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FEDERAL LEGISLATION STILL HAS A ROLE TO PLAY IN THE FIGHT FOR STUDENT-ATHLETE COMPENSATION

*Brandon Beyer**

INTRODUCTION

The signing ceremony of California Senate Bill No. 206 (“SB 206”) was not your typical administrative event. On the set of HBO’s *The Shop*, Governor Gavin Newsom was seated alongside professional basketball superstars LeBron James and Diana Taurasi as he placed his signature at the bottom of the legislation on September 30, 2019.¹ The unique scene of the statute’s enactment was a testament to the high hopes of its broader implications, the potential effects of which stretched far beyond the borders of the state where it was now signed into law.

SB 206, better known as the Fair Pay to Play Act, represents the most prominent attack against the National Collegiate Athletic Association’s (“NCAA”) prohibition against compensation for college athletes.² The legislation prohibits all California four-year colleges and universities from denying their student-athletes the opportunity to earn compensation for their identities.³ The law directly contradicts the NCAA’s long-standing rules, setting the stage for an inevitable legal battle to determine the state law’s legitimacy.

However, proponents of the Fair Pay to Play Act are hoping that its passage represents something much greater than a single state’s effort to compensate college athletes. The law is a testament to growing national public sentiment calling for student-athletes’ ability to receive compensation for the use of their identity. SB 206 has inspired lawmakers in several states to draft and introduce their own versions of the Fair Pay to Play Act. The collective actions of these various state legislators have illustrated an appetite for student-athlete compensation that spans throughout the nation. Nonetheless, even at the very early stages of these efforts, the disparate treatment among states over how college athletes should be compensated foreshadows roadblocks to the potential widespread implementation of laws similar to the new California legislation. If such laws are enacted, the practical result would be divergent systems of athlete compensation among the states.

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¹ See *The Shop: Uninterrupted, Gavin Newsom signs California's 'Fair Pay to Play Act' with LeBron James & Mav Carter*, YOUTUBE (Sept. 30, 2019), <https://www.youtube.com/watch?v=7bfBgjxVgTw>.

² See CAL. EDUC. CODE ANN., § 67456 (West 2019).

³ See *id.* at § 67456(a)(1).

As a national organization, the NCAA operates on a broader level than sovereign states, and its challenge to state laws—such as SB 206—can hinge upon its ability to operate interstate. In order to achieve the goals behind this wide-spread initiative, the interstate nature of collegiate athletics demands a federal solution for the ability of players to be compensated for use of their identity.

It is clear that California's initial push has succeeded in building national momentum against the NCAA's ban on college athletes being paid for use of their name, image, and likeness. On October 29, 2019, the initiative for change received the news that it had longed for: the NCAA's top governing board voted unanimously to begin the process to permit students participating in collegiate athletics the opportunity to benefit from the use of their name, image, and likeness.⁴ While the announcement was cause for celebration, cautious optimism quickly swept over those who had long advocated for such a change. This skepticism is rooted in the fact that the NCAA fought long and hard before conceding to the swelling calls of the public and legislators across the country. With the amendments to these policies left in the hands of the NCAA, the organization retains control of the implementation of player compensation in collegiate sports.

If the objectives of the name, image, and likeness (“NIL”) compensation effort are entrusted to the very organization that had long opposed its calls for change, it is clear that the NCAA requires a check to such unilateral control of these policies. This Note will argue that Congress should introduce legislation as a strategic safety measure to ensure the goals of this successful movement will be sufficiently achieved. Congress should utilize the statutes currently being drafted, introduced, and enacted at the state level as models to develop an interstate solution to an issue that requires national treatment. By introducing a federal legislative proposal, Congress can ensure that the NCAA employs policies that would safeguard the intentions of the public advocates, student-athletes, and state legislators who led the NCAA to concede its opposition and prevent the NCAA from eluding the goals behind the resounding calls for change.

Part I of this Note will give a brief overview of the history behind the NCAA's policies regarding player compensation—both direct and indirect—and the legal issues related to amateurism in collegiate sports. Part II will then address the public movement against the NCAA's amateurism policies, the subsequent state and federal legislative proposals on the issue, the NCAA's response to these various proposals, and the current state of the situation. Part III will analyze the statutory language of the various legislative proposals—specifically comparing SB 206 to other state proposals, the issue of collective bargaining, and the need for precautionary federal legislation to assure that the NCAA properly implements its announced policy in accordance with public demand.

⁴ NAT'L COLLEGIATE ATHLETIC ASS'N, *Board of Governors starts process to enhance name, image and likeness opportunities*, NCAA (October 29, 2019 1:08 PM), <http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities>.

I. THE HISTORY BEHIND THE NCAA'S PROHIBITION ON PLAYER COMPENSATION

A. BACKGROUND

The National Collegiate Athletic Association (“NCAA”) is a voluntary association of over 1,117 universities.⁵ Nearly half a million college athletes participate in sixteen sports across three separate divisions (Division I, II, and III).⁶ The organization was initially formed in late-1905 to centralize the safety protocols of college sports.⁷ In that year alone, eighteen student-athletes were killed and 149 were seriously injured playing football, prompting a public outcry to either reform the sport or discontinue it altogether.⁸ At the direction of President Theodore Roosevelt, collegiate athletics leaders formed the Intercollegiate Athletic Association of the United States (“IAAUS”), which later adopted today’s moniker, the NCAA.⁹

While at first it merely served as a discussion group and rule-making body for individual sports, the NCAA quickly expanded its role in collegiate athletics. The NCAA began hosting national championships for sports in 1921 and began administering women’s athletic programs in 1980.¹⁰ Through these developments, the “voluntary” membership of its participating universities has arguably become compulsory in order for a school to retain its relevance and ability to participate in conferences, tournaments, and bowl games.¹¹

Undoubtedly, the NCAA’s most controversial evolution occurred in 1952 when it established enforcement mechanisms for its member institutions.¹² The NCAA’s enforcement mechanisms allowed for the important preservation of classifying college athletes as amateurs.¹³ Over time, the NCAA has developed the definition of

⁵ NAT’L COLLEGIATE ATHLETIC ASS’N, *What is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Mar. 3, 2020).

⁶ Each of the three divisions has its own rules. The institutions are divided into the divisions based upon the size of their athletic budgets and competitiveness. See Christopher L. Chin, *Illegal Procedures: The NCAA’s Unlawful Restraint on the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1216 (1993). Division I and Division II schools can offer scholarships and financial aid based upon athletic ability. However, Division III schools, the least competitive among the three, have mutually elected to not grant such assistance. See NCAA, 2019-20 NCAA DIVISION III, MANUAL Art. 15.01.3 (2019).

⁷ See *History*, ABOUT THE NCAA (Nov. 8, 2010), <https://web.archive.org/web/20110807060521/http://www.ncaa.org/wps/wcm/connect/public/ncaa/about%2Bthe%2Bncaa/who%2Bwe%2Bare/about%2Bthe%2Bncaa%2Bhistory>.

⁸ WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 38 (1995).

⁹ NAT’L COLLEGIATE ATHLETIC ASS’N, 1995 THE NCAA 7 (1955).

¹⁰ NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 4.

¹¹ See Charles Barrowman III, *Can Congress Play Ball?: Congressional Power to Implement and Enforce Pay-for-Play among Student-Athletes*, 18 U. DENV. SPORTS & ENT. L.J. 111 (2015). The NCAA assists its member universities in providing collegiate athletes with various expenses—including housing, travel, tutoring, graduate test fees, and more—through the Student Assistance Fund. In 2013, the NCAA distributed more than \$73.5 million to its conferences’ member institutions. See *id.* The NCAA’s conference and national championships further cemented its monopoly power over collegiate athletics. By rewarding the academic institutions participating in these championships, the NCAA further incentivized institutions to join its conference and divisional structure.

¹² NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 9, at 13.

¹³ See Jeff K. Brown, *Compensation for the Student-Athlete: Preservation of Amateurism*, 5 KAN. J.L. & PUB. POL’Y 147, 148 (1995).

“amateur” as a series of prohibited actions for college athletes.¹⁴ By maintaining amateur status, students participating in college sports are precluded from receiving funds, awards, or benefits that are not permissible under NCAA policies, including direct compensation for participation or financial aid above the university’s cost of attendance.¹⁵

B. LEGAL ISSUES

The NCAA’s preservation of amateurism has not gone legally uncontested. Its case law is guided mostly by dicta from the Supreme Court’s decision in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*.¹⁶ In that case, the Court emphasized the importance of college sports being classified as amateur in order to distinguish its character and academic tradition from comparable professional sports.¹⁷ Lower courts have followed this guidance, giving the NCAA “ample latitude” to maintain the amateur classification.¹⁸ The NCAA quickly responded to this judicial interpretation by replacing the use of words such as “players” and “athletes” with the term “student-athletes.”¹⁹ The NCAA’s emphasis on competitors being students buttressed their amateur status and further rejected the notion that they could receive any type of employment-like compensation.

In response to further legal challenges, the NCAA continued to reinforce the concept of student-athletes as amateurs. In *Van Horn v. Industrial Accident*

¹⁴ See NCAA, 2019–20 NCAA DIVISION I, MANUAL Art. 12.1.2 (2019).

An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (Revised: 4/25/02 effective 8/1/02, 4/23/03 effective 8/1/03,

4/29/10 effective 8/1/10)

- (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport;
- (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
- (c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw 12.2.5.1;
- (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations;
- (e) Competes on any professional athletics team per Bylaw 12.02.12, even if no pay or remuneration for expenses was received, except as permitted in Bylaw 12.2.3.2.1;
- (f) After initial full-time collegiate enrollment, enters into a professional draft (see Bylaw 12.2.4); or
- (g) Enters into an agreement with an agent.

¹⁵ See Brown, *supra* note 13, at 149.

¹⁶ 468 U.S. 85 (1984).

¹⁷ *Id.* at 102.

¹⁸ McCormack v. Nat’l Collegiate Athletic Ass’n, 845 F.2d 1338 (5th Cir. 1988); *see also* Banks v. Nat’l Collegiate Athletic Ass’n, 977 F.2d 1081 (7th Cir. 1992).

¹⁹ See BYERS, *supra* note 8, at 69-76, 371-72; *see also* MURRAY SPERBER, ONWARD TO VICTORY: THE CRISES THAT SHAPED COLLEGE SPORTS 445-46 (1998).

Commission, the California Court of Appeals held that a college athlete could have a contract of employment where a scholarship served as compensation for athletic services.²⁰ The NCAA again responded, encouraging its member institutions to use language in their athletic grant-in-aid forms that emphasized principles of amateurism and the student status of participating athletes.²¹

The NCAA's development of notions of amateurism and student-athlete status largely revolved around the prohibition of players receiving employment compensation and benefits directly from its member universities. However, for much of the organization's history, legal precedent had left the NCAA's prohibition on player's receiving compensation for the use of their name, image, or likeness untouched. Not only did this additional preclusion bar college athletes from a share of revenue generated by the NCAA or colleges utilizing student-athletes' identities, it also prevented players from acquiring endorsements and advertising deals from third parties.

In 2009, this restriction finally met legal scrutiny in *O'Bannon v. NCAA*, a case in federal court. The plaintiffs, comprised of current and former college student-athletes, claimed that the NCAA violated the Sherman Antitrust Act by preventing players from receiving a portion of the revenue the Association and its member schools earn from "the sale of licenses to use the student-athletes' names, images, and likeness in video games, live game telecasts, and other footage."²²

The Northern District of California found in favor of the plaintiffs, holding that the NCAA's compensation rules were an unlawful restraint on trade and enjoined the association from prohibiting its member schools from awarding up to \$5,000 per year in deferred compensation.²³ *O'Bannon* was the first federal court decision to strike down any aspect of the NCAA's amateurism rules in violation of antitrust laws, and certainly the first to mandate by injunction that the Association change its practices.²⁴

On appeal, the Ninth Circuit limited the scope of the district court decision. While affirming that the NCAA's amateurism rules are not exempt from antitrust scrutiny—to be analyzed under the "rule of reason"—it rejected the lower court's finding that allowing students to be paid compensation for their NILs is virtually as effective as the NCAA's current amateur-status rule.²⁵ The court reasoned that the NCAA's preservation of amateurism was of the utmost importance, and that the ability for

²⁰ See *Van Horn v. Indus. Accident Comm'n*, 219 Cal. App. 2d 457, 464 (Cal. Ct. App. 1963).

²¹ See Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: the College Athlete as Employee*, 81 WASH. L. REV. 71, 85-86 (2006).

²² *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 962 (N.D. Cal. 2014).

²³ See *id.* at 1008.

²⁴ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1053 (9th Cir. 2015).

²⁵ The rule of reason test is the presumptive standard for a Sherman Act claim alleging restraint on trade. Under this standard, a defendant's restraint on competition violates the test if the practice's harm to competition outweighs its procompetitive effects. Courts typically analyze this balancing standard under a burden-shifting framework, requiring the plaintiff to show the restraint produces significant anticompetitive effects within a relevant market before turning to the defendant to produce evidence of the restraint's procompetitive effects. If it reaches this point, the court will only find against the restraint if the plaintiff shows that any legitimate objectives can be achieved in a substantially less restrictive manner. See *O'Bannon*, 7 F. Supp. 3d at 985.

students to collect cash compensation was in direct contradiction with maintaining this status.²⁶

The Ninth Circuit refused to address whether participants in live TV broadcasts of sporting events have enforceable rights of publicity or whether players are injured by the NCAA's current licensing arrangement for archival footage.²⁷ Instead, it concluded that the plaintiffs had shown that the NCAA's rules foreclosing the market for their NILs in video games made by third parties resulted in an injury in fact.²⁸

The *O'Bannon* effect was to essentially bookend the legal argument for the NCAA's prohibition on player compensation for their NIL. The case further solidified the NCAA's argument to retain amateur status for collegiate athletics, foreclosing legal challenges to its restriction on indirect player compensation. From a legal standpoint, the NCAA's regulations against any and all player compensation held sound following *O'Bannon*. Nevertheless, despite this judicial ruling, the NCAA's policies regarding player compensation soon met opposition from an aspect of society wherein final judgments are much harder to come by.

II. THE PUBLIC CAMPAIGN FOR CHANGE AND THE NCAA'S RESPONSE

A. THE COURT OF PUBLIC OPINION

Had the challenges to the NCAA's restrictions on player compensation been restricted to the judicial system, collegiate athletics were all but assured to remain in the confines of amateurism. However, the court of public opinion has increasingly come to reflect broad support for some compensation for college athletes. The shift in opinion was also swift and dramatic, leaving the NCAA to fight the battle over player compensation on a front that had previously been nonexistent.

A Gallup poll conducted in 2001 showed that three out of four Americans opposed paying college athletes anything beyond the scholarships they were receiving.²⁹ Public

²⁶ *O'Bannon*, 802 F.3d at 1076.

We cannot agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both equally effective in promoting amateurism and preserving consumer demand. Both we and the district court agree that the NCAA's amateurism rule has procompetitive benefits. But in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs*.

²⁷ *See id.* at 1067.

²⁸ *See id.* At the time of *O'Bannon*, the NCAA had terminated its relationship with Electronic Arts ("EA"), the video game maker granted the ability to use college athletes' NIL by the NCAA. The NCAA asserted that it had no intent to license its intellectual property for use in video games in the future. However, the court placed no weight on that assertion, stating that it was not clearly erroneous for the lower court to conclude that the NCAA may well begin working with EA or another video game company in the future.

²⁹ Mark Gillespie, *March Madness in Minneapolis Makes Many Hoops Fans Merry*, GALLUP (Mar. 30, 2001), <https://news.gallup.com/poll/1852/March-Madness-Minneapolis-Makes-Many-Hoops-Fans-Merry.aspx>. The Gallup poll also showed that only twenty-one percent of Americans would favor paying college athletes anything in addition to the scholarships they were receiving. Moreover, seventy-seven percent of respondents stated that they would be opposed to any protests over the issue that would involve a boycott of the NCAA basketball tournament, which was beginning at the time of the survey, to draw attention to the issue of paying college athletes.

perception changed little over the coming years,³⁰ but fringe efforts to combat the NCAA's regulations began to crop up in the corners of a few state legislatures.³¹ However, public opinion began to shift as *O'Bannon* was being litigated. Polls by Seton Hall and Marist College in late 2011 and early 2012 respectively, showed that attitudes on the issue revealed a shrinking majority of Americans were still opposed to player compensation.³²

However, many of these polls asked respondents if college-athletes should receive stipends beyond their school's cost of attendance. *O'Bannon* assisted in drawing a distinction between player stipends and players being able to capitalize on their NIL through merchandise and advertising contracts. This distinction proved to be vital in the eyes of the public. A 2014 Reason-Rupe poll showed that sixty-four percent of Americans believed that student-athletes should receive money if a college or company sells gear containing their likeness or jersey number.³³ The 2017 Seton Hall survey showed that while sixty percent of Americans still felt providing a scholarship was sufficient for college-athletes, only forty-five percent of respondents felt that student-athletes should not share in TV revenue, or receive a salary for participating in the NCAA March Madness tournament.³⁴

³⁰ A 2003 USA Today polling showed that seventy-two percent of Americans were still opposed to paying college athletes beyond their school's cost of attendance. While this number was down slightly from the previous year's result of seventy-two percent, the figure remained within the margin of error. See USA TODAY, *Poll: 72% say athletes should not be paid* (Feb. 28, 2003, 3:05 AM), http://usatoday30.usatoday.com/sports/college/2003-02-28-notes_x.htm.

³¹ See *id.* In 2003, Nebraska state senator Ernie Chambers introduced his second legislative attempt for University of Nebraska football players to be issued a stipend. The bill was meant to spark a national conversation about paying college athletes, as it would only go into effect if three other states in the Big 12 Football Conference passed similar legislation. With public opinion still resoundingly adverse to Chambers' efforts, the movement sputtered with little momentum beyond the borders of Nebraska. His efforts on the issue may finally be coming to a head after all these years. Senator Chambers, at eighty-two years old and now Nebraska's longest-serving state senator, introduced Nebraska's version of the Fair Pay to Play Act as part of this year's momentous push by state legislatures across the country for college athlete compensation. See Van Jensen, *For love or money*, THE DAILY NEBRASKAN (FEB. 20, 2003), http://www.dailynbraskan.com/for-love-or-money/article_e4338184-3fea-5b24-bea0-5d975ec9faea.html.

³² See Rob Gloster, *College Athletes Shouldn't Be Paid for Playing Sports, Poll Says*, BLOOMBERG (Sept. 23, 2011, 12:00 AM) <https://www.bloomberg.com/news/articles/2011-09-22/college-athletes-shouldn-t-get-salary-for-playing-seton-hall-survey-finds>; see also MARIST POLL, 3/29: *Majority Thinks Colleges Break NCAA Rules . . . Most Say Only Scholarships for Athletes* (Mar. 29, 2012), <http://maristpoll.marist.edu/329-majority-thinks-colleges-break-ncaa-rules%E2%80%A6most-say-only-scholarships-for-athletes/#sthash.41eVjeQd.dpbs>. The 2011 Seton Hall survey showed that two-thirds of people believed that student-athletes should be paid a salary to participate in intercollegiate sports. The survey's timing is noteworthy, as it came on the heels of the NCAA beginning investigations into the University of Miami's possible payment to dozens of athletes and Ohio State football players selling memorabilia for their own profit. Subsequent polling by Marist College continued to show that roughly two-thirds of people remained opposed to the idea of compensating student athletes.

³³ Alexis Garcia, *Poll: Americans Say College Basketball Players Deserve Share of NCAA's TV Money and Merchandise Sales*, REASON-RUPE (Apr. 3, 2014, 11:50 AM), <https://reason.com/2014/04/03/poll-americans-support-giving-college-ba/>. The Reason-Rupe poll also showed that half of Americans believed that college basketball players should share in NCAA's \$700 million television revenue from the annual March Madness tournament. *Id.*

³⁴ Marty Appel, *Seton Hall Sports Poll on NCAA Tournament and Student-Athlete Pay* (Mar. 30, 2017), <https://www.shu.edu/business/news/sports-poll-on-ncaa-basketball-players-and-tournament.cfm>. The Seton Hall poll also showed a generational divide on the issue, as individuals ages eighteen to forty-four were much more likely to believe that students were being exploited than those over the age of forty-five. *Id.*

Buttressed by *O'Bannon*, the distinction between a direct payment stipend being provided to players and their ability to capitalize on the use of their NIL showed a window of opportunity for advocates of change. Unlike a stipend, NIL rights would not reallocate money away from other college students or cost taxpayer dollars. Instead, NIL rights would open the door for merchandise and advertising sales of third parties, who would be able to voluntarily capitalize on the privilege of using college-athletes' identities.

B. THE MOVEMENT BY STATES

With this distinction drawn, it seemed only to be a matter of time before state legislatures took action responding to this new public outlook. The movement eventually found its inception in California, a progressive state with a staggering twenty-five institutions participating in Division I Athletics alone and 24,000 college-athletes across all three NCAA divisions.³⁵ State Senators Nancy Skinner and Steve Bradford introduced Senate Bill 206 (“SB-206”), the Fair Pay to Play Act, in February 2019, which proposed to prohibit any of the state’s universities from denying their student-athletes the ability to profit from their NIL.³⁶ The legislation moved through committees with little resistance and passed by unanimous support through both houses of the state legislature in September 2019.³⁷ The bill was subsequently signed into law by Governor Gavin Newsom at the end of that very month.³⁸

The ultimate ambitions behind California’s Fair Pay to Play Act are much greater than a desire to promptly change the compensation status of Californian student-athletes. In fact, the statute’s provisions do not become operative until 2023.³⁹ Instead, SB-206 was intended to kickstart a national movement toward demanding college-athletes the right to capitalize on their NIL rights. This intention is evidenced by Governor Newsom’s statements made while signing the bill:

Maverick Carter, *Lebron James’s Business Manager*: “When you put pen to paper right now, what’s this going to change, and what’s this going to do?”

³⁵ NAT’L COLLEGIATE ATHLETIC ASS’N, *Division I Schools*, NCAA, <http://www.ncaa.org/about/division-i-schools> (last visited Mar. 3, 2020); *see also* NAT’L COLLEGIATE ATHLETIC ASS’N, *NCAA responds to California Senate Bill 206*, NCAA (Sept. 11, 2019, 10:08 AM), <https://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206>.

³⁶ CAL. EDUC. CODE ANN. § 67456 (West 2019). *See* CALIFORNIA LEGISLATIVE INFORMATION, *SB-206 Collegiate athletics: student athlete compensation and representation* (2019), https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200SB206; *see also* Michael McCann, *California’s New Law Worries the NCAA, but a Federal Law Is What They Should Fear*, SPORTS ILLUSTRATED (Oct. 04, 2019), <https://www.si.com/college-football/2019/10/04/ncaa-fair-pay-to-play-name-likeness-image-laws>. Sports Illustrated even gave SB-206 the moniker the “Ed O’Bannon law,” due to its close inspiration based on the successful case brought forward by the former NBA player and UCLA basketball star.

³⁷ *See* CALIFORNIA LEGISLATIVE INFORMATION.

³⁸ *See id.*

³⁹ CAL. EDUC. CODE ANN. § 67456 (West 2019).

Governor Newsom: “It’s going to initiate dozens of other states to introduce similar legislation, and it’s going to change college sports for the better by having now the interest, finally, of the athletes on par with the interests of the institutions.”⁴⁰

The predictions of Governor Newsom and those behind the Fair Pay to Play Act were realized nearly instantaneously. Within a matter of days, lawmakers in other states such as Colorado, Florida, Illinois, Kentucky, Minnesota, Nevada, New York, Pennsylvania, and South Carolina had each begun the process of drafting and introducing their own versions of SB-206 into their respective state legislatures.⁴¹ The speed of the movement was staggering, rebuking any notion that this initiative was destined to meet the same ends as similar, albeit isolated, efforts for student-athlete compensation in previous decades.

While impressive in its ability to span across dozens of states, the movement to enact legislative proposals quickly shifted from expanding across the country to creating uniformity among the numerous state proposals. While each state signified a complementary effort to advance the goal of NIL compensation for student-athletes, the statutes being introduced in these disparate legislatures were not consistent, therefore setting up the NCAA’s traditional legal argument that collegiate sports require a national standard.

C. THE NCAA’S RESPONSE

The NCAA was not completely blindsided by the legislative efforts occurring at the state levels. In May 2019, the NCAA had announced that a Federal and State Legislation Working Group would examine issues highlighted in recently proposed federal and state statutes related to student-athlete NIL rights.⁴² The working group was charged with producing a set of Association-wide principles to provide each division guidance for a consistent approach on legislation related to NIL payments.⁴³ By creating a working group to address these legislative proposals, early supporters believed the NCAA was looking to keep the ball in its court, so to speak, by dictating how the organization considered modifications to their current policies.⁴⁴ This concern was prompted by the belief that, even at the time of its creation, the working group’s

⁴⁰ The Shop: Uninterrupted, *supra* note 1.

⁴¹ See McCann, *supra* note 36.

⁴² See Michelle Brutlag Hosick, *NCAA working group to examine name, image and likeness*, NCAA (May 14, 2019, 2:40 PM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-working-group-examine-name-image-and-likeness>.

⁴³ NAT’L COLLEGIATE ATHLETIC ASS’N, *NCAA BOARD OF GOVERNORS FEDERAL AND STATE LEGISLATION WORKING GROUP*, available at https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/BOG_FederalStateLegWGFINAL.pdf (last visited Nov. 21, 2019).

⁴⁴ See Terry Collins, *NCAA’s Ruling on College Athletes Getting Paid Is Still ‘Smoke and Mirrors,’ Experts Say*, FORTUNE MAGAZINE (Oct. 30, 2019, 7:35 PM), <https://fortune.com/2019/10/30/ncaa-decision-college-athletes-pay/>.

directives seemed at odds with the desires of those initiating legislative proposals to address the issue of NIL rights for student-athletes.⁴⁵

The diverse effects of each state's statute also played to the advantage of the NCAA. As a national organization running an interstate operation, the NCAA requires uniformity among states for a cohesive system of college athletics. As a legal argument, this plea for comity among states is not novel by the NCAA. For example, in *National Collegiate Athletic Association v. Miller*, the NCAA was successful in seeking injunctive relief to rule a Nevada statute as a *per se* unconstitutional violation of the commerce clause because it required the NCAA to provide additional procedural due process protections in enforcement proceedings against the state's universities.⁴⁶ Unquestionably, the NCAA's legal challenges to subsequent state laws, such as California's Fair Pay to Play, would center around its historically successful argument that collegiate athletics is a product of interstate commerce inherently requiring a uniform national standard.

D. FEDERAL PROPOSALS

As an alternative to state-led initiatives, there have been signs of efforts to introduce legislation at the federal level. Notably, Congressman Mark Walker (R-NC) has introduced House Resolution 1804, known as the "Student-Athlete Equity Act."⁴⁷ The Act, which has bipartisan co-sponsorship, would amend the Internal Revenue Code to remove a corporate exemption for student-athletes' ability to profit off their name, image, or likeness.⁴⁸ In effect, this would force the NCAA to either pay significantly more in taxes or allow student-athletes to earn NIL compensation.⁴⁹ While more succinct than California's Fair Pay to Play Act, Congressman Walker's bill illustrates the effectiveness of federal legislation. Unlike individual state statutes

⁴⁵ See *id.* The NCAA's press release announcing the working group, while a positive step toward achieving the goal of NIL compensation for student-athletes, contained language that seemed to be an attempt at mitigating its potential outcomes. For example, the press release noted that part of the working group's charge was to determine whether players' NIL payments "would be achievable and enforceable" and "whether this would be plausible in keeping with the Association's mission." This language mirrored much of the legal arguments that the NCAA had brought forth over the decades in defending its amateur status. *Id.*

⁴⁶ See *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993).

Nevada is not the only state that has enacted or could enact legislation that establishes procedural rules for NCAA enforcement proceedings. Florida, Illinois, and Nebraska have also adopted due process statutes and similar legislation has been introduced in five other states. Those statutes could easily subject the NCAA to conflicting requirements. For example, suppose that state X required proof of an infraction beyond a reasonable doubt, while state Y only required clear and convincing evidence, and state Z required infractions to be proven by a preponderance of the evidence. Given that the NCAA must have uniform enforcement procedures in order to accomplish its fundamental goals, its operation would be disrupted because it could not possibly comply with all three statutes. Nor would it do to say that it need only comply with the most stringent burden of persuasion (beyond a reasonable doubt), for a state with a less stringent standard might well consider its standard a maximum as well as a minimum. The serious risk of inconsistent obligations wrought by the extraterritorial effect of the Statute demonstrates why it constitutes a *per se* violation of the Commerce Clause. *Id.*

⁴⁷ H.R. 1804, 116th Cong. (2019).

⁴⁸ See *id.*

⁴⁹ See McCann, *supra* note 36.

attempting to replicate California's initiative, the Student-Athlete Equity Act amends the federal tax code to force the NCAA's hand on a national level.

A separate federal approach is being pursued by Congressman Anthony Gonzales (R-OH), who was a wide-receiver at Ohio State and went on to play in the National Football League.⁵⁰ Congressman Gonzalez's intention is to introduce a bill with greater "guardrails" than its counterpart from Congressman Walker.⁵¹ Congressman Gonzalez believes that a national approach is necessary for giving college athletes the opportunity to make endorsement money.⁵² Further, he is unsatisfied with California's delayed implementation of the Fair Pay to Play Act, stating, "I actually think that we need to do something quickly, within the next year. I don't think you have three years to figure this out. I think decisions will start happening immediately."⁵³ Congressman Gonzalez is also confident in his ability to achieve bipartisan support on his proposal.⁵⁴

Lastly, Senator Mitt Romney (R-UT) has expressed his interest in pursuing NIL compensation legislation.⁵⁵ Senator Romney participated in a roundtable discussion with other politicians and advocates of the player compensation movement.⁵⁶ In an interview with ESPN, Senator Romney said he was committed to finding a better way to compensate college athletes and that he would spend time to gather perspectives on how to best move forward.⁵⁷ In as many words, he stated, "The reality is Congress is going to act. We're coming for you [referring to the NCAA]."⁵⁸

Irrespective of the nuances of each federal proposal, it is clear that there is an appetite in Congress for a federal approach to student-athlete compensation. The NCAA recognized this fact when establishing the Federal and State Legislation Working Group.⁵⁹ While state legislative efforts, such as the Fair Pay to Play Act, are in more mature stages of their enactment process, industry commentators have argued that a federal approach is the more appropriate vehicle to deliver NIL rights to college athletes.⁶⁰

E. CALIFORNIA AND THE CURRENT STATE OF THE NCAA'S POLICIES

⁵⁰ See *id.*

⁵¹ See *id.*; Dan Murphy, *Congressman to propose federal legislation for paying college athletes*, ESPN (Oct. 2, 2019), https://www.espn.com/college-sports/story/_/id/27751454/congressman-propose-federal-legislation-paying-college-athletes.

⁵² See *id.*

⁵³ *Id.*

⁵⁴ See *id.*

⁵⁵ Dan Murphy, *House, Senate members drum up support for compensating college athletes*, ESPN (Oct. 19, 2019), https://www.espn.com/college-sports/story/_/id/27862466/house-senate-members-drum-support-compensating-college-athletes.

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ *Id.*

⁵⁹ See Brutlag Hosick, *supra* note 42. Most obviously, the title of the working group is "NCAA Board of Governors Federal and State Legislation Working Group." The first few sentences in the Working Group's charge state that "Federal and state legislators have introduced legislation about student-athletes' ability to license and benefit from their name, image and likeness during their period of NCAA eligibility."

⁶⁰ See McCann, *supra* note 36.

Due to the various efforts at different legislative levels, it is likely that the NCAA's capitulation to these disparate movements for student-athlete compensation is not monocausal. However, it would appear that California's ratification of the Fair Pay to Play Act was the straw that broke the camel's back.⁶¹ Prior to the signing of the bill, the NCAA sent a letter to Governor Newsom imploring him not to ratify the piece of legislation.⁶² In the letter, which was also posted on their website, the NCAA Board of Governors stated they believed the Fair Pay to Play Act was an unconstitutional upending of the college sports model.⁶³ Instead, they advocated for a national standard to maintain the "essential element of fairness and equal treatment that forms the bedrock of college sports."⁶⁴ In a USA TODAY interview, Ohio State President and Chairman of the NCAA Board of Governors, Michael Drake, stated that SB-206 raised constitutional challenges that could be legally challenged if it went into law.⁶⁵

Nevertheless, Governor Newsom signed the bill with the knowledge that it could serve as the catalyst for a national conversation.⁶⁶ Although the enforcement of the Fair Pay to Play Act was delayed until 2023, the NCAA is now in the position of either legally challenging the law or facing an effective expiration date for its prohibition on its restrictions against student-athlete NIL compensation. As previously stated, the Fair Pay to Play's intentions were realized nearly instantaneously across several state legislatures. These disparate pieces of legislation magnified the difficulty of the NCAA's legal challenges to these statutes.

Just weeks after claiming that legislation such as the Fair Pay to Play Act was unconstitutional, the NCAA's Board of Governors voted unanimously to begin the process of enhancing name, image, and likeness opportunities for student-athletes.⁶⁷ In the press release announcing the decision, Chairman Drake stated,

Additional flexibility in this area can and must continue to support college sports as a part of higher education. This modernization for the future is a natural extension of the numerous steps NCAA members have taken in recent years to improve support for student-

⁶¹ See Steve Almasy, Wayne Sterling, and Angela Barajas, *NCAA says athletes may profit from name, image and likeness*, CNN (Oct. 29, 2019, 5:19 PM), <https://www.cnn.com/2019/10/29/us/ncaa-athletes-compensation/index.html>. In an interview with CNN, Ohio State University athletic director and co-chair of the NCAA's working group stated, "[d]ifferent organizations and associations need interest groups or pressure groups to move them in a certain direction, and the California law and other states that bring about laws is probably a pressure point for us and caused us to move. So the bottom line is we're doing what's right and for our student-athletes."

⁶² See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 35.

⁶³ See *id.*

⁶⁴ *Id.* ("It isn't possible to resolve the challenges of today's college sports environment in this way—by one state taking unilateral action. With more than 1,100 schools and nearly 500,000 student-athletes across the nation, the rules and policies of college sports must be established through the Association's collaborative governance system. A national model of collegiate sport requires mutually agreed upon rules.").

⁶⁵ Chris Bumbaca & Steve Berkowitz, *NCAA sends California governor letter calling name, likeness bill 'unconstitutional'*, USA TODAY (Sept. 11, 2019, 10:51 AM), <https://www.usatoday.com/story/sports/ncaaf/2019/09/11/ncaa-sends-letter-calling-california-likeness-bill-unconstitutional/2284789001/>.

⁶⁶ See The Shop: Uninterrupted, *supra* note 1.

⁶⁷ See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 4.

athletes, including full cost of attendance and guaranteed scholarships.⁶⁸

The process directs the three NCAA divisions to update their bylaws and policies regarding players' opportunities to benefit from the use of their NILs by January 2021.⁶⁹ The Board also listed several principles and guidelines to direct divisions in their modernization process, including making clear the distinction between collegiate and professional opportunities, reaffirming student-athletes are students and not employees of the university, and making clear that compensation for athletics performance or participation is impermissible.⁷⁰ The NCAA's release stated that the board's action was based upon the recommendations from the Federal and State Legislation Working Group.⁷¹

By establishing this process, the NCAA arguably sought to retain control over NIL compensation policies. Instead of litigating the multitude of state statutes being brought forward or advocating for Congressional action to create a national standard for these laws, the NCAA process puts the movement back on its own terms. In directing their divisions to modernize their rules governing NIL rights for players, the NCAA will be the sole overseer for how these bylaws and policies will be formulated in the coming years.⁷²

This is obviously troublesome for many advocates of the movement for college-athlete NIL compensation. The very organization that has fought numerous legal battles over decades to uphold the policy of amateurism in college sports and reject player compensation could now be in the driver's seat of the process to award college-athletes these rights.

Following the NCAA's announcement, those close to the movement for student-athlete NIL compensation expressed a guarded response. Andrew Zimbalist, professor at Smith College and an expert on the economics of college sports, stated that the NCAA's action must be viewed as a reaction to the overwhelming force from outside and an attempt to "puncture a hole in the balloon of legal and political pressure."⁷³ Lawmakers from across the country involved in the efforts to introduce legislation at the state level also expressed their wariness in trusting the NCAA with autonomy over the process.⁷⁴

⁶⁸ *Id.*

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² See Andy Kroll, *Don't Cheer the NCAA's New Player Compensation Announcement Quite Yet*, ROLLING STONE (Oct. 29, 2019, 4:16 PM), <https://www.rollingstone.com/politics/politics-news/ncaa-student-athlete-compensation-california-football-basketball-905380/>.

⁷³ *Id.*

⁷⁴ See Senators Nancy Skinner & Steven Bradford, *Senators Skinner and Bradford Issue Statement on NCAA's Announcement on Name, Image, and Likeness* (Oct. 29, 2019), <https://sd09.senate.ca.gov/news/20191029-senators-skinner-and-bradford-issue-statement-ncaa%E2%80%99s-announcement-name-image-and>. The original co-sponsors of California's Fair Pay to Play Act issued a release of conditioned optimism upon the NCAA announcement; see also Mary Green, *Lawmakers react to NCAA's initial proposal for athlete likeness compensation*, KCRG (Oct. 29, 2019, 11:33 PM), <https://www.kcrg.com/content/news/ncaa-reaction-564079751.html>. Iowa State Representative Joe Mitchell, who was planning to propose a version of the Fair Pay to Play Act in their legislature, stated, "If states like

Others were even less sanguine about the NCAA's announcement. Although the NCAA's press release only established high-level principles and guidelines for the process moving forward, some close to the effort to procure NIL compensation found this guidance to be lacking compared to the state legislative packages being introduced across the country. Ramogi Huma, the National College Players Association's executive director, stated that the NCAA was engaging in smoke and mirrors with the process and laying the groundwork for limiting the benefit to non-cash and direct compensation.⁷⁵

The lack of details in the announcement, combined with the NCAA's historical stance toward compensation for its players, quickly led many advocates to continue pushing for external pressures to ensure that the Association would adhere to the calls for change. Huma urged state and federal lawmakers to continue with efforts to enact legislative proposals, saying, "I don't think this is going to happen voluntarily."⁷⁶ David Carter, executive director of the Marshall Sports Business Institute at the University of Southern California, agreed that legal challenges to the NCAA's eventual policies were almost an assurance due to the numerous states that have proposed NIL compensation legislation.⁷⁷

Lawmakers at the heart of the issue readily offered their support to the idea of utilizing state and federal legislation to impact the NCAA's policy prescriptions moving forward. California Senator Nancy Skinner, who co-authored the Fair Pay to Play Act, stated, "[T]he devil will be in the details. Here in California, we are clear that we won't accept arbitrary limitations and look forward to the NCAA's final action being consistent with the right all other students have to generate income from their talent and skills."⁷⁸

To advocates of NIL compensation rights, it seems that the legislative proposals being introduced tipped the scales of the debate in their favor, convincing the NCAA to begin the process of granting such rights to student-athletes.⁷⁹ For this reason, advocates also see legislation as having a continued role in shaping the policies that are born from this process initiated by the NCAA.⁸⁰ Mr. Huma stated that the NCAA, through its initiation of this process, is "attempting to impose conditions it now has no

Iowa, Florida, California had not put pressure on the NCAA to do this, they would not have done any initial steps to combat this issue, and so I think it was good that we have had this discussion brought up, and we're going to continue to have this discussion on what the details should be on all of this." See Brady McCollough, *News Analysis: NCAA makes move on name, image and likeness use, but there's a long way to go*, LOS ANGELES TIMES (Oct. 29, 2019 11:34 AM), <https://www.latimes.com/sports/story/2019-10-29/ncaa-athletes-nil-college-athletes-profit-name-image-likeness> (California Governor Gavin Newsom stated, "California will be closely watching as the NCAA's process moves forward to ensure the rules ultimately adopted are aligned with the legislation we passed this year.").

⁷⁵ Collins, *supra* note 44.

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ Billy Witz, *N.C.A.A. Considers Loosening Rules for Athletes Seeking Outside Deals*, THE NEW YORK TIMES (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/sports/ncaaf/ncaa-football/ncaa-athlete-pay.html>.

⁷⁹ See Kroll, *supra* note 72.

⁸⁰ See Collins, *supra* note 44; McCann, *supra* note 36; Kroll, *supra* note 72.

control over” due to the demands of enacted legislation such as the Fair Pay to Play Act.⁸¹

Although the NCAA has initiated its own procedure to implement NIL rights for student-athletes, advocates have raised legitimate concerns based upon the Association’s precedent and its lack of oversight. For this reason, legislation still holds a meaningful purpose in guiding the policies that will eventually regulate the NIL compensation rights of college student-athletes. Particularly, a national standard for NIL compensation rights for NCAA athletes is the most desirable outcome. Accordingly, lawmakers should look to the legislative proposals already proposed in dozens of states to make a uniform standard. This uniform standard could be introduced at the congressional level, giving advocates the ability to shape the NIL compensation process at the national lawmaking level.⁸² With the authority of federal legislation, lawmakers would be able to effectively check the NCAA as it proceeds through its own process, which could otherwise run the risk of lacking such accountability.⁸³

III. A MODEL FOR CONGRESSIONAL LEGISLATION

A. THE FAIR PAY TO PLAY STATUTE

Though many states have proposed related statutes, California remains the only jurisdiction to pass legislation on the matter of NIL compensation for student-athletes.⁸⁴ The state’s Fair Pay to Play Act has served as a model for a growing number of legislators around the country looking to introduce their own versions into state law. For this reason, it is important to look toward SB-206’s statutory language, examining the policies that will guide the state’s policy toward NIL rights for student-athletes if the law were to go into effect in 2023.

Foremost, SB-206 proscribes, “[a] postsecondary educational institution shall not uphold any rule, requirement, standard, or other limitation that prevents a student of that institution participating in intercollegiate athletics from earning compensation as a result of the use of the student’s name, image, or likeness.”⁸⁵ The clause creates a blanket prohibition on any postsecondary educational institution attempting to prevent its student-athletes from compensating from their NIL. This includes a prohibition from such compensation affecting the student’s scholarship eligibility.⁸⁶

Moreover, this prohibition extends to any “athletic association, conference, or other group or organization with authority over intercollegiate athletics” attempting to prevent a student-athlete or school from participating in intercollegiate athletics.⁸⁷ These provisions are specifically aimed at the NCAA, which is explicitly mentioned

⁸¹ See Collins, *supra* note 44; McCann, *supra* note 36; Kroll, *supra* note 72.

⁸² See McCann, *supra* note 36.

⁸³ See Collins, *supra* note 44.

⁸⁴ See McCann, *supra* note 36.

⁸⁵ CAL. EDUC. CODE ANN., *supra* note 2, at § 67456(a)(1).

⁸⁶ See *id.*

⁸⁷ *Id.* at § (a)(2)–(3), (b) (West. 2019).

in the text of the statute.⁸⁸ The legislation also prohibits scholarships earned by student-athletes from being treated as NIL compensation.⁸⁹

Importantly, SB-206 also lays forth the guidelines for agent representation for student-athletes looking to become compensated for their NIL.⁹⁰ These agents are to comply with federal sports agency laws with respect to their relationships with student-athletes, which are the same laws that guide professional sports agency relationships.⁹¹ However, a student-athlete's "professional representation" is guided by that of state law and licensure.⁹²

The Fair Pay to Play Act also establishes processes for student-athletes entering contracts for NIL compensation.⁹³ A student-athlete may not enter into contracts conflicting with the contractual agreements of their college team.⁹⁴ All contracts compensating athletes for their identity shall also be disclosed to an official designated by the postsecondary institution.⁹⁵ Lastly, SB-206 prohibits NIL compensation from being procured by prospective student-athletes during the recruiting process.⁹⁶ The Fair Pay to Play Act's broad language allows student-athletes to receive NIL compensation with little constraint. Save for compliance with existing sports agent laws, school policies, and reporting requirements, SB-206 largely creates a sweeping allowance for student-athletes to be compensated for their NIL.⁹⁷

Upon the NCAA's announcement that it would start the process for NIL opportunities to be granted to its student-athletes, the press release's language seemed to be an attempt to retreat from such permissions. In contrast to the Fair Pay to Play Act, the NCAA's press release articulated principles and guidelines for the process that would appear to open the door for divisions to establish rules that would conditionalize college-athletes' ability to be compensated for their identity.⁹⁸ For example, the guidelines included:

1. "Assure student-athletes are treated similarly to non-athlete students unless a compelling reason exist to differentiate."
2. "Make clear the distinction between collegiate and professional opportunities."

⁸⁸ See *id.* at § 67456(d).

⁸⁹ See *id.*

⁹⁰ See *id.* at § 67456(c); see 15 U.S.C. § 104 (2004).

⁹¹ See *id.*

⁹² See *id.* at § 67456(c)(1).

⁹³ See *id.* at § 67456(e)(1). SB-206 also requires that any institution attempting to assert such a conflict would be required to disclose to the athlete or the athlete's legal representation the relevant contractual provisions that are in conflict. See *id.* at § 67456 (c)(3). However, a team contract would not be allowed to prevent a student-athlete from being compensated for their NIL when the athlete is not engaged in official team activities. See *id.* at § 67456 (f). Moreover, postsecondary educational institutions are not allowed to prevent student-athletes from being represented by athlete agents or legal representation provided by attorneys. See *id.* at § 67456 (c)(1).

⁹⁴ *Id.*

⁹⁵ *Id.* at § 67456(e)(2).

⁹⁶ *Id.* at § 67456(b).

⁹⁷ See generally *id.*

⁹⁸ See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 4.

3. “Protect the recruiting environment and prohibit inducements to select, remain at, or transfer to a specific institution.”⁹⁹

These statements raised concerns from NIL advocates and led to calls to continue legislative procedures to compel the NCAA from creating restrictive measures on NIL rights for student-athletes.¹⁰⁰

B. STATUTES IN OTHER STATES

In an attempt to impede such imposed restrictions, California’s Fair Pay to Play Act has served as a framework for other states looking to create a sweeping right for college-athletes to obtain NIL compensation. Illinois State Representative Emanuel Chris Welch and Florida State Representative Kionne McGhee have introduced statutes in their respective legislatures that virtually mirrors the language of SB-206.¹⁰¹ However, the consistency among proposals essentially disappears aside from those replicating the statutory language of the Fair Pay to Play Act for their state.

Left to their own design, state legislators have proposed an assortment of statutes that directly conflict with one another. For example, legislation introduced in Washington would not limit payment for compensation to student-athletes’ NIL rights, but would instead only limit compensation to an amount “commensurate with the market value of the services provided. . . .”¹⁰² Other instances of inconsistencies include: a bill introduced in Colorado that would allow student-athletes to be paid directly for competing; a proposed law in New York that would require college athletic departments to give a fifteen percent share of annual revenue to student-athletes; a South Carolina proposal that would require the state’s largest colleges to pay a \$5,000 annual stipend to athletes of its profitable sports; and a law introduced in Maryland that would grant student-athletes the right to unionize and participate in collective bargaining.¹⁰³

While California’s SB-206 was groundbreaking at the time of its enactment, these various state legislative proposals include provisions that would far exceed those granted in the Fair Pay to Play Act. These discrepancies are important because they signify the potential lack of uniformity that would attempt to govern a national organization if various state legislatures were to pass such disparate provisions. As previously stated, this lack of uniformity could actually play to the advantage of the

⁹⁹ *Id.*

¹⁰⁰ See Senators Skinner & Bradford, *supra* note 74; McCollough, *supra* note 74; Collins, *supra* note 44.

¹⁰¹ See H.B. 3904, 101st General Assembly (Ill. 2019); H.B. 251, 2020 General Assembly (Fla. 2020).

¹⁰² See H.B. 1084, 66th Legislature (Wash. 2019).

¹⁰³ See Courtney Annway, *States Leading the Charge: A Map of the States Proposing Pay to Play Legislation*, UB LAW SPORTS & ENTERTAINMENT FORUM (Oct. 2, 2019), <https://ublawsportsforum.com/2019/10/02/states-leading-the-charge-a-map-of-the-states-proposing-compensation-for-student-athletes/>. New York’s legislative proposal also required that an injured athlete would retain his compensation opportunities and a sharing obligation for certain revenues. See McCann, *supra* note 36.

NCAA, whose legal arguments for interstate comity has succeeded in cases such as *National Collegiate Athletic Association v. Miller*.¹⁰⁴

The importance of a national standard becomes even more apparent when recognizing that the enactment of these various statutes would virtually destroy the playing field of the NCAA. Without a uniform standard, states would be incentivized to engage in a race to the bottom, fighting to create the most accommodating laws for prospective student-athletes to become attracted to their state's higher education institutions.¹⁰⁵ Alternatively, a national standard would allow the NCAA to continue with a level playing field across the country and between states. Not only would this simplify and balance the competitive environment of collegiate athletics, it would also eliminate the NCAA's most promising legal challenges to state statutes attempting to grant further rights to its student-athletes.¹⁰⁶

As described above, many states' policy proposals necessitate that college athletics departments engage in revenue-sharing with its participants.¹⁰⁷ However, this scheme would have untoward effects on the collegiate athletics landscape because it encumbers upon these departments an expense that was not previously in their static budget. For this reason, it is reasonably foreseeable that many sports programs around the country would be eliminated to necessitate the added expense of providing direct compensation to student-athletes.

Moreover, the athletes most likely to receive limited NIL compensation opportunities would also likely be the most affected by any such budget constraints—as athletic departments would be incentivized to eliminate programs with the least generated revenue. Instead, the players in higher revenue programs, who by their nature will have greater exposure to NIL compensation opportunities, will receive these direct compensation payments required by law as an added bonus to their NIL endorsement opportunities. This complication could also raise the potential for Title IX issues, as athletic departments would have to shift scholarship considerations and participation opportunities for men and women following the elimination of sports program.¹⁰⁸ For these reasons, it would be unwise to include direct compensation provisions as part of a federal legislative proposal to guide student-athlete compensation rights.

C. COLLECTIVE BARGAINING

Much like the prospect of direct compensation payments, a legislative proposal to allow the state's student-athletes to unionize and engage in collective bargaining may

¹⁰⁴ See *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, at 639 (9th Cir. 1993).

¹⁰⁵ See McCann, *supra* note 36.

¹⁰⁶ See *id.*

¹⁰⁷ Colorado, New York, and South Carolina are the most apparent of these examples. Described at the beginning of the subsection, each of these state proposals include a component of direct payments to student-athletes.

¹⁰⁸ See NAT'L COLLEGIATE ATHLETIC ASS'N, *Title IX Frequently Asked Questions*, NCAA, <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions#how>.

prove to be too strenuous of an extension beyond California's Fair Pay to Play Act.¹⁰⁹ The right for players to unionize is wholly separate from granting NIL compensation. Therefore, even if proponents looking to advance student-athletes' rights wish to achieve unionization, it would be unwise to demand that such a right be attached to NIL compensation rights. If it were included in a federal legislative proposal for NIL rights, collective bargaining rights may be seen as a dealbreaker for members of Congress.

Furthermore, the issue of collective bargaining for student-athletes has been litigated as a separate issue. Most recently, the issue of unionization for collegiate athletes was undertaken in *College Athletes Players Association v. Northwestern*, where Northwestern University football players sought the right to unionize as a team.¹¹⁰ The National Labor Relations Board ("NLRB") voted unanimously to deny the football team's players the right to unionize, citing its concern about whether it could even assert jurisdiction for an alternative ruling, which would foreseeably upset the NCAA's competitive balance and have detrimental effects on its existing rules.¹¹¹

Due to the NLRB's hesitation to entertain the unionization of a single team's players, the Board did not address the broader question of whether NCAA student-athletes have the ability to form a union altogether.¹¹² Additionally, the NLRB declined to decide upon whether the football team's scholarship student-athletes are employees under Section 2(3) of the National Labor Relations Act ("NLRA").¹¹³ Further, the NLRB asserted that even if it had determined that scholarship student-athletes were statutory employees under the NLRA, "it would not effectuate the policies of the Act to assert jurisdiction."¹¹⁴

Northwestern is the most recent illustration of the unique legal and prudential challenges faced by NCAA players' efforts for collective bargaining and unionization.¹¹⁵ These challenges are wholly separate from the progression toward NIL compensation benefits. For these reasons, it would also be unwise for a federal legislative proposal to include statutory language granting collective bargaining rights to student-athletes of higher education institutions.

D. A NATIONAL STANDARD

¹⁰⁹ See Annway, *supra* note 103. A legislative proposal in the Maryland state legislature has provisions allowing for unionization and collective bargaining for student-athletes.

¹¹⁰ Nw. Univ. Emp'r & Coll. Athletes Players Ass'n (CAPA), Case 13-RC-121359, 1352 (N.L.R.B. Region 13 Mar. 26, 2014), <http://www.nlr.gov/case/13-RC-121359>.

¹¹¹ See *id.* at 1352.

¹¹² See *id.* at 1354. "Just as the nature of league sports and the NCAA's oversight renders individual team bargaining problematic, the way that FBS football itself is structured and the nature of the colleges and universities involved strongly suggest that asserting jurisdiction in this case would not promote stability in labor relations." *Id.*

¹¹³ See *id.* at 1355. The NLRB follows the common definition of an employee, which is 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. *Brown University*, 342 NLRB 483, 490, fn. 27 (2004) (citing *NLRB v. Town & Country Electric*, 516 U.S. at 94). See also RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958).

¹¹⁴ Nw. Univ. Emp'r & Coll. Athletes Players Ass'n (CAPA), Case 13-RC-121359 at 1352.

¹¹⁵ See Barrowman, *supra* note 11. See generally *Nw. Univ. Emp'r & Coll. Athletes Players Ass'n (CAPA)*, Case 13-RC-121359.

While California's Fair Pay to Play Act was extraordinary at the time of its enactment, the Act's passage influenced state legislators across the country to expound upon its rights granted to student-athletes. A flurry of legislative proposals as diverse as their jurisdictions have appeared in the few short months since SB-206 was signed.¹¹⁶ The proposals have called for terms and rights far beyond those granted by the Fair Pay to Play Act, whose passage alone was monumental in granting NIL compensation rights to student-athletes.¹¹⁷

Nevertheless, the diverse statutory grants of direct compensation benefits, collective bargaining, and revenue sharing each introduce untold challenges for the actualization of greater rights to student-athletes. The legislative proposals and their effects are untested and have ramifications for higher education institutions, athletic conferences, and the NCAA. For these reasons, a federal legislative proposal for NIL compensation rights for student-athletes should not include these additional proposals. Attempting to piggyback such rights onto a proposal for NIL compensation benefits jeopardizes efforts to actualize any enhanced rights altogether.

Consequently, a federal legislative proposal should mirror that of California's Fair Pay to Play Act. The Act gives a sweeping allowance to collegiate athletes' ability to be compensated for their NIL compensation rights, but its authority is arguably the most conservative approach to laws that have been introduced to grant student-athletes such an allowance.¹¹⁸ Aside from granting states' licensure authority for sports agents representing student-athletes, SB-206's statutory language can be virtually copied word-for-word into a federal proposal.¹¹⁹ Moreover, unlike other proposals put forward in various states, the simple granting of NIL rights to student-athletes has demonstrable support among the general public.¹²⁰

It is important to note that such a federal proposal to grant NIL rights may not even require passage. The mere proposal of such a law would initiate congressional hearings and increased public awareness that would spotlight the NCAA's ongoing modifications of its NIL compensation policies. Legislation introduced at the federal level would therefore be able to serve the purpose of providing accountability to the NCAA's process of exploring NIL opportunities for collegiate athletes. While the Fair Pay to Play Act's passage could be seen as being the catalyst for the NCAA's concession to exploring such rights, its oversight ability pales in comparison to a hypothetical federal legislative proposal, even prior to the passage of any such congressional act.

There has also been demonstrable congressional support for granting student-athletes NIL compensation rights. Representatives Mark Walker and Anthony Gonzalez have separately proposed legislation to grant collegiate athletes the right to collect revenue based upon their identity.¹²¹ Additionally, senatorial interest on the issue has been evidenced by Senator Romney, who signaled his readiness to address

¹¹⁶ See Annway, *supra* note 103.

¹¹⁷ See *id.*

¹¹⁸ See generally CAL. EDUC. CODE ANN., *supra* note 2.

¹¹⁹ See Annway, *supra* note 103.

¹²⁰ See Appel, *supra* note 34.

¹²¹ See H.R. 1804, *supra* note 47; McCann, *supra* note 36.

the issue with congressional action.¹²² Collectively, the prospect of congressional support for granting NIL compensation rights for student-athletes appears to be quite promising.

If congressional action were to be taken, it would be advantageous to introduce such legislation as soon as possible. The NCAA's directive for its divisions to update their bylaws and policies regarding the opportunity for players to benefit from their NIL by January 2021 places a definitive timeline upon the creation of these policies.¹²³ With the NCAA currently left unchecked, its three divisions are amending their bylaws independent of external advocacy, legislative mandate, or effective oversight. Not only would an immediate legislative proposal allow for proper vetting before the NCAA's deadline, it would also give the Association's divisions adequate time to adjust to any such proposed statutory language.

CONCLUSION

The signing of California Senate Bill 206 was a turning point in the fight for student-athlete compensation. Since its inception at the beginning of the twentieth century, the NCAA has fiercely guarded the amateur status of collegiate sports. However, a growing public majority has called for student-athletes to have the ability to generate revenue for their name, image, and likeness.¹²⁴ Even in the event that NIL compensation rights are granted to student-athletes, the amateur classification of collegiate sports retains its non-employee status, bolstered by precedent such as *Board of Regents of the University of Oklahoma* and its progeny.¹²⁵

The NCAA's announcement of exploring NIL opportunities inherently contains the concession that the amateur status of collegiate athletics can be retained while granting its participants NIL compensation rights.¹²⁶ *O'Bannon* provided a window of opportunity for advocates of player compensation, acknowledging a distinction between direct compensation and NIL compensation.¹²⁷ Long before *O'Bannon*'s decision in 2015, pollsters had already seen momentum in the public opinion's willingness to accept some sort of compensation for student-athletes.

NIL compensation opportunities quickly became the most likely avenue for student-athlete compensation to become a reality. As opposed to salaries, revenue-sharing, or direct stipends, NIL contracts could allow third-party organizations to voluntarily enter into contracts for the use of a player's identity. Free from the considerations of taxpayer dollars and athletic department budgets, NIL compensation for student-athletes has found majority support in the court of public opinion.¹²⁸

¹²² See Murphy, *supra* note 55.

¹²³ See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 4.

¹²⁴ See Garcia, *supra* note 33; Appel, *supra* note 34.

¹²⁵ See Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984); McCormack, 845 F.2d 1338 (5th Cir. 1988); Banks, 977 F.2d 1081 (7th Cir. 1992).

¹²⁶ See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 4. The NCAA was careful to split the difference between its current prohibition on any compensation and treating student-athletes as employees, indicating in their guidelines that the NCAA should "[r]eaffirm that student-athletes are students first and not employees of the university."

¹²⁷ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1076 (9th Cir. 2015).

¹²⁸ See Appel, *supra* note 34.

Through the Fair Pay to Play Act, the California state legislature took the exceptional step of passing legislation to reflect the public's antagonism toward NCAA policies regarding NIL rights for student-athletes. California's capacity to effect change, represented by its outsized twelve percent proportion of the entire population of the United States, motivated legislators around the country to follow suit and introduce their own bills to grant student-athletes with similar NIL rights.¹²⁹

For its part, the NCAA appeared to be accepting the writing on the wall, announcing a working group to examine the legislation that was sweeping the country prior to SB-206's enactment. However, Governor Newsom's signing of the law in the fall of 2019 created a new reality for the NCAA, establishing a timetable where player compensation would be treated differently by statutory mandate. However, a single state's attempt to effectuate its own policy around collegiate athletics is not novel, and precedent such as *Miller* has shown that the NCAA's plea for comity among states and a national uniform standard is readily heard by courts.¹³⁰ The NCAA has long utilized theories of interstate commerce to strike down individual state's attempts to alter treatment of student-athletes. However, this argument loses its luster when presented against a federal mandate. Removed from the prospect of disparate impacts upon a national organization, congressional action would create the uniformity that has been at the heart of the NCAA's legal argument for decades.

Placed in a position where the prospect of federal legislation seems likely, the NCAA has begun its own process to explore the prospect of instituting bylaws to allow for players' NIL compensation. Instead of relying upon its longtime tactics of litigating student-athlete compensation, the NCAA is attempting to circumvent a potential congressional approach to the matter by seeking to recover authority to shape its NIL compensation policy. However, the organization's history in matters regarding player compensation has caused many of the movement's advocates to call for legislative mandates to proceed at all levels.

The disparate state legislative proposals, albeit impressive in their geographic scope, retain the NCAA's ability to argue for a uniform standard. Therefore, a federal legislative proposal should be brought forward to provide for effective oversight as the NCAA proceeds with its own development of NIL policies. State proposals, although inspired by the Fair Pay to Play Act, have had dissimilar statutory language attempting to create further rights unconsidered by SB-206. Disconnected from NIL compensation, these proposed rights granted beyond those of SB-206 present their own discrete legal and prudential challenges. For this reason, such statutory language should be decidedly separate from a federal legislative proposal for NIL compensation rights.

California's Fair Pay to Play Act has provided a basic framework for granting NIL rights, allowing for such compensation without many constraints. Effectively, its statutory terms are constructed to allow Congress to copy its language into a federal proposal. The mere introduction of such a proposal would signal to the NCAA that it is not without supervision in its drafting of NIL compensation policies.

¹²⁹ See McCann, *supra* note 36.

¹³⁰ See *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, at 639 (9th Cir. 1993).

Irrespective of whether Congress passes a law mandating NIL compensation rights for student-athletes, merely proposing such an enactment still has a place in the effort to grant student-athletes such opportunities. Time is of the essence for any such proposal, as the NCAA's divisions are now within a year's time of required institution of NIL policies. Congressional action could prove to be the deciding factor in the longstanding advocacy for collegiate athletics properly introducing NIL compensation opportunities for its participants. Unquestionably, federal legislation still has a role to play in the fight for student-athlete compensation.