The Fair Pay to Play Act: Likely Unconstitutional, Yet Necessary to Protect Athletes

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I. INTRODUCTION

Donald De La Haye, former kicker for the University of Central Florida (UCF) football team, ran a popular video channel on the website YouTube, garnering more than 50,000 subscribers by detailing his life as a college athlete.[1]

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In 2017, the UCF Office of Compliance informed him that in order to comply with National Collegiate Athletic Association (NCAA) restrictions, he must either delete or demonetize his YouTube channel.[2] He would not be allowed to continue using his name or likeness in future videos if he continued to profit off the channel, due to NCAA rules against athletes profiting from the use of their own likeness.[3] Ultimately, De La Haye decided to continue making videos for his channel, [4] and, as of November 2020, his channel had more than 3 million subscribers.[5] As a result, UCF pulled his athletic scholarship and NCAA eligibility.[6] In response, he filed suit against UCF alleging violations of his First and Fourteenth Amendment rights.[7] After an eight month legal battle, UCF settled the case, allowing him to continue both his schoolwork and video channel, but his promising athletic career was forever forfeited.[8]

The NCAA is an intercollegiate sports governing body that has regulated college athletic activities for over a century and currently prohibits collegiate athletes at participating schools from profiting off the use of their name, image, or likeness (NILs).[9] On September 30, 2019, California lawmakers thrust the issue of compensation for college athletes into the national spotlight when Governor Gavin Newsom signed into law the Fair Pay to Play Act.[10] The law specifically maintains the prohibition on colleges, universities, conferences, and

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[1] Richard Johnson, *UCF Says Its Kicker Can't Make Money Off of YouTube Videos Because … NCAA*, SB NATION (June 16, 2017), https://www.sbnation.com/college-football/2017/6/12/15785390/ucf-kicker-youtube-donald-de-la-haye. In interviews, De La Haye has stated that his video production is an extension of his marketing studies and has been his passion since he was young. *Id.*

[2] Steven Ruiz, *A College Football Player Has a Hit YouTube Channel. He Might Have to Give It Up to Remain Eligible*, FORTHEWIN (June 12, 2017), https://ftw.usatoday.com/2017/06/donald-de-la-haye-youtube-channel-central-florida-ucf-ncaa [https://perma.cc/5SLX-59EJ] ("De La Haye's most popular videos are shot at UCF facilities but really have nothing to do with the football team and do not use the school's name or logo in order to promote the videos.").

[3] *Id.*

[4] Alex Kirshner, *He Lost a Scholarship Because of YouTube Ads, So He's Taking NCAA Rules to Court*, SB NATION (July 14, 2018), https://www.sbnation.com/college-football/2018/7/13/17565672/donald-de-la-haye-youtube-ncaa-deestroying.

[5] *Deestroying*, YOUTUBE, https://www.youtube.com/channel/UC4mLlRa_dezwvytudo9s1sw [https://perma.cc/3LXS-M2DR].

[6] Kirshner, *supra* note 4.

[7] *Id.*

[8] Robert Henneke & Jon Riches, *Attorneys: UCF's De La Haye Settles for a Bright Future Off the Field*, ORLANDO SENTINEL (Nov. 16, 2018), https://www.orlandosentinel.com/opinion/os-op-ucf-kicker-de-la-haye-success-story-20181116-story.html.

[9] *History*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (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.

[10] S.B. 206, *Collegiate Athletics: Student Athlete Compensation and Representation*, 383 Reg. Sess. (Cal. 2019).

the NCAA itself paying players for the use of their NILs, but allows players to enter into deals with companies and third parties for the use of their NILs.[11] NCAA officials quickly opposed the legislation, stating that it would effectively eliminate the distinction between college and professional sports, and released statements claiming the law is unconstitutional.[12] However, less than two months later, in response to the pressure created by the act and other states introducing similar legislation, the NCAA announced it will amend its rules to allow college athletes to be compensated for the use of their NILs.[13]

Many sportswriters and legal experts have been skeptical about the NCAA's motivations behind this announcement, claiming that the NCAA is attempting to stall the momentum of federal and state governments introducing protections for athletes.[14] Under this theory, the NCAA plans to buy time for the public concern to settle and then pass minimal reforms themselves.

This article will explain the backdrop of the college sports industry, its large market, and the recent turn of events which have led to conflict between the NCAA and the state of California. After analyzing the merits of each side's arguments, this article reasons that a federal court would most likely side with the NCAA and strike down the California law under the Dormant Commerce Clause of the U.S. Constitution. The article concludes by proposing a federal law similar to California's as an ultimate solution.

II. BACKGROUND: THE NCAA, BIG MONEY, AND CALIFORNIA'S FAIR PAY TO PLAY ACT

The evolving nature of modern college sports has thrust NCAA player compensation restrictions into the national spotlight in ways that were likely never contemplated when the rules were first passed. As the market for college sports expands, the exploitation of college athletes increases, since they provide the product but are prohibited from utilizing their successes or independently marketing themselves.

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[11] *See infra* Part II.C.

[12] *NCAA Responds to California Senate Bill 206*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (Sept. 11, 2019), http://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206 [https://perma.cc/57JP-RY6D]; Chris Bumbaca and Steve Berkowitz, *NCAA Sends California Governor Letter Calling Name, Likeness Bill 'Unconstitutional'*, USA TODAY (Sept. 11, 2019), https://www.usatoday.com/story/sports/ncaaf/2019/09/11/ncaa-sends-letter-calling-california-likeness-bill-unconstitutional/2284789001/ [https://perma.cc/9CWC-B2W8].

[13] Steve Almasy et al., *NCAA Says Athletes May Profit from Name, Image and Likeness*, CNN (Oct. 29, 2019), https://www.cnn.com/2019/10/29/us/ncaa-athletes-compensation/index.html [https://perma.cc/8M8H-XKL5].

[14] *See infra* Part II.C.

A. *History of NCAA Restrictions and Where They Currently Stand*

The NCAA was formed in the early 1900's in response to dangerous conditions in football that had led some universities to discontinue the sport entirely.[15] After World War II, the NCAA passed the "Sanity Code," barring any form of merit pay to athletes, including scholarships or cost of living expenses.[16] The NCAA based these restrictions on its designation of college athletic participants as "student-athletes," a term which it successfully used for many years to avoid liability and accountability to athletes in worker's compensation and similar lawsuits for damages resulting from NCAA restrictions.[17]

In the decades following, the NCAA made several changes to this policy, fighting against any compensation for student-athletes, while only allowing progress in this area when forced by courts in antitrust lawsuits.[18]

A recent and pivotal case in this line of antitrust challenges to NCAA restrictions was *O'Bannon v. NCAA* in 2015.[19] There, the United States Court of Appeals for the Ninth Circuit held that NCAA member schools may award monetary grants to student-athletes up to the full cost of attendance at the school, including tuition, cost of living, and small stipends to cover expenses.[20]

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[15] *History*, *supra* note 9.

[16] Andy Schwarz, *The NCAA Has Always Paid Players; Now It's Just Harder to Pretend They Don't*, DEADSPIN (Aug. 29, 2015), https://deadspin.com/the-ncaa-has-always-paid-players-now-its-just-harder-t-1727419062.

[17] For example, Kent Waldrep was a running back at Texas Christian University who was paralyzed in a football game in 1974. *"Student Athletes" - Okay, but What Happens When Things Go Wrong?*, FROGS O' WAR (Aug. 22, 2014), https://www.frogsowar.com/2014/8/22/5922603/student-athletes-okay-but-what-happens-when-things-go-wrong. In 2000, a Texas Court of Appeals overturned his successful worker's compensation claim, stating that he was not an employee, but a "student-athlete," and in doing so, the court cited the definition of "student-athlete" from the NCAA bylaws: "one who engaged in athletics for the education, physical, mental, and social benefits he derives therefrom, and to whom athletics is an avocation." Waldrep v. Tex. Emp'rs. Ins. Assoc., 21 S.W.3d 692 (Tex. App. 2000).

[18] For an in-depth history of the NCAA's campaign against student-athlete compensation and the court cases that slowly forced their hand, see Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS. L. REV. 9, 13–21 (2000).

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

[20] *Id.* at 1074–76. The federal Court of Appeals held the NCAA's player compensation rules were subject to federal antitrust legislation and the plaintiffs in the case (current and former college athletes) had suffered a justiciable injury as a result of the NCAA's compensation restrictions. *Id.* at 1053. Furthermore, the opinion stated that courts will not find the NCAA's player compensation rules presumptively valid but will instead subject them to a "Rule of Reason" analysis. *Id.*

B. *College Sports Have Grown into a Multi-Billion-Dollar Per Year Industry*

The juggernaut market of college sports is continuing to grow with no indication of slowing down anytime soon. Sports revenue for the schools that comprise the five largest college athletic conferences (SEC, Big Ten, ACC, Big 12, and Pac-12) increased from $570 million in 2005 to more than $2 billion in 2015, a 266% increase over just 10 years.[21] These same schools in 2015 paid their cumulative 530 football coaches $405 million in salaries and benefits, while spending just $179.8 million on scholarships and cost of living expenses for their 4,979 football players.[22]

Due to the large economic market surrounding college sports, a correspondingly large market exists for college athletes' NIL use. One expert predicted that Clemson's star quarterback Trevor Lawrence could have made $1 million during the 2019 football season from endorsement deals alone.[23] The same expert also predicted that Duke's Zion Williamson could have made $2.5 million in his single year of college basketball.[24] However, experts predict that only a small percentage of athletes—around 5%—could enter into meaningful deals at major universities.[25]

Star athletes at smaller colleges and universities may still be able to land sponsorship deals with local businesses. Sports marketing authorities have predicted that local businesses will be eager to tap student-athletes who connect with fans.[26] One expert believes these local players may garner regional advertising deals ranging from $10,000 to $25,000 due to local media coverage and alumni networks.[27]

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[21] *Conference Revenues 2015*, KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS (2016) https://www.knightcommission.org/wp-content/uploads/2016/10/2015-conferencerevenues.pdf [https://perma.cc/M7VE-FMDF].

[22] Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, THE ASPEN INSTITUTE (Apr. 23, 2018), https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/ [https://perma.cc/6VSU-FUUK].

[23] Mark Emmert, *If College Athletes Could Profit Off Their Marketability, How Much Would They Be Worth? In Some Cases, Millions*, USA TODAY (Oct. 9, 2019), https://www.usatoday.com/story/sports/college/2019/10/09/college-athletes-with-name-image-likeness-control-could-make-millions/3909807002/ [https://perma.cc/5CE2-8AP9] (statement of Tye Gonser, a lawyer who formerly worked for a private agency handling endorsement deals for professional athletes).

[24] *Id.*

[25] *Id.*

[26] Khristopher J. Brooks, *NCAA Athletes Getting Paid: Thousands Could Be in Their Futures*, CBS NEWS (Nov. 1, 2019), https://www.cbsnews.com/news/ncaa-athletes-getting-paid-thousands-could-be-in-their-future/ [https://perma.cc/4TV4-WV72] (statement of sports marketing and branding expert Tim Derdenger).

[27] Emmert, *supra* note 23 (statement of University of Southern professor David Carter, principal owner of the Sports Business Group).

Non-superstars could also make thousands from licensing fees if they could profit from NIL use. In 2013, former college athletes sued the NCAA and EA Sports, the publisher of NCAA sports video games, seeking a cut of the money that was made from the portrayal of their NILs in the video games.[28] The plaintiffs hired Dan Rascher, a sport management professor, to estimate how much money college football players could potentially make from the video game through a collective bargaining agreement.[29] For an NCAA football video game, a conservative estimate would be $1,000–1,500 per year for each player depicted.[30]

C. *The California Fair Pay to Play Act*

On September 30, 2019, California lawmakers sparked a national debate when Governor Newsom signed into law Senate Bill 206, the Fair Pay to Play Act.[31] Effective 2023, the Act will give all athletes at California colleges and universities the right to profit from the use of their NILs.[32] Specifically, the law bars colleges and universities, collegiate conferences, and athletic associations (e.g. the NCAA) from penalizing students that accept payment from a third party in return for the use of their NILs.[33] The Act specifically only allows athletes to enter into NIL deals with third parties.[34]

The Fair Pay to Play Act addresses a potential loophole by prohibiting the NCAA from banning California schools from participation in intercollegiate sports as retaliation for athletes at that school choosing to profit from the use of their NILs.[35]

In the weeks following the passage of the law, lawmakers in at least twelve other U.S. states rushed to announce they would be pursuing similar legislation; some even introduced similar bills in their state legislatures mere weeks after California's bill unanimously passed.[36] Federally, Congressman Mark Walker of North Carolina introduced the Student-Athlete Equity Act, a law which would amend the tax code, forcing schools to either allow athletes to profit from

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] S.B. 206, *Collegiate Athletics: Student Athlete Compensation and Representation*, 383th Reg. Sess. (Cal. 2019).

[32] *Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act'*, SENATOR NANCY SKINNER (Sept. 30, 2019), https://sd09.senate.ca.gov/news/20190930-gov-newsom-signs-sb-206-%E2%80%98fair-pay-play-act%E2%80%99 [https://perma.cc/W387-VWFB].

[33] S.B. 206 § 2(c)–(d).

[34] S.B. 206 § 2(b).

[35] S.B. 206 § 2(a)(3).

[36] Jon Wilner, *Hotline Newsletter: Washington and Colorado (and Others) Move to NIL Compensation, Larry Scott As You Haven't Heard Him, and More*, THE MERCURY NEWS (Oct. 4, 2019), https://www.mercurynews.com/2019/10/04/hotline-newsletter-washington-and-colorado-and-others-move-to-nil-compensation-larry-scott-as-you-havent-heard-him-and-more/ [https://perma.cc/PRA4-4SJ4].

third-party endorsement deals, or lose their non-profit tax exemptions.[37] Additionally, Congressman Anthony Gonzalez, a United States Representative and former wide receiver for The Ohio State University and the Indianapolis Colts, announced his own version of a bill allowing athletes to profit from the use of their NILs.[38]

D. *The NCAA and the Fair Pay to Play Act: Reaction, Reversal, and Hidden Motives*

NCAA officials quickly opposed the California Act, stating that it would eliminate the distinction between college and professional sports, and the organization released statements claiming that the law is unconstitutional.[39] Despite the California law's prohibition on athletic associations banning schools from play in response to athletes profiting from the use of their likeness, that is precisely what the NCAA initially threatened to do.[40]

However, less than two months after the organization's vehement public opposition to California's law, the NCAA doubled back on this position, announcing that it would amend its own rules to allow college athletes to be compensated for the use of their NILs.[41] Specifically, the NCAA Board of Governors announced in vague wording that it would be asking each of its three divisions to create rules by January 2021 to ensure that college athletes get a share of revenue stemming from the sale of their NILs.[42] Following this announcement, the nationwide movement to pass legislation allowing athletes to profit from the use of their NILs seemed to stall, especially in media coverage.[43]

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[37] Jenna West, *Congressman Anthony Gonzalez to Propose Federal Fair Pay to Play Act*, SPORTS ILLUSTRATED (Oct. 2, 2019), https://www.si.com/college/2019/10/02/anthony-gonzalez-federal-bill-pay-college-athletes [https://perma.cc/V9MG-LWTE].

[38] *Id.*

[39] *NCAA Responds to California Senate Bill 206*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (Sept. 11, 2019); Bumbaca, *supra* note 12.

[40] *See, e.g.*, Marc Edelman, *NCAA's Threat to Ban California Member Colleges Could Lead to Antitrust Lawsuit Reminiscent of 1984*, FORBES (Oct. 1, 2019), https://www.forbes.com/sites/marcedelman/2019/10/01/ncaas-threat-to-ban-california-member-colleges-could-lead-to-antitrust-lawsuit-reminiscent-of-1984/?sh=1004c0d1af39 [https://perma.cc/NB5C-D4QR].

[41] Steve Almasy, *supra* note 13.

[42] Ganesh Setty and Jabri Young, *The NCAA Will Allow Athletes to Profit from Their Name, Image, and Likeness in Major Shift for the Organization*, CNBC SPORTS (Oct. 29, 2019), https://www.cnbc.com/2019/10/29/ncaa-allows-athletes-to-be-compensated-for-names-images.html.

[43] Steve Berkowitz, *Florida Legislators Send College-Athlete Name, Image, and Likeness Bill to Governor*, USA TODAY (Mar. 13, 2020), https://www.usatoday.com/story/sports/college/2020/03/13/florida-legislators-send-college-athlete-name-image-bill-governor/5041474002/ [https://perma.cc/4WR2-7B3E].

Many sportswriters and experts in the sports industry are wary about the NCAA announcement.[44] Skeptics claim that the NCAA merely announced the change to stall the momentum of the federal and state governments introducing legislation similar to the California law, and experts believe the whole announcement by the NCAA is merely "smoke and mirrors."[45]

Jeremy Bloom, two-time Olympic skier and former college football and NFL player, released a statement via Twitter in response to the NCAA's announcement:

> [W]e should all be highly skeptical of what their intent is here. For example, in today's press release they say that they support profiting off NIL "In a manner that is consistent with the collegiate model." What in the world does that mean? Bottom line, state legislators need to continue down the path and keep the pressure high while the NCAA figures out how to hold up their house of cards.[46]

Representative Walker said the NCAA announcement "offers no insight as to how to resolve this . . . . [T]hey have used words in the past to deny equity and basic constitutional rights for student-athletes."[47]

Shortly after its announcement, the NCAA published a document supporting the view that the organization is not working towards fair compensation for athletes.[48] It states: "We believe the actions taken by California and other states are unconstitutional . . . [t]he NCAA is closely monitoring the approaches taken by state governments and the U.S. Congress and is considering all potential next steps."[49] The NCAA continues to attack the California law, while simultaneously claiming it plans to allow athletes to profit from the use of their NILs. If the NCAA plans to allow players to profit from the use of their NILs, there would be no need to continue attacking the California law.[50]

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[44] *See, e.g.*, Terry Collins, *NCAA's Ruling on College Athletes Getting Paid Is Still 'Smoke and Mirrors,' Experts Say*, FORTUNE (Oct. 30, 2019), https://fortune.com/2019/10/30/ncaa-decision-college-athletes-pay/ [https://perma.cc/KR8M-WX3L].

[45] *Id.* Ramogi Huma, the National College Players Association's executive director, stated that the NCAA has no concrete proposals, and its position reflects a "continued state of denial." *Id.*

[46] Jeremy Bloom (@JeremyBloom11), TWITTER (Oct. 29, 2019, 8:02 P.M.), https://twitter.com/JeremyBloom11/status/1189331792219820039.

[47] Dennis Dodd, *Inside the NCAA's Move to Allow Athletes to Profit from Name, Image, and Likeness Rights*, CBS SPORTS (Oct. 29, 2019), https://www.cbssports.com/college-football/news/inside-the-ncaas-move-to-allow-athletes-to-profit-from-name-image-and-likeness-rights/ [https://perma.cc/LE2B-ZMFK].

[48] *Questions and Answers on Name, Image and Likeness*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (last updated 28, 2020), http://www.ncaa.org/questions-and-answers-name-image-and-likeness [https://perma.cc/SB2R-NRUT].

[49] *Id.*

[50] The NCAA stated that the reason it still opposes the California law:

Approximately four months after the NCAA announced that it would allow college athletes to profit from the use of their NILs, NCAA President Mark Emmert confirmed the organization's hidden motive behind its announcement when he urged Congress to implement federal restrictions on college athletes' ability to earn money from endorsements.[51]

III. CALIFORNIA'S FAIR PAY TO PLAY ACT LIKELY VIOLATES THE DORMANT COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

Before the passage of California's Fair Pay to Play Act, California State Senator Nancy Skinner, a co-sponsor of the bill, reached out to Chris Sagers, an antitrust expert and law professor at Cleveland State University, to analyze whether the law could withstand a constitutional challenge.[52] Professor Sagers replied with a six-page analysis concluding that an NCAA challenge to the California law would fail and the law would be upheld as constitutional.[53]

A. *Rebuttal to Professor Sagers' Letter to Gavin Newsom*

As Sagers points out in his constitutional analysis, "the NCAA's argument appears to be that SB 206 would violate the 'dormant commerce clause' of the U.S. Constitution."[54] The Supreme Court interprets the federal government's ability to "regulate Commerce . . . among the several States,"[55] to mean that the power to regulate interstate commerce is reserved to the federal government rather than state governments, and those state governments therefore may not discriminate or burden an interstate market.[56]

It is critical that college sports are regulated at a national level. This ensures the uniformity of rules and a level playing field for student-athletes. The California law and other proposed measures ultimately would lead to pay for play and turn college athletes into employees. This directly contradicts the mission of college sports within higher education — that student-athletes are students first and choose to play a sport they love against other students while earning a degree.

Id. However, California's law merely prohibits the NCAA from retaliating against schools where athletes exercise their NIL rights. It specifically prohibits colleges, universities, conferences, and athletic associations from paying athletes, which the NCAA is listing as its main concern.

[51] *NCAA President Mark Emmert Seeks Senate's Help on Topic of Athlete Pay*, ESPN (Feb. 11, 2020), https://www.espn.com/college-sports/story/_/id/28680672/ncaa-president-mark-emmert-seeks-senate-help-topic-athlete-pay [https://perma.cc/YY2V-S5RP].

[52] Chris Sagers, *Letter to Gavin Newsom in Reply to the NCAA: Constitutionality of California SB 206, the "Fair Pay to Play Act"*, (Sept. 24, 2019), https://ssrn.com/abstract=3460551 [https://perma.cc/JQ73-HRCB].

[53] *Id.*

[54] *Id.*

[55] U.S. CONST. art. I, § 8, cl. 3.

[56] For a more complete history of the evolution of the Dormant Commerce Clause in American jurisprudence, see Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 574–81 (1987).

When evaluating a Dormant Commerce Clause case, the Supreme Court has adopted a two-tier test.[57] First, if a state statute *directly* regulates or discriminates against interstate commerce, or if its effect favors in-state economic interests over out-of-state interests, federal courts will strike down the statute without further inquiry.[58] Second, if a statute only indirectly affects interstate commerce and regulates in a geographically neutral manner, then federal courts will weigh whether the state's interest is legitimate and whether the burden on interstate commerce outweighs the local benefits in what has become known as the Pike balancing test.[59]

1. *California's Fair Pay to Play Act May Directly Discriminate Against Out-of-State Schools*

Professor Sagers begins his analysis of California's law by stating that the proposed S.B. 206 "does not 'inject[] . . . [its] regulatory scheme into the jurisdiction of other states'" and also "does not discriminate against any commerce in any way."[60] Through this reasoning, he quickly dismisses the argument that the California law could violate the first prong of the test.

However, the analysis under the first prong should not be dismissed so hastily. While Sagers takes it as a given that "[t]he NCAA will be just as free to restrict compensation outside California as it was before adoption of S.B. 206,"[61] this does not hold true in the context of interstate athletic competition. If athletes from California teams choose to exercise their right to profit from the use of their NILs through an endorsement deal, then the California law would force schools, conferences, and athletic associations in other states to recognize the rights of those players to participate in athletic events in their state, despite the prohibitive rules in that state.[62]

This argument ultimately would be determined by what frame of reference a trial judge decides to view the California law under—either preventing retaliatory action by schools in California or forcing out-of-state schools to accept and play against California schools with major recruiting advantages. A trial judge could reasonably interpret the California law as directly forcing the

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[57] Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).

[58] *Id.*

[59] *Id. See also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[60] Sagers, *supra* note 52, at 4.

[61] *Id.* at 3–4.

[62] For instance, if athletes for the University of Southern California chose to enter into major endorsement deals, some players could potentially be making hundreds of thousands of dollars per year from these deals. *See supra* Part II.B. The California law would then require schools in other states to allow USC's team to compete there. Conference rules require many schools outside California to schedule games against California schools. Michael Felder, *How Is a College Football Schedule Made?*, BLEACHER REPORT (Sept. 27, 2012), https://bleacherreport.com/articles/1350023-how-is-a-college-football-schedule-made [https://perma.cc/Y9QJ-4EJQ].

will of the state legislature on schools outside of California by forcing them to accept and play against athletes that are in violation of the rules of their state. The court would then be required to find this as direct discrimination against schools in other states and strike down the law for violating the first prong of the Dormant Commerce Clause test.[63]

2. Even if a Court Finds No Direct Discrimination Against Interstate Commerce in the California Law, the Law Will Still Likely Fail the Pike *Balancing Test*

Even if a court finds that the California law does not directly discriminate against interstate commerce, the law will still need to survive the second prong of the Dormant Commerce Clause test: the Pike balancing test. Professor Sagers begins his analysis under this test by stating that the burdens the California law places on other states in the collegiate sports market will be "[f]or the most part . . . small and incremental."[64]

However, the dollar amounts that certain players would be able to make through marketing their NILs to third parties could be in the hundreds of thousands, and potentially into the millions each year for the most decorated players in college sports.[65] When large sums of money would be available to top athletes in California, but not in other states, it would be unlikely that the top athletes in the country decide to attend school somewhere besides California.[66]

Professor Sagers' analysis attempts to rationalize the potential recruiting advantage by pointing to current inconsistencies in scholarships and grants between conferences and schools.[67] The problem here is that those restrictions are typically self-imposed by the school or conference,[68] and are quite small.

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[63] *See Brown-Forman*, 476 U.S. at 579.

[64] Sagers, *supra* note 52, at 4. The crux of Professor Sagers' analysis seems to be that the majority of athletes in California under this legislation will make such a small sum of money by marketing their NILs that the actual burden will be quite small, and therefore not enough to overcome California's interest in protecting athletes.

[65] *See supra* Part II.B.

[66] While only a minority of athletes—the top 5%—could negotiate meaningful endorsement deals, the effect of the top 5% of talent concentrating in one state cannot be characterized as "small and incremental," as Sagers claims.

[67] For instance, Ivy league schools do not offer athletic scholarships, but still can compete against schools that do. Sagers, *supra* note 52, at 4. Similarly, under conference and sub-national organization rules, athletes at some schools may only be entitled to a maximum scholarship of tuition and room and board, while other schools may be permitted to distribute the same amount plus cost of living stipends, but the NCAA allows competition between said schools. *Id.*

[68] Conferences and schools may lift their self-imposed restrictions at any time to place themselves on an even playing field with other schools, and schools may leave a conference with restrictions if they so choose. With the competitive boost that California schools will gain under the new law, out-of-state schools would be unable to equalize their position due

Under California's new law, however, a California quarterback could be on a full scholarship and also marketing their NILs, while an opposing team's quarterback may have a maximum total grant package that is a mere fraction of that.[69] Professor Sagers next argues that higher education and employment are traditionally areas where state governments are given wide discretionary authority,[70] but there is no such tradition of state regulation of the inner workings of college athletics specifically, and courts have routinely differentiated college athletes from employees.[71]

Professor Sagers also notes that the Supreme Court has permitted state antitrust laws to go beyond federal protections.[72] However, courts may be wary to apply these protections to the college sports industry, for similar reasons to why courts routinely differentiate college athletes from employees. Due to the small number of top recruits in each sport every year and the direct competition between schools, recruiting athletes can have a much larger impact on competition between teams than recruiting employees can on competition between businesses. Furthermore, a business that disagrees with a state antitrust law may simply move to another state to regain its maximum rights under federal law, while moving states is an impossibility for colleges and universities.

If the Court finds that California's law indirectly discriminates against other states in interstate commerce, the burden shifts to California to demonstrate an overriding state interest.[73] Federal courts are reluctant to defer to the judgement of states who argue that a state interest overrides interstate commerce.[74]

California may attempt to justify its law with the history of NCAA exploitation of college athletes. However, federal courts have been hesitant to legitimize this concern in antitrust cases brought by college athletes, and instead have deferred to the NCAA on matters of athlete compensation.[75]

B. *In a Dormant Commerce Clause Challenge, California's Fair Pay to Play Act Will Most Likely Be Struck Down as Unconstitutional*

Ultimately, there is no denying just how large of a market college sports are, and it would be difficult to argue that elite athletes could not see large profits from the California bill.[76] The substance of the NCAA's argument is certainly

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to NCAA restrictions, absent lobbying their respective state governments to pass similar legislation.

[69] *See supra* Part II.B.

[70] *See* Sagers, *supra* note 52, at 4–5.

[71] *See supra* note 17.

[72] Sagers, *supra* note 52, at 5–6.

[73] *See* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 671–74 (1981).

[74] *See id.* at 675–76.

[75] *See, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049, 1066 (2015) ("the labor of student-athletes is an integral and essential component of the NCAA's 'product,' and a rule setting the price of that labor goes to the heart of the NCAA's business").

[76] *See supra* Part II.B.

not "weak," as Professor Sagers argues. In fact, a court analyzing the California law under the Dormant Commerce Clause would likely find the law unconstitutional because it impermissibly burdens interstate commerce, either directly or through a Pike balancing analysis.

IV. CONGRESS SHOULD PASS LEGISLATION ALLOWING ATHLETES TO PROFIT FROM THE USE OF THEIR NILS TO PROTECT ATHLETES

Federal action is required to ensure athletes continue to be protected from the exploitative practices of the NCAA, as state protections like California's Fair Pay to Play Act are likely unconstitutional.[77] Currently, the best way to protect athletes would be federal legislation allowing them to enter into sponsorships and similar arrangements with third parties, enabling them to profit from the use of their NILs.

A federal law similar to California's should not be unconstitutional, as the Dormant Commerce Clause appears to be the only grounds on which the NCAA could possibly challenge the California law.[78] Having one set of fixed laws that every college and university must abide by will invalidate one of the most-cited criticisms of the California law: the competitive edge that it gives to California schools in recruiting athletes.[79]

V. CONCLUSION

After analyzing the merits of both the NCAA and State of California's arguments regarding personal payment for athlete NIL use, a federal court would most likely side with the NCAA and find the California law unconstitutional. As a result, the time is now for Congress to step in and pass legislation to protect athletes nationwide and ensure that the NCAA does not "sweep the issue under the rug."

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[77] *See supra* Part III.B.

[78] *See supra* notes 54–56 and accompanying text.

[79] *See, e.g.*, *Questions and Answers*, *supra* note 48 ("It is critical that college sports are regulated at a national level. This ensures the uniformity of rules and a level playing field for student-athletes.").