NCAA athletes protections in order to allow them to attain some form of compensation.

⁵ Martin Kessler, *Power And The NCAA: One Athlete’s Fall From The Big 12 To The Oil Fields*, WBUR (Oct. 13, 2017), <https://www.wbur.org/onlyagame/2017/10/13/kyle-hardrick-story-ncaa-show>.

⁶ Kessler, *supra* note 5.

⁷ THE BUSINESS OF AMATEURS (Gravitas Ventures 2016).

⁸ Ben Strauss, *A Fight to Keep College Athletes From the Pain of Injury Costs*, N. Y. TIMES (Apr. 25, 2014), <https://www.nytimes.com/2014/04/25/sports/a-fight-to-keep-college-athletes-from-the-pain-of-injury-costs.html>.

⁹ See Kessler, *supra* note 5.

¹⁰ See Strauss, *supra* note 8.

¹¹ See Kessler, *supra* note 5.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Kessler, *supra* note 5.

¹⁸ See Strauss, *supra* note 8.

¹⁹ *Id.*

²⁰ *Id.*

in his knee worsened until he needed another surgery.²¹ He decided this was the end of his basketball career.²² In 2012, in the midst of endless pain and overwhelming medical costs, with no scholarship, Kyle dropped out of college.²³

Where is Kyle now? He works twelve-hour shifts in the oil fields in Texas.²⁴ His mother worries about his depression.²⁵ She stated that “[i]t’s a system of college sports. You put trust in these universities. You trust them with your kid on and off the court, and once you’re damaged good, they just kick you to the curb.”²⁶ While Kyle continues to toil over 12 hour shifts in the oil fields, the University and the NCAA continue to line their pockets.

II. BACKGROUND

A. Establishment of the NCAA

In 1905, President Theodore Roosevelt was concerned with the state of intercollegiate football and the violence involved.²⁷ He wanted to make sure the game had appropriate regulations for player safety while maintaining the notion of amateurism.²⁸ Therefore, Roosevelt called leaders from major universities like Harvard, Yale, and Princeton to meet with him and discuss a resolution.²⁹ They collectively decided that in order for college sports to continue, there must be some

²¹ See Kessler, *supra* note 5.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* ([She] “wake[s] up in the middle of the night dreaming that [she] walk[s] in the door and he’s hanging or he shot himself, because he’s that depressed”).

²⁶ *Id.*; see also Terry Collins, *Will Paying Student Athletes Save College Sports—or Kill the NCAA?*, FORTUNE (Oct. 8, 2019, 10:30 AM) <https://fortune.com/2019/10/08/ncaa-paying-athletes-california-fair-pay-play-law/> (California Governor Gavin Newsom, who approved the Fair Pay to Play Act, agrees because he “think[s] too many athletes . . . have given up everything, body, and mind in some cases, for a sport that they love and they were let down”).

²⁷ James V. Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L.J. 9, 12 (1985).

²⁸ Koch discusses the founding of the NCAA and states the following:

The NCAA was founded in 1906 as a consequence of the efforts of President Theodore Roosevelt and others to reduce the unsavory violence and mayhem that characterized intercollegiate football contests at the time. An additional concern of Roosevelt and others was the preservation of amateurism. One means of doing that was to define athlete eligibility; another was to develop common rules for conducting games and competition. These rules were used by the NCAA when it began to sponsor regional and national championships in a growing number of sports.

Koch, *supra* note 27, at 12.

²⁹ Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

reform.³⁰ In 1906, representatives from sixty-eight schools founded what would come to be known as the NCAA to solve these problems.³¹

Before the establishment of the NCAA, most of the intercollegiate athletics that took place were controlled by the students.³² This is likely why the NCAA played less of a role and held minimal control at the beginning.³³ In 1929, a report by the Carnegie Foundation found that “[c]ommericalism in college athletics must be diminished and college sport must rise to a point where it is esteemed primarily and sincerely for the opportunities it affords to mature youth”³⁴ Slowly, over time, the NCAA continued to adopt this belief and gained more and more control over college athletics.

B. Television Rights

In the early days, one of the main reasons for the NCAA’s acquisition of control was a new technology—the television.³⁵ “The combination of adverse public attention . . . and the desire of most NCAA members to limit the effects of television upon their gate attendance led to dramatic increases in the power and control of the central NCAA organization.”³⁶ In 1951, the NCAA decided to ban televised games, other than ones of their choosing.³⁷ A year later, it was able to negotiate their first television contract for college football, worth approximately \$1,140,000.³⁸ The NCAA was able to negotiate restrictions so that it had essentially complete control over which teams received television exposure.³⁹ With this, it “had secured enough power and money to regulate all of college sports.”⁴⁰ As televisions became more commonplace, the NCAA’s television revenues increased and, consequently, so did its power.⁴¹ Indeed, until 1984, it earned over \$65,000,000 negotiating the broadcasting rights for football alone.⁴²

³⁰ Branch, *supra* note 29.

³¹ *Id.* (“At Roosevelt’s behest, the three schools issued a public statement that college sports must reform to survive, and representatives from 68 colleges founded a new organization that would soon be called the National Collegiate Athletic Association.”).

³² HOWARD J. SALVAGE, *AMERICAN COLLEGE ATHLETICS* 22 (The Merrymount Press, 1929) (“During most of what we have called the second period of American college athletics, the direction and management of sports and games rested, in general, with the undergraduates.”).

³³ Rodney K. Smith, *The National Collegiate Athletic Association’s Death Penalty: How Educators Punish Themselves and Others*, 62 *Ind. L.J.* 985, 991 (1987) (“The actual governance and running of intercollegiate athletic events remained largely in the hands of the students until after World War I.”).

³⁴ See SALVAGE, *supra* note 32, at 310.

³⁵ See Koch, *supra* note 27, at 13 (“Simultaneously, a new technological innovation, television, threatened to alter the intercollegiate athletic landscape even further.”).

³⁶ *Id.*

³⁷ See Branch, *supra* note 29.

³⁸ See Smith, *supra* note 33, at 993; see also Branch, *supra* note 29 (“On June 6, 1952, NBC signed a one-year deal to pay the NCAA \$1.14 million for a carefully restricted football package.”).

³⁹ See Branch, *supra* note 29

⁴⁰ *Id.*

⁴¹ *Id.* See also Koch, *supra* note 27, at 14 (“These television rights turned out to be a gold mine for the NCAA.”).

⁴² See Koch, *supra* note 27, at 14.

In the midst of the NCAA solidifying their control over television rights, “a threat arose that garnered universal support by the member universities for increased power to the NCAA and the ‘tradition’ of amateurism in college sports.”⁴³ The threat was the potential for the state to identify NCAA athletes as employees.⁴⁴ In response, the NCAA “crafted the term student-athlete, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes.”⁴⁵ By instilling this “student-athlete” persona to promote their ideal of amateurism, it provided them a way to avoid the identification of their athletes as employees.⁴⁶ “[T]he NCAA rose to power, and the ‘revered tradition’ of amateurism was restyled with a spoonful of sugar to help the public—the consumers of college sports—swallow it.”⁴⁷

The NCAA has managed to avoid the threat of athletes-as-employees for the time being, but today the NCAA faces a new challenge—athletic endorsements.⁴⁸ These endorsements threaten to diminish the NCAA’s vital amateurism ideology. Yet it is different because it does not necessarily require the NCAA or their schools to have to pay. In particular, California is preparing to enact legislation that allows athletes to seek their own pay.⁴⁹ California Governor Gavin Newsom made the final decision to pass the Fair Pay to Play Act. Newsom stated that “‘if the athletic association stands its ground and threatens to pull its access to schools in states seeking fair pay to play, its 113—year reputation—and its existence—will be on the line.’”⁵⁰ He continued, “‘I think they will lose the public opinion and, ultimately, their moral authority will wane as well as their formal authority and the whole system will collapse.’”⁵¹ The whole system collapsing may seem far-fetched, but the point still rings true. Endorsement compensation is a viable and highly sought-after remedy.⁵²

⁴³ Kelly Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 STAN. L. & POL’Y REV 181, 191 (2017).

⁴⁴ Stanton Wheeler, *Rethinking Amateurism and the NCAA*, 15 STAN. L. & POL’Y REV 213, 215 (2004) (“That threat was the dreaded notion that NCAA athletes could be identified as employees by state industrial commissions and the courts.”).

⁴⁵ *Id.*; see Crabb, *supra* note 43, at 191.

⁴⁶ Crabb, *supra* note 43, at 192 (“[W]ith the . . . money flowing to support this commercial enterprise, the NCAA’s promotion of the ‘student-athlete’ and the ‘Principle of Amateurism,’ as a protection against the purported evils of professionalism, proved to be a convenient way for the NCAA and its member universities to escape the ‘employee’ label for college players.”).

⁴⁷ *Id.*

⁴⁸ See Collins, *supra* note 26 (“Ohio freshman Congressman Anthony Gonzalez, a Republican and former NFL and star wide receiver at Ohio State University, has one suggestion on how to level the playing field. Gonzalez is proposing a federal law to give college athletes nationwide a chance to make endorsement money.”).

⁴⁹ Tom Goldman, *College Athletes In California Can Now Be Paid Under Fair Pay To Play Act*, NPR (Sep. 30, 2019, 5:23 PM), <https://www.npr.org/2019/09/30/765834549/college-athletes-in-california-can-now-be-paid-under-fair-pay-to-play-act> (“The law will allow California student athletes to earn money from endorsements, sponsorship deals and other activities related to their athletic skill. They’ll be able to hire agents.”).

⁵⁰ See Collins, *supra* note 26.

⁵¹ *Id.*

⁵² Andrew Atterbury & Mackenzie Mays, *How states forced the NCAA’s hand on student athlete endorsements*, POLITICO (Oct. 29, 2019, 7:57 PM), <https://www.politico.com/states/florida/story/2019/10/29/how-states-forced-the-ncaas-hand-on-student-athlete-endorsements-1226080> (California Senator Nancy Skinner, the woman who authored the Fair Pay to Play legislation, stated that “[w]hether you come from the fact that this has been an

After overcoming the athletes-as-employees issue, the NCAA re-established its power. However, there is still one issue it continues deal with: keeping its colleges and universities happy.⁵³ In 1973, the NCAA divided their member schools into three divisions: division one, division two, and division three.⁵⁴ “Ostensibly, this effort at federation was conceived as a means of enhancing enforcement by placing institutions of similar size in the same division and for the purpose of maintaining a similar level of competitiveness among member schools in a given division.”⁵⁵ It also created a new policy calling for punishment when necessary to enforce their rules.⁵⁶ This new policy allowed it to punish schools directly, so it also indirectly was able to punish administrators, coaches, and student athletes.⁵⁷ Of course, this new enforcement and regulation did not come without criticism.⁵⁸ This was also one of the first times there was concern that the NCAA had wrongly transformed college athletics into a commercial enterprise, rather than just an additional benefit of the educational system.⁵⁹

As tensions continued to rise, many of the bigger institutions began to wonder why they even needed the NCAA to play this controlling role.⁶⁰ This sparked further controversy and, in 1981, the NCAA faced their biggest challenge to date. Sixty-one of their greatest football member-schools threatened to negotiate their own television contracts with NBC.⁶¹ The NCAA attempted to threaten sanctions if the institutions did not comply, but the effort was futile.⁶² That is because two universities, the University of Georgia and the University of Oklahoma, responded with an antitrust lawsuit.⁶³

exploitation of black athletes or come at it from that it’s just a violation of every free-market principle . . . it’s a change that was so ripe for right now.”).

⁵³ See Branch, *supra* note 29 (“The NCAA’s control of college sports still rested on a fragile base, however: the consent of the colleges and universities it governed.”).

⁵⁴ O’Bannon v. NCAA, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014); *see also* Smith, *supra* note 33, at 993 (“The early seventies witnessed the divisionalizing of college athletics.”).

⁵⁵ See Smith, *supra* note 33, at 993.

⁵⁶ See Koch, *supra* note 27, at 14 (“[T]he NCAA undertook punitive actions that often carried with them significant financial penalties in order to enforce its rules”).

⁵⁷ See Smith, *supra* note 33, at 994.

⁵⁸ *Id.* at 993 (“[M]embers were beginning to voice concerns regarding alleged unfairness in the rules and the enforcement process”).

⁵⁹ *Id.* at 994 (“[C]riticism surfaced anew asserting that intercollegiate athletics had been commercialized to the point that it was little more than a big business masquerading as an educational enterprise.”); *see also* Branch, *supra* note 29 (“[R]eformers fretted that commercialism was hurting college sports, and that higher education’s historical balance between academics and athletics had been distorted by all the money sloshing around.”).

⁶⁰ See Branch, *supra* note 29 (“Why do we need to have our television coverage brokered through the NCAA? Couldn’t we get a bigger cut of that TV money by dealing directly with the networks?”).

⁶¹ *Id.* (“Calling the NCAA a price-fixing cartel that siphoned every television dollar through its coffers, in 1981 a rogue consortium of 61 major football schools threatened to sign an independent contract with NBC for \$180 million over four years.”).

⁶² *Id.*

⁶³ *Id.*

C. Antitrust Litigation

In *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*,⁶⁴ the Supreme Court of the United States held that the NCAA's television plan violated the Sherman Act.⁶⁵ The Court held that the "the NCAA television plan on its face constitutes a restraint upon the operation of a free market . . ." ⁶⁶ The Court continued, however, that "[i]n order to preserve the character and quality of the 'product,' athletes *must not be paid*, must be required to attend class, and the like."⁶⁷

Luckily for the NCAA, it had an influx of money from basketball in recent years, otherwise, it may have been incapable of recovering from its loss of football revenue.⁶⁸ In fact, the year of the *Board of Regents* decision, the NCAA earned over \$31,000,000 from selling television rights to its Division one men's championship game alone.⁶⁹ That financial support has not ceased either. In 2017, the March Madness Tournament brought in over \$1,000,000,000.⁷⁰ It has had similar numbers in years prior as well.

Although the *Board of Regents* decision was a setback, the NCAA maintained its strength. Its next big legal challenge was not until 1988 in *Nat'l Collegiate Ath. Ass'n v. Tarkanian*.⁷¹ Although this case did not involve an antitrust issue, it still provided a holding that remains relevant today. Leading up to the case, the NCAA placed University of Nevada Las Vegas's ("UNLV") basketball team on probation for two years.⁷² It found thirty-eight NCAA violations, ten of which involved Tarkanian.⁷³ It told the school they must "show cause why the NCAA should not impose further penalties unless UNLV severed all ties during the probation between its intercollegiate athletic program and Tarkanian," their current head coach.⁷⁴ Tarkanian sued the university and the NCAA under 42 U.S.C. § 1983⁷⁵ alleging a violation of his

⁶⁴ 468 U.S. 85, 85-136 (1984).

⁶⁵ Sherman Act, 15 U.S.C. §§ 1-7 (1890) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal." 15 U.S.C. § 1. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ." 15 U.S.C. § 2).

⁶⁶ *Board of Regents of the University of Oklahoma*, 468 U.S. at 113.

⁶⁷ *Id.* at 102 (emphasis added).

⁶⁸ See Branch, *supra* note 29 ("A few years earlier, this blow might have financially crippled the NCAA—but a rising tide of money from basketball concealed the structural damage of the Regents decision.")

⁶⁹ See Koch, *supra* note 27, at 14 ("In the 1984-1985 academic year, for example, the NCAA expected to earn over \$31 million solely from selling the rights to televise its Division I men's basketball championship.")

⁷⁰ Marc Edelman, *College Basketball Players Get None Of The NCAA Tournament Revenue — Is It Time To Unionize?*, FORBES (Mar. 18, 2018, 11:30 AM), <https://www.forbes.com/sites/marcedelman/2018/03/18/college-basketball-players-get-none-of-the-ncaa-tournaments-revenues-is-it-time-to-unionize/#6191ace85b47> ("Last year, the tournament produced more than \$1 billion in revenue.")

⁷¹ 488 U.S. 179, 179-203 (1988).

⁷² *Id.* at 181.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ The statutory provision that provides for a civil action for deprivation of rights states the following:

Fourteenth Amendment⁷⁶ due process rights.⁷⁷ Reversing a Nevada Supreme Court decision, the Supreme Court of the United States decided that the NCAA was not a state actor under 42 U.S.C § 1983.⁷⁸ This seemingly minor ruling holds great weight. By determining the NCAA was not a state actor, this allows the NCAA to not follow constitutional requirements.⁷⁹ “By ignoring the interdependencies of money and power between the Association and public universities, the Court has shielded the NCAA from judicial review and left the liberty and property interests of college athletes and coaches unprotected.”⁸⁰

Another antitrust case came later that same year. In *McCormack v. National Collegiate Athletic Assn.*,⁸¹ “[t]he NCAA found that Southern Methodist University [“SMU”] had violated its rules limiting compensation for football players to scholarships with limited financial benefits.”⁸² In response, the NCAA suspended their program.⁸³ SMU alumni, football players, and cheerleaders challenged the suspension as violating the Sherman Act for creating rules that restrict benefits for the players.⁸⁴

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1871).

⁷⁶ The Fourteenth Amendment states the following:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

⁷⁷ 488 U.S. 179, 181 (1988).

⁷⁸ *Id.* at 199 (“It would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law.”).

⁷⁹ Terri Peretti, *What If the NCAA Was a State Actor? Here, There, and Beyond*, 20 ROGER WILLIAMS U. L. REV. 292 (“In 1988, in *NCAA v. Tarkanian*, the United States Supreme Court ruled that the National Collegiate Athletic Association (‘NCAA’) was not a state actor and, thus, did not have to abide by constitutional requirements, such as due process of law.”).

⁸⁰ *Id.*

⁸¹ 845 F.2d 1338, 1338-1347 (5th Cir. 1988).

⁸² *Id.* at 1340.

⁸³ *Id.* (“It accordingly suspended the SMU football program for the entire 1987 season and imposed restrictions on it for the 1988 season.”).

⁸⁴ The Fifth Circuit laid out the general facts of the case as follows:

A group of SMU alumni, football players, and cheerleaders challenges that action, contending that the NCAA violated the antitrust and civil rights laws by promulgating and enforcing rules restricting the benefits that may be awarded student athletes The complaint, as amended, charges antitrust violations in that (1) the restrictions on compensation to football players constitute illegal price-

The Fifth Circuit held that the NCAA's rules reasonably serve their purpose of maintaining the dichotomy between professional and collegiate sports.⁸⁵

The next antitrust challenge came in 1998 in *Law v. NCAA*.⁸⁶ In an effort to reduce cost, the NCAA created the "restricted-earnings coach" position on collegiate basketball staffs, thereby replacing the role of part-time assistants or graduate assistants.⁸⁷ It capped the restricted-earnings coaches salary at \$16,000.⁸⁸ The plaintiffs in the case were restricted-earnings coaches that challenged the rule's salary cap as violating the Sherman Act.⁸⁹ The Tenth Circuit ruled that the restricted-earnings salary cap violated antitrust law.⁹⁰

fixing in violation of the Sherman Act and (2) the suspension of SMU constitutes a group boycott by other NCAA members.

Id.

⁸⁵ In discussing the role of the NCAA, the Fifth Circuit stated the following:

The NCAA markets college football as a product distinct from professional football. The eligibility rules create the product and allow its survival in the face of commercializing pressures. The goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal . . . [T]he plaintiffs still produce only two allegations to support their claim that the NCAA's rules are designed to stifle competition: that the NCAA permits some compensation through scholarships and allows a student to be a professional in one sport and an amateur in another. Accepting these facts as true, however, they do not undermine the rationality of the eligibility requirements. That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable. We therefore conclude that the plaintiffs cannot prove any set of facts that would carry their antitrust claim and that the motion to dismiss was properly granted.

Id. at 1344-1345.

⁸⁶ 134 F.3d 1010, 1010-1024 (10th Cir. 1998).

⁸⁷ *Id.* at 1013 ("The Committee proposed an array of recommendations to amend the NCAA's bylaws, including proposed Bylaw 11.6.4 that would limit Division I basketball coaching staffs to four members—one head coach, two assistant coaches, and one entry-level coach called a 'restricted-earnings coach.'" That "category was created to replace the positions of part-time assistant, graduate assistant, and volunteer coach.").

⁸⁸ *Id.* at 1014.

⁸⁹ *Id.* at 1015 ("In this case, plaintiffs-appellees were restricted-earnings men's basketball coaches at NCAA Division I institutions in the academic year 1992-93. They challenged the REC Rule's limitation on compensation under section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1990), as an unlawful 'contract, combination . . . or conspiracy, in restraint of trade.'").

⁹⁰ Richard J. Hunter, Jr. & Ann M. Mayo, *Issues in Antitrust, the NCAA, and Sports Management*, 10 MARQ. SPORTS L.J. 69, 84 ("[T]he Tenth Circuit affirmed the District Court's order granting a permanent injunction barring the NCAA from reenacting compensation limits as those contained in the 'restricted earnings' rule.").

III. ANALYSIS

A. State Action

The key case in this section is *Nat'l Collegiate Ath. Ass'n v. Tarkanian*.⁹¹ The Supreme Court in this case determined the NCAA was not a state actor and thus, it has not been subject to constitutional requirements since.⁹² In contrast, many circuit courts have maintained that high school athletic associations are state actors.⁹³ Indeed, the Supreme Court did too in *Brentwood Academy v. Tennessee Secondary School Athletic Association*.⁹⁴ The somewhat obscure reason provided by Justice Souter in *Brentwood* is that all of the high school athletic association's member schools are within a single state, while NCAA's member schools are across many states.⁹⁵ Sure, the argument seems plausible on its face. But in current times, when essentially all the member schools *defer* to NCAA rule and allow it to discipline athletes, coaches, and programs on their own, isn't it really the one creating the rules and taking action to enforce them? In *Tarkanian*, UNLV was the one that fired Coach Tarkanian. However, the NCAA had already placed the school on probation for two years and was going to punish them further unless they fired him. Was this really the school's action? The reasoning is hard to align. For these reasons, it is difficult to review these cases and determine why they should be resolved differently, which is why many people think the NCAA should be considered a state actor.

In light of the decision in *Brentwood*, it is not wholly implausible that *Tarkanian* can be reversed.⁹⁶ All of the necessary doctrines and rules are in place, they just need to be followed.⁹⁷ This would eventually force the NCAA to make changes to their current practices and policies, causing a major rift in their business. If the NCAA were deemed to be a state actor, essentially everything it does would be subject to judicial review.⁹⁸ "State actor status for the NCAA brings judges into its investigatory and enforcement processes and alters the power relationships among the key players."⁹⁹ The judges would be able to "assess the substantive and procedural fairness

⁹¹ 488 U.S. 179, 179-99 (1988).

⁹² See Peretti, *supra* note 79, at 292.

⁹³ See, e.g., *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1126-32 (9th Cir. 1982); *Griffin High School v. Ill. High Sch. Ass'n*, 822 F.2d 671, 671-76 (7th Cir. 1987); see also *A.H. v. Illinois High School Ass'n*, 263 F. Supp. 3d 705, 717 (N.D. Ill. 2017) (directly discussing *Griffin High School*, the court stated that "[a]lthough the Seventh Circuit has not addressed the application of Title II to a high school athletic association, it has held that IHSA is a state actor for the purposes of 42 U.S.C. § 1983").

⁹⁴ 531 U.S. 288, 290-305 (2001).

⁹⁵ *Id.* at 298.

⁹⁶ See Peretti, *supra* note 79, at 303 ("[T]he Court's reasoning in the latter case [*Brentwood*] provides an opening for reformers seeking to subject the NCAA's policies and activities to judicial review.").

⁹⁷ *Id.* at 317 ("Brentwood Academy and its corresponding scholarly commentary make clear that reversing *Tarkanian* would not require the Court to invent a new doctrine or discard an entire line of precedents and doctrinal rules.").

⁹⁸ *Id.* at 332 ("Reversing *Tarkanian* opens the door to judicial oversight of the NCAA.").

⁹⁹ *Id.*

of NCAA policies and practices and protect the liberty and property interests of college athletes, coaches, and member institutions.”¹⁰⁰

B. Athletes as Employees

Walter Byers, former NCAA Executive Director and the man who essentially created the NCAA amateurism ideal, once stated, “[a]mateurism is not a moral issue; it is an economic camouflage for monopoly practice.”¹⁰¹ Thankfully, however, “[t]he myth of amateurism is on the verge of being eliminated.”¹⁰² One facially reasonable response in discussion of NCAA exploitation is to simply call for the NCAA to treat the athletes as employees and pay them wages.

One clear benefit of labeling student athletes as employees is that the athletes would then be entitled to coverage under worker’s compensation law. The NCAA would be obligated to comply with state laws regarding pay, overtime, and worker’s compensation.¹⁰³ As previously stated, that is one of the reasons the NCAA designated the term student-athlete in the first place.¹⁰⁴ Surely Kyle Hardrick¹⁰⁵ (and many others)¹⁰⁶ would appreciate having this source of recourse when their lives and dreams were completely ruined while playing for the organization. The overtime requirement would help as well. Currently, NCAA rules only allow an athlete to spend twenty hours per week on their sport.¹⁰⁷ However, the Pac-12, an NCAA conference made up of twelve schools, performed a study on nine of their member schools to determine how long athletes were truly spending on their sport.¹⁰⁸ The study found that 409 of their

¹⁰⁰ *Id.*

¹⁰¹ Warren Zola, *NCAA Amateurism Is an Illusion*, U.S. NEWS & WORLD REPORT (Apr. 1, 2013, 5:48 PM), <https://www.usnews.com/debate-club/should-ncaa-athletes-be-paid/ncaa-amateurism-is-an-illusion#targetText=Former%20NCAA%20Executive%20Director%20Walter,the%20existing%20collusive%20wage%20fixing>.

¹⁰² See Crabb, *supra* note 43, at 181.

¹⁰³ *Id.* at 191 (“The threat was that NCAA athletes could be identified as employees by the state, the result of which would mean that the universities would become subject to the state labor rules respecting wages, overtime, and workers compensation.”).

¹⁰⁴ See Wheeler, *supra* note 44, at 228 (“One example is accident insurance. This is what led Wally Byers and company to anoint the concept of student athlete, and it has been a lament of injured college athletes ever since.” One example of an injured college athlete is “Kent Waldrep[,] the running back whose football accident three decades ago while competing for TCU turned him into a paraplegic, but who was not eligible as a student athlete for coverage under state worker’s compensation law.”); see *supra* text accompanying note 3.

¹⁰⁵ See Kessler, *supra* note 5.

¹⁰⁶ Kristina Peterson, *College Athletes Stuck With The Bill After Injuries*, N.Y. TIMES (July 15, 2009), <https://www.nytimes.com/2009/07/16/sports/16athletes.html> (“Still, many athletes are not so lucky—victims to disagreements over who is responsible for payment or what constitutes a medical condition.”).

¹⁰⁷ Dennis Dodd, *Pac-12 study reveals athletes 'too exhausted to study effectively'*, CBS SPORTS (Apr. 21, 2015, 5:05 AM), <https://www.cbssports.com/college-football/news/pac-12-study-reveals-athletes-too-exhausted-to-study-effectively/> (“NCAA rules restrict athletes’ time spent on their particular sport to 20 hours per week.”).

¹⁰⁸ *Id.*

“athletes spend an average of 50 hours per week on their sport and are often ‘too exhausted to study effectively’”¹⁰⁹

Regardless of whether it should be resolved this way or not, even proponents of the idea find it to be a tough resolution. Considering the NCAA’s most paramount ideal is amateurism, it is easy to understand why people believe this option to be unsuitable.

C. Endorsement Compensation

The NCAA knows that change needs to be made which is why it formed a working group to discuss potential solutions.¹¹⁰ It formed the group in the face of the overwhelming pressure state legislatures continue to impose with potential legislation that would allow athletes to profit from their name, image, and likeness.¹¹¹ There are little details about the type of resolution the group is considering, but Big 12 commissioner Bob Bowlsby stated that they “are coalescing on a set of principles that adhere as close to the collegiate model as possible.”¹¹²

Thus, it is evident that the amateurism ideal is not going to be relinquished just yet. Whatever change the NCAA makes, it still is going to maintain the amateurism and professionalism divide. Therefore, it is likely that the NCAA allows for some sort of profit off the athlete’s names, images, and likenesses, but that the organization *regulates* it.¹¹³ If the NCAA were to allow endorsement opportunities without regulation the system simply would be a free-for-all and its amateurism policies would essentially fade into nothingness.

Additionally, in the digital age, there are countless opportunities to increase one’s notoriety and receive financial gain. In fact, one student athlete from University of Central Florida, Donald De La Haye, had his own YouTube channel where he received advertising revenue.¹¹⁴ However, he had to give up his side business when the NCAA ruled him ineligible because of it.¹¹⁵ One possible endorsement compensation model for consideration is the Olympic Endorsement Model.

¹⁰⁹ *Id.*; see also McCormick & McCormick, *supra* note 3, at 100 (“The fifty-three hours required each week for football, of course, is in addition to class time, study time, and ten hours per week of mandatory study hall time in academic-support facilities.”).

¹¹⁰ Dan Murphy, *NCAA to meet Tuesday to consider allowing athletes to profit from endorsements*, ESPN (Oct. 28, 2019), https://www.espn.com/college-sports/story/_id/27952245/ncaa-meet-tuesday-consider-allowing-athletes-profit-endorsements (“The NCAA’s top decision-makers will meet Tuesday in Atlanta for their first formal discussion about modifying rules that currently prohibit college athletes from making money by selling the rights to their names, images or likenesses.”).

¹¹¹ *Id.* (“The association’s long-held policy regarding that aspect of amateurism is under increasing pressure from state and federal legislators who believe college athletes deserve an opportunity to collect money from endorsements.”).

¹¹² See Dodd, *supra* note 107.

¹¹³ See Murphy, *supra* note 110 (“That would likely mean regulating potential endorsement deals in some fashion, which sets up a battle between those who wish to see an unrestricted market for college athlete endorsement deals and others who believe some degree of oversight is necessary.”).

¹¹⁴ Dan Gartland, *UCF Kicker Ruled Ineligible After YouTube Channel Gets Him in Trouble with NCAA*, SPORTS ILLUSTRATED (July 31, 2017), <https://www.si.com/college/2017/07/31/ucf-kicker-donald-de-la-haye-ineligible-ncaa-youtube-videos> (“De La Haye, a junior kickoff specialist, has a YouTube channel with over 90,000 subscribers that has amassed nearly five million total views.”).

¹¹⁵ *Id.* (“UCF kicker Donald De La Haye has been ruled ineligible after he refused to give in to the NCAA’s demand for him to stop monetizing his popular YouTube channel.”).

1. Olympic Endorsement Model

Although the NCAA would like to avoid it,¹¹⁶ one of the better options for regulation is to follow the Olympic Model.¹¹⁷ This model is practical for many reasons. The first being that it still allows the NCAA to maintain oversight over the endeavor, which it clearly desires to have. Another is that it is already an established model that it can implement without the arduous process of coming up with a plan. Furthermore, it is already proven to be successful. And finally, the transition should be seamless, considering the NCAA and Olympic programs are already very similar.¹¹⁸ In fact, the NCAA already allows its student-athletes to receive compensation for their performance in the Olympic games.¹¹⁹ “Athletes [including NCAA student-athletes] competing for their country are free to collect prize money from specific donors.”¹²⁰ An example of this would be Katie Ledecky. She swam for Stanford after earning more than \$100,000 from the USOC in Rio.¹²¹ Meanwhile, however, “[a]thletes responsible for bringing massive revenue to their schools are barred from receiving any money beyond their scholarship and a small stipend.”¹²² Indeed, there are differences between Olympic reward programs and paying a student-athlete for their individual accomplishment. However, the point still stands that “money for athletic performance is money for athletic performance, regardless of where it comes from or when the performance takes place.”¹²³ Therefore, many people wonder: why maintain this arbitrary discrepancy?¹²⁴

¹¹⁶ See Dodd, *supra* note 107 (“We ought to look at things in light of modern circumstances. But we also believe the collegiate model has certain components to it that’s not appropriate to compare it to the Olympic model, and it’s not appropriate to compare it to professional sports.”).

¹¹⁷ *Id.* (The “[o]lympic model’ gives athletes the opportunity to profit off their notoriety in order to earn money for such things as training.”).

¹¹⁸ Dionne Koller, *Putting Public Law into “Private” Sport*, 43 PEPP. L. REV. 681, 733 (2016) (“Outside of the realm of professional sports, although sometimes overlapping, are Olympic and intercollegiate sports.”); see also Josephine R. Potuto & Matthew J. Mitten, *Comparing NCAA and Olympic Athlete Eligibility Dispute Resolution Systems in Light of Procedural Fairness and Substantive Justice*, 7 HARV. J. OF SPORTS & ENT. LAW 1, 3-4 (2016) (“For more than 100 years the National Collegiate Athletic Association . . . and the International Olympic Committee . . . in combination with the United States Olympic Committee . . . , which all are private associations, respectively have regulated ‘amateur’ athletic competition within the United States and internationally.”).

¹¹⁹ Adam Kilgore, *College athletes can’t be paid for their performances — unless they’re Olympians*, WASHINGTON POST (Sep. 4, 2016), https://www.washingtonpost.com/sports/colleges/college-athletes-cant-be-paid-for-their-performances--unless-theyre-olympians/2016/09/02/45ae7c36-7123-11e6-8365-b19e428a975e_story.html (Kyle Snyder, an American wrestler who participated in the Brazil Olympics, went directly back to Columbus, Ohio from Brazil “to begin his junior year at Ohio State, diving headlong into classwork he missed. In the winter and spring, he plans to defend his NCAA national championship, wrestling again for the Buckeyes after accepting that \$250,000 from an outside organization—all within the parameters of NCAA rules.”).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* (“Last week, several Olympic-medal winners returned to campus just as college football season was set to open, and the monetary rewards they reaped from their accomplishments highlight a contrast between how the NCAA views them and the players filling those stadiums.”).

The NCAA maintains authority over intercollegiate sports and the International Olympic Committee (“IOC”), while the United States Olympic Committee (“USOC”) maintains authority over Olympic sports.¹²⁵ They each create rules based on their policies and enforce compliance with them.¹²⁶ However, the IOC also allows athletes to maintain sponsorship deals pursuant to their rules.¹²⁷ Following this model would allow individual athletes an opportunity to seek their own form of compensation, letting the NCAA off the hook in terms of having to pay athletes out of its own pocket.¹²⁸ “Colleges, most of whom lose money on athletics, would not be responsible for paying players directly, yet college athletes whose skills command millions in the free market are able to profit while in college.”¹²⁹

Although the NCAA wants to avoid making any change; that will not work any longer. Therefore, they should do their best to come to some sort of happy medium for the two sides. For the NCAA that would mean giving up as little ground as possible. For the athletes that means gaining as much as they can. Surely the athletes would be willing to agree to a model that would allow them to earn money outside of their sport, something they have not been able to do since the inception of amateurism. This type of resolution could be a solid middle ground that would benefit both parties. The NCAA will argue that this hurts its amateurism and professionalism divide. However, it is debatable if that will be a successful argument for much longer.

¹²⁵ See Potuto & Mitten, *supra* note 120, at 4 (“The NCAA exercises plenary governing authority over intercollegiate athletic competition in the United States, while the IOC exercises plenary governing authority over Olympic sports competition worldwide and the USOC does so nationally.”).

¹²⁶ *Id.* (“These governing bodies adopt and enforce their respective rules defining and regulating the eligibility of Olympic sport and NCAA athletes to compete, including anti-doping rules designed to safeguard the health and safety of participating athletes as well as the integrity of athletic competition.”).

¹²⁷ Maureen A. Weston, *Gamechanger: NCAA Student-Athlete Name & Likeness Licensing Litigation And The Future Of College Sports*, 3 MISS. SPORTS L. REV. 77, 110 (2013) (“Another alternative to the pay-for-play system is amending NCAA rules to allow student-athletes to accept individual sponsorship deals similar to the Olympic model used in international sports.”); see also INTERNATIONAL OLYMPIC COMMITTEE, OLYMPIC CHARTER Rule 40 (Rev. 26, June 2019) (“Competitors, team officials and other team personnel who participate in the Olympic Games may allow their person, name, picture or sports performances to be used for advertising purposes during the Olympic Games in accordance with the principles determined by the IOC Executive Board.”). See also Nicholas Piotrowicz, *Can the Olympic Model Fix the NCAA*, THE BLADE (Mar. 31, 2018, 10:20 AM), <https://www.toledoblade.com/College/2018/03/31/Can-the-Olympic-model-fix-the-NCAA.html> (“U.S. swimming champion Michael Phelps, for instance, signed a deal with Under Armour, while gold medal gymnast Gabby Douglas became a brand ambassador for Gillette’s Venus razors ahead of the 2016 Summer Games.”).

¹²⁸ See Weston, *supra* note 129, at 110 (“The NCAA would not be paying the athletes and would thereby avoid an employer-employee relationship; however, the best players—the Johnny Manziels—would be rewarded in the open market, potentially allowing elite, popular players to rival the salaries of their professional counterparts.”).

¹²⁹ See Branch, *supra* note 29.

IV. PROPOSAL

A. State Action

Subjecting the NCAA to constitutional requirements would likely solve many issues. It is a reasonable potential solution to a very complex issue. However, of all the potential resolutions, it seems the least attainable.

The Supreme Court's ruling in *Nat'l Collegiate Ath. Ass'n v. Tarkanian*,¹³⁰ which is the only thing preventing the NCAA from being categorized as a state actor, is simply flawed. "Given that the purpose, structure, and operations of the NCAA and high school athletic associations are similar, and public-school members are critically involved in both associations, there is no convincing basis to distinguish between high school athletic associations and the NCAA for state actor purposes."¹³¹ Federal circuits have long held that high school athletic associations are state actors.¹³² The Supreme Court even followed suit, deciding in *Brentwood Academy v. Tennessee Secondary School Athletic Association* that a high school athletic association is a state actor.¹³³ There, the Court returned itself to its proper, more functionalist¹³⁴ approach to state action.¹³⁵ It is for this reason, and others, that many people call for the reversal of *Tarkanian*.¹³⁶ "The dichotomy created by *Tarkanian* and *Brentwood* between the NCAA and a high school athletic association is unsustainable."¹³⁷

Many believe that this change would be an appropriate way to fix the inequity¹³⁸ within the collegiate system. Although this solution would be insufficient from a

¹³⁰ 488 U.S. 179, 179-99 (1988).

¹³¹ Kadence A. Otto & Kristal S. Stippich, *Revisiting Tarkanian: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*, 18 J. LEGAL ASPECTS OF SPORT 243, 245 (2008); see also Koller, *supra* note 120, at 733 ("Intercollegiate and interscholastic sports programs also enjoy considerable insulation from government regulation, despite the fact that nearly all of them, whether in public or private schools, are recipients of government funding.").

¹³² See, e.g., *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1126-32 (9th Cir. 1982); *Griffin High School v. Ill. High Sch. Ass'n*, 822 F.2d 671, 671-76 (7th Cir. 1987); see also *A.H. v. Illinois High School Ass'n*, 263 F. Supp. 3d 705, 717 (N.D. Ill. 2017) (directly discussing *Griffin High School*, the court stated that "[a]lthough the Seventh Circuit has not addressed the application of Title II to a high school athletic association, it has held that IHSA is a state actor for the purposes of 42 U.S.C. § 1983.").

¹³³ 531 U.S. 288, 288-305 (2001).

¹³⁴ William N. Eskridge Jr., *Relationships between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J. L. & PUB. POL'Y 21, 21 (1998) ("Functionalism, at least as an antipode, might be associated with standards or balancing tests that seek to provide public actors with greater flexibility.").

¹³⁵ See Peretti, *supra* note 79, at 314 ("Not only was the outcome different in *Brentwood Academy*, the Court there employed a much more flexible and fact-based approach.").

¹³⁶ *Id.* at 313-14 (There aren't "compelling functional reasons to protect the NCAA from being considered a state actor; there are numerous interdependencies between the state and the NCAA; and UNLV appears to have delegated its authority to the NCAA." Therefore, "[t]he Court was incorrect in its 1988 *Tarkanian* ruling that the NCAA is not a state actor.").

¹³⁷ See Otto & Stippich, *supra* note 132, at 245.

¹³⁸ See Collins, *supra* note 26 ("One camp of people 'don't agree with paying student-athletes and argue,' '[t]hey're getting a free education, room, and board,' 'that's all well and good,' said Adam Earnhardt," chair of communications at Youngstown State University. 'But, when you think about

temporal standpoint. The NCAA currently has no cases set on the Supreme Court's docket.¹³⁹ Additionally, the last antitrust appeal the Supreme Court received was from the Ninth Circuit in *O'Bannon v. NCAA*¹⁴⁰ where the Court denied certiorari.¹⁴¹ Currently, it seems more likely that the Court will refrain from addressing this issue and will leave it to be resolved through the democratic process. Many state legislatures have shifted their focus to the issue and the Court's recent denial of certiorari in *O'Bannon*, coupled with the absence of any other cases addressing the issue, evinces the Court's reluctance to be the first to act on the matter.

B. Athletes as Employees

A seemingly straight forward proposal is to designate all athletes as employees and simply pay them wages. This is not the first time the NCAA has faced this idea.¹⁴² But ideally, it should be the last.

One of the reasons courts often cite for denying student athletes employment compensation is their acceptance of the amateurism ideology.¹⁴³ However, in other contexts, many courts have completely repudiated this fabricated ideal.¹⁴⁴ So, why accept it in this case? "The courts and the NLRB are two possible fora for the ultimate determination of the viability of the tradition of amateurism in sports."¹⁴⁵ It is time for one of these fora to make this change.

Unfortunately, it seems as if the NCAA will do anything but call the athletes employees. Indeed, the effects of this would be monumental.¹⁴⁶ That is no reason to shy away from doing it. However, it just does not look to be possible. It simply goes against every policy the NCAA has and would utterly ruin the amateurism and professionalism divide it has been fighting to maintain.¹⁴⁷ It is for this reason that the matter will not be resolved in this way. The NCAA will never agree to pay the athletes directly.

how their talents and image are being used to potentially help their schools make multi-millions of dollars, that just doesn't equal out.").

¹³⁹ 2019-2020 Term, OYEZ, <https://www.oyez.org/cases/2019> (last visited Oct. 30, 2019).

¹⁴⁰ 802 F.3d 1049, 1049-79 (9th Cir. 2015).

¹⁴¹ *O'Bannon v. NCAA*, 137 S. Ct. 277, 277 (2016).

¹⁴² See *supra* text accompanying note 44.

¹⁴³ See Crabb, *supra* note 43, at 204 ("The NCAA did successfully get the Supreme Court in its *Board of Regents* dicta to support the notion of this 'revered tradition,' which was in turn perpetuated by the Seventh Circuit in the *Berger* case as the 'long tradition of amateurism.'").

¹⁴⁴ *Id.* ("[Many courts have not] accepted the notion that the tradition is culturally significant to the point that there is no room for change. For example, the NCAA and its member schools have seen an erosion in the viability of the legal footing of amateurism in sports in antitrust cases like *O'Bannon*.").

¹⁴⁵ *Id.*

¹⁴⁶ See McCormick & McCormick, *supra* note 3, at 79 ("We understand that legal recognition of some of these young men as 'employees' would carry profound implications for the NCAA, its member schools, and the future of major college sports.").

¹⁴⁷ *Amateurism And The Future Of The NCAA*, 3 MISS. SPORTS L. REV. 1, 39 (2013) ("If a university is paying you to play, that's a professional. To me that's the drawing line, whether it's a booster or the university, paying you to play for them, that's it. That violates amateurism.").

C. Endorsement Compensation

Perhaps the most plausible option is for the NCAA to allow athletes to profit off their name, image, and likeness. “The debate rages because the NCAA does not allow athletes to profit from their name, image and likeness. Ability to profit off those qualities is basically a birthright to every other U.S. citizen.”¹⁴⁸ There is no other (unemployed) group of people one can find, in the United States, that is not allowed to use their own image to profit.

1. Olympic Endorsement Model

The NCAA’s argument against the Olympic endorsement model, of course, is amateurism. It tries to equate the student athletes with the regular students.¹⁴⁹ However, that is not the problem. The problem is that all other students can partake in almost any commercial endeavor they want.¹⁵⁰ As Dr. Mark Nagel, an associate director at the University of South Carolina said, “[t]he irony . . . is that if you looked at just about any other student—and the NCAA claims that these players are just like any other student—students do internships, students do part-time jobs, students start YouTube channels.”¹⁵¹ Therefore, “[t]he idea . . . that . . . [they are] like any other student, but they can’t engage in commerce, . . . is pretty ironic.”¹⁵² Simply put, the NCAA’s stance is unfair and contradictory. If it can get past these baseless concerns, it could potentially be a great resolution. Romagi Huma, the executive director of the National Collegiate Players Association, agrees it would be beneficial to all. Huma remarked, “[f]irst of all, the NCAA can get rid of a legal problem, and they can simultaneously . . . get rid of a moral problem. The players can get rid of part of an economic problem and an equal rights problem.”¹⁵³

¹⁴⁸ See Dodd, *supra* note 107.

¹⁴⁹ See Piotrowicz, *supra* note 129 (“The NCAA previously has fought hard to maintain its educational model, whereby it insists that athletes are just like every other college student.”).

¹⁵⁰ *Id.* (“Other college students, however, face almost no restrictions to being paid while they are students. Business majors can start companies, art students may sell their work, and journalism students are encouraged to freelance.”).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

V. CONCLUSION

A change needs to be made.¹⁵⁴ And it is coming.¹⁵⁵ The NCAA has itself stated that there will be some sort of change within their system.¹⁵⁶ Many people are skeptical, however, about how serious the NCAA is taking it.¹⁵⁷ Will it even result in much of a change? Those same skeptics do not believe it will.¹⁵⁸ Much of the skepticism is due to the NCAA continuing to delay this process as much as possible.¹⁵⁹ “Happily, however, stall tactics are of limited utility against motivated adversaries with superior power.”¹⁶⁰ Stalling will not save them, because although they have a few years before these bills would become law, the laws are coming. And it would be in their best interest to come to a resolution before that, where it holds the power, on its own terms.¹⁶¹

¹⁵⁴ Tim Sullivan, *As NCAA changes image, likeness rule, the delaying will go until government intervenes*, USA TODAY (Oct. 30, 2019, 11:20 AM), <https://www.usatoday.com/story/sports/ncaaf/2019/10/30/ncaa-changes-names-image-likeness-rule-athletes-its-own-terms/4096410002/> (“There’s no question the legislative efforts in Congress and various states has been a catalyst to change,” NCAA President Mark Emmert stated . . . ‘It’s clear that schools and the presidents are listening and have heard loud and clear that everyone agrees this is an area that needs to be addressed.’”).

¹⁵⁵ *Id.*

¹⁵⁶ Ganesh Setty & Jabari Young, *The NCAA will allow athletes to profit from their name, image and likeness in a major shift for the organization*, CNBC, <https://www.cnbc.com/2019/10/29/ncaa-allows-athletes-to-be-compensated-for-names-images.html> (last updated Oct. 29, 2019, 6:22 PM) (“The NCAA is embracing ‘change’ and starting the process of allowing student-athletes to profit off of their name, image and likeness, the organization announced Tuesday.”).

¹⁵⁷ Billy Witz, *NCAA Considers Loosening Rules for Athletes Seeking Outside Deals*, N.Y. TIMES (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/sports/ncaaf/ncaa-football/ncaa-athlete-pay.html?emc=rss&partner=rss> (“Nancy Skinner, a California state senator and an author of the bill that was signed into law last month, said she was cautiously optimistic about the NCAA’s move. ‘The devil is in the details,’ Skinner said . . . ‘We’ll have to see what the N.C.A.A. actually has in mind.’”).

¹⁵⁸ See Sullivan, *supra* note 154 (“Shoved against the wall by legislation, lawsuits and evolving public opinion, the NCAA would nonetheless have us think it is backing down out of benevolence. That is not the case, however, as ‘[i]t is, of course, a crock.’ This is because the extent of their change is unknown and they are ‘not doing so because of inalienable rights or because it’s the right thing to do but because the organization’s heavy hand has been forced by the law, by lawmakers and by the inexorable tide of history.’”).

¹⁵⁹ Sullivan, *supra* note 154 (“Even now, as federal and state governments prod the organization toward meaningful reforms, foot-dragging continues to frustrate measures that properly belong on the fast track.”); see also Collins, *supra* note 26 (“Comments from the NCAA suggest that the organization agrees, albeit grudgingly, with Gov[ernor] Newsom when he says that, ‘Reform is coming.’ But it would prefer that change comes slowly.” The NCAA knows they cannot face this head on, therefore, “[t]he NCAA’s endgame is to slow this down because they can’t stop it over the long haul with the way the winds are currently blowing,” said David Carter, executive director of the Marshall Sports Business Institute at the University of Southern California.”).

¹⁶⁰ Sullivan, *supra* note 154.

¹⁶¹ *Id.* (“Should it fail to move fast or far enough, the NCAA would risk losing some of its self-governing authority to politicians.”); see also Dennis Dodd, *NCAA seeks federal assistance from Congress on name, image and likeness rules*, CBS (Dec. 12, 2019, 5:00 pm), <https://www.cbssports.com/college-football/news/ncaa-seeks-federal-assistance-from-congress-on-name-image-and-likeness-rules/> (The good news, however, is that the NCAA and their officials are beginning to take the matter more seriously. “NCAA president Mark Emmert told reporters Wednesday that he had met with representatives of the U.S. House of Representatives and Senate to

The Olympic Model, or a model of similar form, is most appropriate. It not only gives student athletes a way to make money on their own terms, but it also allows the NCAA to maintain total control. It can regulate it how it deems fit and maintain the role of boss where it can supervise everyone involved. More importantly, the NCAA can still withhold its most prized possession, amateurism.¹⁶²

Furthermore, and as an added bonus, the NCAA does not have to pay for it and neither does its universities. “Given the billions its member schools generate through sports, and that . . . payments would presumably come from third parties and not university funds, this would be a bad time to misread the room.”¹⁶³

With the government and media breathing down its neck, the NCAA should be looking for a quick, and more importantly, a fair fix. Thus, it should implement a model that is already established and successful. The Olympic Model is the best bet.

discuss federal legislation on name, image and likeness. That is significant because, for decades, the NCAA has fought federal legislation on several fronts.”)

¹⁶² Sullivan, *supra* note 154 (“Tuesday’s unanimous vote to allow athletes’ [Name, Image, and Likeness] rights was conditioned on those rights being exercised ‘in a manner consistent with the collegiate model.’”); *see also* Setty & Young, *supra* note 156 (“The decision is a major shift for the NCAA, which had historically been steadfast in prohibiting college athletes from being paid, in order to preserve its amateurism rules.”).

¹⁶³ Sullivan, *supra* note 154.