Journal of Business and Social Science Review
Issue: Vol. 2; No.7; July 2021 pp.11-25
ISSN 2690-0866(Print) 2690-0874 (Online)
Website: www.jbssrnet.com
E-mail: editor@jbssrnet.com
Doi: 10.48150/jbssr.v2no7.2021.a2

"The NCAA Is Not Above The Law": The Changing Landscape of College Athletics Changes Once Again

Michael Delle Donne
Graduate Research Assistant
Seton Hall New Jersey

Richard J. Hunter*, Jr.
Professor of Legal Studies
Seton Hall New Jersey

John H. Shannon
Professor of Legal Studies
Seton Hall New Jersey

Abstract

This is Part II of an article focusing on the NCAA as it grapples with the new reality that athletes may be compensated both for certain academically related expenses as well as commercially for the use of their names, images, and likenesses. This article begin with an discussion of the United States Supreme Court's decision in *Alston v. NCAA*, with a special analysis of the concurring opinion of Justice Kavanaugh which poses a unique challenge to the principle of amateurism as espoused as a core value by the NCAA. The paper then outlines the various state and federal approaches to dealing with questions revolving around fair compensation for college athletes and the NCAA response to these issues. The paper concludes with observation and commentary about the future of a possible federal legislative approach, as well as its consequences for the NCAA.

1. Introduction

July 1, 2021—a date that will either "live in infamy," signaling the end of amateurism in college athletics and ushering in an era of the "Wild West" for collegiate sports marketing (Kaplan, 2021), or a date in which fundamental economic fairness finally arrived for college athletes. Two distinct views began to emerge. Forde (2021) writes:

"It began just after the stroke of midnight, as soon as legally possible. College athletes took pickaxes and hammers to the antiquated NCAA bylaws, performing a jubilant demolition like East Germans at the Berlin Wall in 1989. They tore down that amateurism wall, and in the process began deconstructing establishmentarian fears of what's coming next."

"Name, image and likeness (NIL) rule changes will make the rich richer, the establishment said. This will help only the Alabamas, Clemsons and Ohio States of college football. It will help only the North Carolinas, Dukes and Kentuckys of college basketball."

"And then, at 12:01 a.m. Thursday, Jackson State football player Antwan Owens signed an endorsement contract with a hair-care product. Some of his teammates signed deals with the same company, as well. Yes, there were plenty of deals for higher-profile players at bigger programs—podcast sponsorships, merchandise deals, gaming companies, appearance fees and a sweet tea endorsement for the Auburn quarterback. But NIL rules won't simply make the rich richer; it will make the *niche* richer. The athletes with specialty interests—including those at historically Black colleges and universities—are in line to cash in."

Nothing short of the future of the model of NCAA athletics is at stake. Will the future be one grounded in traditional concepts surrounding amateurism or will the future be one of "big money," "pay- for-play" (Knoester & Ridpath, 2020; Browndorf, 2021), or the end of the concept of a true student athlete, engaged for the "honor of the sport" or for the glory of their academic institution?

A series of federal cases, state legislative enactments and proposals, the threat of federal intervention, and finally the announcement of a change in policy by the NCAA itself have altered the landscape of college athletics and opened a new era in the relationship between the college athlete, the NCAA, and their individual institutions.

1. *O'Bannon v. NCAA*: A Reprise of the Seminal Challenge to NCAA Rules on Amateurism

In Part I of this study, Delle Donne and Hunter (2021) described in great detail the seminal case of *O'Bannon v. NCAA* (2009)—essentially a "non-decision decision" which presaged both the United States Supreme Court's decision in *Alston v. NCAA* (2021), attempts by states to install a legislative solution to the problem, and finally, the NCAA's seemingly reflexive actions in July of 2021. Part II begins with a short reprise of the essential facts of *O'Bannon* (adapted from Delle Donne & Hunter, 2021).

NCAA rules prohibiting payments to athletes for the use of their name, image, and likeness were initially challenged in *O'Bannon v. NCAA* (2009) (Edelman, 2014). Ed O'Bannon was a star basketball player for UCLA in the mid-1990's. In 2009, O'Bannon filed a class action lawsuit against the NCAA and the Collegiate Licensing Company, alleging that the arrangement entered into by these parties was a violation of the the Sherman Act of 1890 as a "contract, combination, or conspiracy in restraint of trade" and for enacting policies that required him to sign a waiver to forego compensation for the use of his name, image, and likeness in return for maintaining his collegiate eligibility, depriving him of his personal "right of publicity" (generally, Moore-Willis, 2018)

O'Bannon had cited the sale of individual game videos and videos highlighting UCLA's National Championship; photographs and stock footage; the rebroadcast of games on the ESPN Classic network; and the use of his likeness by Electronic Arts [EA], a video game developer, in a popular video game. EA was also alleged to have conspired with the NCAA based on licensing agreements between the NCAA and EA relating to the use of student-athlete likenesses.

The case was first heard by Judge Claudia Wilken in the U.S District Court for the Northern District of California. On August 8, 2014, Judge Wilken issued a decision in the case. In her decision, Judge Wilken found that the rules of the NCAA prohibiting payment of compensation to student-athletes violated Section 1 of the Sherman Act of 1980 as an "unreasonable restraint on competition in the college education market." As a result, "colleges and universities behave as a cartel — a group of sellers who have colluded to fix the price of their product" (see Blair & Wang, 2017).

The District Court permanently enjoined the NCAA from enforcing certain of its rules as they applied to the Football Bowl Subdivision and Division I men's basketball student-athletes. The decision permitted schools to offer student-athletes an athletic scholarship representing the "*full cost of attendance*" (Bradury & Pitts, 2017; Tumminello, 2018) at their respective schools and up to $5,000 per year in deferred compensation, the amount to be held in trust for student-athletes until *after* they leave college. The NCAA appealed this decision to the Ninth Circuit Court of Appeals. The NCAA argued that it had effectively be granted full immunity from anti-trust suits based on an earlier decision of the United States Supreme Court in *NCAA v. Board of Regents of the University of Oklahoma* (1984) (see Scully, 1985).

The Ninth Circuit first held that it was not precluded from reaching the merits of plaintiffs' Sherman Act claim because: (1) the Supreme Court did *not* hold in *NCAA v. Board of Regents of the University of Oklahoma* (1984) that the NCAA's amateurism rules are valid as a matter of law under *all* circumstances; (2) the NCAA rules *are* subject to the Sherman Act because they regulate commercial activity; and (3) the plaintiffs established that they suffered injury in fact, and therefore had standing, by showing that, absent the NCAA's rules, video game makers would likely pay them for the right to use their names, images, and likenesses in college sports video games. The appellate panel conceded that even though many of the NCAA's rules were likely to be found to be pro-competitive, promoting the principle of amateurism (O'Brien, 2015; Feigenbaum, 2019), they were *not* exempt from antitrust scrutiny and must be analyzed under the rule of reason (Arico, 1985).

However, applying the rule of reason, the Ninth Circuit held that the NCAA's rules had significant anticompetitive effects within the college education market, in that they fixed an aspect of the "price" that recruits pay to attend college. The Ninth Circuit agreed that the District Court had properly identified a "less restrictive alternative" to the current NCAA rules: allowing NCAA members to offer athletic scholarships up to the "full cost of attendance."

However, the District Court's other remedy—allowing students to be paid cash compensation of up to $5,000 per year—was erroneous and could not be justified on any factual basis. The panel thus vacated the District Court's judgment relating to the $5,000 payment.

3. *Alston v. NCAA:* From the Ninth Circuit to the United States Supreme Court

As a result of *O'Bannon*, a number of class-action lawsuits were filed by student-athletes against the NCAA and their individual universities, challenging these and other restrictions, including a lawsuit originally filed in 2014 by former West Virginia running back Shawne Alston, as well as other Division I basketball and football players. These suits were combined into a single suit, also heard by Judge Wilken, who once again ruled against the NCAA in March 2019. Judge Wilken required the NCAA to permit students to receive other non-cash scholarships, payment for internships, and other academic support beyond the *full cost-of-attendance* for academic purposes (see Smith 2015). The Ninth Circuit upheld the ruling on appeal (see Ramsey, 2020), and the Supreme Court certified the case in 2021 for argument as *National Collegiate Athletic Association v. Alston* after the NCAA filed a notice of appeal.

In discussing the *Alston* case, Delle Donne and Hunter (2021, p. 6) noted that "While the *Alston* case is broader in scope than the singular issue relating to of name, image and likeness, a decision by the United States Supreme Court may shape the future, determining how the NCAA will be allowed to define amateurism and how the organization will move forward in treating their greatest assets- the student-athletes."

In support of its position, the NCAA continued to maintain that amateurism is key to preserving the uniqueness of college athletics and its differentiation from professional sports (e.g. Manion, 2017). The NCAA argued that granting compensation to athletes in the form of paying the cost of post-graduate degrees, paid internships or other educational expenses would potentially be exploited by member schools as a recruiting tool, creating an unfair and fundamentally unequal marketplace and would run afoul of its core amateurism principle (see Feigenbaum, 2019).

3.1. The Supreme Court Speaks [See Appendix for a full record of the Proceedings before the United States Supreme Court]

The Supreme Court would offer a partial answer in its June 21, 2021 decision, however, considering only the subset of NCAA rules restricting education-related benefits that the district court had enjoined. We will quote extensively from the case where appropriate. In a unanimous decision authored by Associate Justice Neil Gorsuch, the Supreme Court emphasized the following points:

- The NCAA business model relies on "amateur" student-athletes who compete under horizontal restraints restricting how universities compensate them for their play in various ways. In reality, these rules *depress compensation* for at least some student-athletes below what a competitive market would yield.
- The NCAA and its members have agreed to compensation limits for student-athletes; the NCAA enforces these limits on its member-schools; and these compensation limits affect interstate commerce.
- Courts have properly subjected the NCAA's compensation restrictions to antitrust scrutiny under a "rule of reason" analysis. Analyzing a case under the "rule of reason" requires a court to "conduct a fact-specific assessment of market power and market structure" to assess a challenged restraint's "actual effect on competition."
- The NCAA maintained that courts should have analyzed its compensation restrictions under an "extremely deferential standard" because its structure is essentially a joint venture among members who must collaborate to offer consumers the unique product of intercollegiate athletic competition.
- The NCAA next contends that the Court's decision in *Board of Regents* expressly approved the NCAA's limits on student-athlete compensation.
- The Supreme Court disagreed. "That is incorrect. The Court in *Board of Regents* did not analyze the lawfulness of the NCAA's restrictions on student-athlete compensation. Rather, that case involved an antitrust challenge to the NCAA's restraints on televising games—an antitrust challenge the Court sustained. Along the way, the Court commented on the NCAA's critical role in maintaining the revered tradition of amateurism in college sports as one "entirely consistent with the goals of the Sherman Act." But that sort of passing comment (dicta) on an issue not presented is not binding, nor would it be dispositive of the issue here.
- The NCAA also argued that a rule of reason analysis is inappropriate because its member schools are not "commercial enterprises" but rather institutions that exist to further the "societally important" noncommercial objective of undergraduate education. This submission also fails.

- "The Court has regularly refused these sorts of special dispensations from the Sherman Act. The Court has also previously subjected the NCAA to the Sherman Act, and any argument that "the special characteristics of [the NCAA's] particular industry" should exempt it from the usual operation of the antitrust laws is "properly addressed to Congress."

Perhaps more importantly, Justice Gorsuch, writing for the Court, noted:

- The NCAA contends the district court should have deferred to its conception of amateurism instead of "impermissibly redefin[ing]" its "product." Moreover, the district court found the NCAA had not even maintained a consistent definition of amateurism throughout its history.
- Finally, the court's injunction preserves considerable leeway for the NCAA, while individual conferences remain free to impose whatever rules they choose. To the extent the NCAA believes meaningful ambiguity exists about the scope of its authority, it may seek clarification from the district court as to individual issues.

In practical terms, the Court noted that the injunction applies only to the NCAA's rules "limiting the *education-related* benefits" that conferences or schools may offer student-athletes. The Court stated that relaxing these restrictions will not "blur the distinction between college and professional sports," and the NCAA can achieve the "same pro-competitive benefits" by significantly less restrictive means than its current rules provide.

With these points in mind, the Supreme Court unanimously upheld the injunction prohibiting the NCAA from enforcing its rules limiting education-related benefits that conferences and schools may provide to student-athletes, including those rules limiting scholarships for graduate or vocational school, payments for academic tutoring, and paid post-eligibility internships (Randall, 2021). The Court cautioned that permitting universities to award certain education-related benefits could not 'be confused with a professional athlete's salary." The Court also held that the NCAA may continue to limit cash awards for academic achievement, but only if those limits are no lower than the cash awards currently allowed for athletic achievement under the rubric of "full cost of attendance" (currently a maximum of $5,980 per year).

Eberspacher and Edel (2021) suggest that "The *Alston* decision is likely to force college and university athletic departments to change how they deal with revenue and Olympic student-athletes in significant ways:

- *First*, to competitively recruit student athletes, colleges and universities likely will have to promise not only grant-in-aid packages but also additional, education-related benefits to student-athletes.
- *Second*, colleges and universities will need to determine not only how annual "academic achievement awards" will impact their budgets, but also how these awards will impact compliance with Title IX.
- *Third*, colleges and universities will need to determine whether student-athletes receipt of these types of compensation transforms them into employees, entitled to mandatory benefits and possible unionization for collective bargaining purposes under the National Labor Relations Act" (see Hunter & Shannon, 2016).

There was, however, also a recognition that schools might offer benefits under the guise that they were "education related" in order to impermissibly recruit athletes. Kastner and Yeung (2021) stated:

"To the extent the NCAA is concerned that schools might exploit the injunction to give student-athletes 'unnecessary or inordinately valuable items' that are only nominally related to education, the Court held that the NCAA can specify and enforce 'rules delineating which benefits it considers legitimately related to education' and forbid questionable benefits. Finally, the NCAA and its member schools can propose a definition of 'compensation or benefits related to education,' and the NCAA is free to regulate how conferences and schools provide them."

However, unlike many Supreme Court opinions where the Court speaks with one unified voice, Associate Justice Kavanaugh authored a concurring opinion that may have spurred direct and almost immediate action by the NCAA (Brandt, 2021). It is important to carefully analyze the concurring opinion of Justice Kavanaugh which would serve as a clear warning to the NCAA. It should also be recognized that the Supreme Court's decision was not made in a vacuum. At the same time as the Supreme Court was handing down its decision, multiple states were moving to establish legislation that would protect athletes in pursuit of their monetary interests in circumstances that had been the gravamen of the allegations originally brought forth in *O'Bannon.*

4. The Kavanaugh Concurring Opinion: A Shot Across the NCAA's Bow

In his concurring opinion, Justice Kavanaugh noted that the NCAA had been "surprising[ly] success[ful" in restricting the compensation and benefits for student athletes and has "shielded its compensation rules from ordinary antitrust scrutiny." That would all end with the Court's opinion in *Alston.* Justice Kavanaugh stated: "Today, however, the Court holds that the NCAA has violated the antitrust laws." However, Justice Kavanaugh also recognized the limited scope of the Court's ruling:

"But this case involves only a narrow subset of the NCAA's compensation rules—namely, the rules restricting the education-related benefits that student athletes may receive, such as post-eligibility scholarships at graduate or vocational schools. The rest of the NCAA's compensation rules are not at issue here and therefore remain on the books. Those remaining compensation rules generally restrict student athletes from receiving compensation or benefits from their colleges for playing sports. And those rules have also historically restricted student athletes from receiving money from endorsement deals and the like."

The portions of Justice Kavanaugh's opinion that would be most threatening to the NCCC deals with how the Supreme Court *might* consider anti-trust issues in the future: "I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws."

Justice Kavanaugh would make three points. First, the Court did not address the legality of the NCAA's remaining compensation rules in *Alston*. Second, although the Court did not "weigh in" on the ultimate legality of the NCAA's remaining compensation rules, the Court established that the NCAA's remaining rules dealing with compensation of athletes should receive ordinary "rule of reason" scrutiny under the Sherman Act. Justice Kavanaugh emphasized that the decades-old "stray comments" about college sports and amateurism made in *National Collegiate Athletic Association. v. Board of Regents of the University of Oklahoma* (1984) were mere *dicta* which would not necessarily bear on whether the NCAA's current compensation rules would pass future anti-trust scrutiny under the Sherman Act. The Justice makes a critical point and states, "absent legislation or a negotiated agreement between the NCAA and the student athletes, the NCAA's remaining compensation rules should be subject to ordinary rule of reason scrutiny." Third, there are serious questions whether the NCAA's remaining compensation rules would pass muster under ordinary rule of reason scrutiny. Justice Kavanaugh correctly notes that under the rule of reason, the burden of proof would be squarely on the NCAA to supply a legally valid *pro-competitive justification* for its remaining compensation rules. And Justice Kavanaugh was skeptical that the NCAA could meet its burden on this point.

The NCAA acknowledges that it controls the market for college athletes through its rules, regulations, and what it terms as "legislation." The NCAA concedes that its compensation rules set the price of student athlete labor at a below-market rate (in many cases, with the market rate for athletes set at 0). The NCAA also recognizes that student athletes currently have no meaningful ability to negotiate with the NCAA over compensation issues:

"The NCAA nonetheless asserts that its compensation rules are procompetitive because those rules help define the product of college sports. Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid"—which argument Kavanaugh cites as "circular… But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America."

In an apt summary, Justice Kavanaugh takes note of the reality of college athletics.

"The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing. "

Justice Kavanaugh raises several questions that would no doubt accompany a change in NCAA rules relating to compensation.

"If it turns out that some or all of the NCAA's remaining compensation rules violate the antitrust laws, some difficult policy and practical questions would undoubtedly ensue. Among them: How would paying greater compensation to student athletes affect non-revenue-raising sports? Could student athletes in some sports but not others receive compensation? How would any compensation regime comply with Title IX? If paying student athletes requires something like a salary cap in some sports in order to preserve competitive balance, how would that cap be administered? And given that there are now about 180,000 Division I student athletes, what is a financially sustainable way of fairly compensating some or all of those student athletes?"

We would add: "Should these questions be addressed in a comprehensive, universal way through thoughtful NCAA legislation or perhaps through passage of a *federal statute* that would preempt often contradictory or incomplete state actions?

And herein lies the challenge to the NCAA. Justice Kavanaugh sets forth an interesting context: "Of course, those difficult questions could be resolved in ways other than litigation. Legislation would be one option. Or colleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues" (Hunter & Shannon, 2016).

Justice Kavanaugh, while pointed in his comments, was not totally dismissive of the contributions of the NCAA. In recognizing the important role that college athletics has played in American life, Justice Kavanaugh noted: "To be sure, the NCAA and its member colleges maintain important traditions that have become part of the fabric of America…. But those traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different." He concludes his concurring opinion with words that no doubt reverberated throughout the headquarters of the NCAA: "The NCAA is not above the law."

5. States Preemptively Deal with Athlete Compensation: Will the Congress Be Next?

As noted by Cohen (2021): "The decision in *NCAA v. Alston* does not require schools spend more money on athletics relating to academics. It just allows them to do so." Neither did its limited scope require the NCAA to permit athletes to individually profit from the use of their names, images, and likenesses. These distinctions may be especially important to students when they are making decisions which school to attend based on "incentives" schools are able to offer—or which economic opportunities may be available to them.

While athletes and the NCAA were sparring in the judicial arena, both the federal government and individual states were busy fashioning their own responses to "name, image and likeness" and other compensation issues raised in both *O'Bannon* and *Alston*. In fact, almost by coincidence, ten states had already enacted legislation that would come into effect on July 1, 2021 (Alabama, Colorado, Florida, Georgia, Illinois, Louisiana, Mississippi, New Mexico, Oregon, and Texas) to deal with the matter. Legislation in Arizona comes into force on July 23, 2011 and in Connecticut on September 1, 2021. California's law comes into effect in January of 2023, unless changed to September 1, 2021. In addition, Governors of two states (Ohio and Kentucky) had signed Executive Orders essentially providing for protections for student athletes who compete in their states. It appears that legislators had grown impatient that the NCAA would change (Blinder & Witz, 2021). The following table is a comprehensive review of these state and federal statutes and initiatives.

State	Official Bill Name	Status	Effective Date
Alabama	HB 82	Signed into law	7/1/2021
Arizona	HB 2143	Signed into law	7/23/2021
Arkansas	HB 1671	Signed into law	1/1/2022

California	SB 206	Signed into law	1/1/2023 (there's a proposal to move the date up to 9/1/21)
Colorado	SB 20-123	Signed into law	7/1/2021 (moved up from 1/1/2023)
Connecticut	HB 6402	Now recognized as a Public Act since 15 days have passed since the Senate approved it	9/1/2021
Federal	HR 1804	"Student-Athlete Equity Act"; Introduced by Rep. Mark Walker (R-NC); Referred to the House Committee on Ways and Means 03/14/19	Taxable year beginning after bill is passed
Federal	S 4004	"Fairness in Collegiate Athletics Act"; Introduced by Sen. Marco Rubio (R-FL); Read twice and referred to the Committee on Commerce, Science, and Transportation as of 6/8/20	7/30/2021
Federal	S 8382	"Student Athlete Level Playing Field Act"; Introduced by Sen. Anthony Gonzalez (R-OH); Referred to the Committee on Energy and Commerce, and in addition to the Committee on Education and Labor as of 9/24/20	N/A
Federal	S 5003	"Collegiate Athlete Compensation Rights Act"; Introduced by Sen. Roger Wicker (R-MS); Read twice and referred to the Committee on Commerce, Science, and Transportation as of 12/10/20	N/A
Federal	HR 9033	"College Athletes Bill of Rights"; Introduced by Rep. Janice Schakowsky (D-IL); Referred to the Committee on Education and Labor, and in addition to the Committee on Energy and Commerce as of 12/18/20	N/A
Federal	S 5062	"College Athletes Bill of Rights"; Read twice and referred to the Committee on the Judiciary as of 12/17/20	N/A
Federal	S 414	"Amateur Athletes Protection and Compensation Act of 2021"; Introduced by Sen. Jerry Moran (R-KS); Read twice and referred to the Committee on Commerce, Science, and Transportation as of 2/24/21	N/A
Federal	S 238	"College Athlete Economic	N/A

		Freedom Act"; Introduced by Sen. Christopher Murphy (D-CT); Read twice and referred to the Committee on Commerce, Science, and Transportation as of 2/4/21	
Florida	SB 646	Signed into law	7/1/2021
Georgia	HB 743	Signed into law	7/1/2021
Hawai'i	SB 2673	Bill introduced	Upon approval
Illinois	SB 2338	Signed into law	7/1/2021
Iowa	SF 245	Bill introduced	7/1/2021
Kansas	HB 2264	Passed House	1/2/2022
Kentucky		Governor issued executive order 6/24/21	7/1/2021
Louisiana	SB 60	Signed into law	7/1/2021
Maryland	HB 125	Signed into law	7/1/2023
Massachusetts	S 2454	Bill introduced	1/1/2022
Michigan	HB 5217	Signed into law	12/31/2022
Minnesota	HB 3329	Bill introduced	1/1/2023
Mississippi	SB2313	Signed into law	7/1/2021
Missouri	HB 297	Waiting on governor's signature	8/28/2021
Montana	SB 248	Signed into law	6/1/2023
Nebraska	LB 926	Signed into law	Immediately, but no later than 7/1/2023
Nevada	AB 254	Signed into law	1/1/2022
New Hampshire	HB 1505	Bill introduced	N/A
New Jersey	S 971	Signed into law	5th academic year after passage
New Mexico	SB 94	Signed into law	7/1/2021
New York	SB S6722B	Bill introduced	1/1/2023
North Carolina	SB 324	Bill introduced	1/1/2023
Ohio	SB 187	Governor signed an executive order 6/28/21	7/1/2021
Oklahoma	HB 1994	Signed into law	Immediately, but no later than July 1, 2023
Oregon	SB 5	Signed into law	7/1/2021
Pennsylvania	HB 1909	NIL language included in state budget proposal	Immediately
Rhode Island	HB 7806	Bill introduced	1/1/2021
South Carolina	SB 935	Signed into law	7/1/2022
Tennessee	HB 1351	Signed into law	1/1/2022
Texas	SB 1385	Signed into law	7/1/2021

Vermont	S.328	Bill introduced	1/1/2023
Virginia	HB 300	Bill introduced	7/1/2024
Washington	HB 1084	Bill introduced	1/1/2023
West Virginia	HB 2583	Bill introduced	N/A
Wisconsin	N/A	No bill proposed, but politicians say they are	N/A

6. The NCAA Reacts (Perhaps "Kicking and Screaming") and Adopts an "Interim" Name, Image and Likeness Policy: But Will That Be Enough?

Under a policy announced on Thursday, June 30, 2021 by the NCAA, college athletes will have the opportunity to benefit financially from their name, image and likeness. Governance bodies in all three NCAA Divisions (I, II, and II) adopted a uniform "interim policy" (Athletic Staff, 2021) suspending NCAA name, image, and likeness rules for all incoming and current student-athletes in all sports—rules which would have declared ineligible any students who financially benefitted from such actions.

Chair of the powerful Division I Board of Directors, Dennis Trauth (President of Texas State University) added: "Today, NCAA members voted to allow college athletes to benefit from name, image and likeness opportunities, no matter where their school is located. With this interim solution in place, we will continue to work with Congress to adopt federal legislation to support student-athletes."

Division II President's Council Chair, Sandra Jordan, Chancellor at the University of South Carolina Aiken, stated: "The new policy preserves the fact college sports are not pay-for-play. It also reinforces key principles of fairness and integrity across the NCAA and maintains rules prohibiting improper recruiting inducements. It's important any new rules maintain these principles."

Division III Presidents Council chair, Fayneese Miller, president at Hamline University, stated that the NCAA will "continue to work with Congress to develop a national law that will help colleges and universities, student-athletes and their families better navigate the name, image and likeness landscape."

Interestingly, another individual who commented on this action was NCAA President Mark Emmert, who has been under increasing criticism for his handling of this and other issues and for what has been termed as "lackluster leadership" (O'Brien, 2021). Stated Emmert: "This is an important day for college athletes since they all are now able to take advantage of name, image and likeness opportunities."

However, Emmert may have tipped the hand on the preference of how the NCAA would prefer to see a resolution of the issue: "With the variety of state laws adopted across the country, we will continue to work with Congress to develop a solution that will provide clarity on a national level. The current environment — both legal and legislative — prevents us from providing a more permanent solution and the level of detail student-athletes deserve."

The policy announced by the NCAA was designed to provide "guidance" to college athletes, recruits, their families, and administrators of NCAA affiliated colleges and universities:
Main points of the Interim Policy include:

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for resolving state law questions (i.e., in providing guidance to their student athletes).
- College athletes who attend a school in a state without an NIL law can engage in this type of activity *without* violating NCAA rules related to name, image and likeness.
- Individuals can use a professional services provider (i.e., an agent) for NIL activities.
- Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school administration.
- With the NIL interim policy, schools and conferences may choose to adopt their own additional policies.

The NCAA stressed that while opening name, image, and likeness opportunities to student-athletes, the policy in all three divisions preserves the NCAA's commitment to avoid "pay-for-play" and improper inducements tied to choosing to attend a particular school. Those rules will remain in effect.

7. Observations and Conclusions

The ruling of the National Labor Relations Board in the case of the Northwestern football players who attempted to form a union (*Northwestern University and College Athletes Players Association*, 2015) seems to have precluded this option of resolving issues relating to compensation through collective bargaining or "some other similar process" (Hunter and Shannon, 2016) *at this time*. As Strauss (2015) noted: "Chief among the board's reasons for declining to consider the case were the complexities of an NCAA in which one team might be unionized while others were not, and whether a union would negotiate terms that conflicted with the association rules."

As a consequence, it is clear that the NCAA is opting for comprehensive and permanent solution in the form of federal legislation or perhaps in a series of rules the NCAA would adopt. However, the NCAA also clearly expressed its opinion that "The NCAA is best positioned to provide a uniform and fair name, image and likeness approach for all student-athletes on a national scale." Are these two statements reconcilable? Does the NCAA believe its views should be preeminent and controlling in fashioning any federal response in the form of legislation? Is it fair to doubt the words of NCAA President Emmert in light of the fact that under his leadership the NCAA had filed appeals in both *O'Bannon* and *Alston* and had consistently argued against compensation for student-athletes for their names, images, and likenesses in the ground of preserving its policy of amateurism and its control over college athletics?

McCollough (2021) states flatly that at one point, Emmert may have been banking that federal legislation coming from a Republican Senate would be more responsive to NCAA views. In fact, legislation sponsored by Senators Marco Rubio (R-Fl.) and Roger Wicker (R-Miss.) seemed to be moving in that direction. However, that hope may have faded when Democrats took over the Senate in 2021 and prospects for federal legislation moved decidedly towards legislation sponsored by Democratic Senators Corey Booker (D-NJ) and Richard Bloomenthal (D-Conn.) in the form of the "College Athlete Bill of Rights" (McCollough, 2021).

Considering the skepticism about the actions and motivations brought forth by several members of the House and Senate in discussing the role the NCAA has thus far played in questions relating to compensation of student-athletes, the real question is: Will Congress agree to leave the resolution of this and other issues to the NCAA or will it insist on its own legislative approach? One other possibility exists: Might it not also be time to reconsider the possibility of unionization of college athletes?

References

Athletic Staff. (2021). NCAA approves interim NIL policy for college athletes. *The Athletic* (July 1, 2021). Available: https://theathletic.com/news/ncaa-approves-interim-nil-policy-for-college-athletes/HSSJIy9wkRMg

Arico, J.S. (1985). NCAA v. Board of Regents of the University of Oklahoma: has the Supreme Court abrogated the per se rule of antitrust analysis? *Loyola of Los Angeles Law Review*, 19: 437-472.

Blair, R.D. & Wang, W. (2017). The NCAA cartel and antitrust policy. *Review of Industrial Organizations*, 52: 351-368.

Blinder, A. & Witz, B. (2021). The N.C.A.A. says it's working to change. Next year, at the soonest. *New York Times* (January 20, 2021). Available: https://www.nytimes.com/2020/01/24/sports/ncaa-athlete-pay.html

Bradbury, J.C. & Pitts, J.D. (2017). Full cost-of-attendance scholarships and college choice: evidence from NCAA football. *Journal of Sports Economics*, 19(7): 977-989.

Brandt, A. (2021). Business of football: the Supreme Court sends a message to the NCAA. *Sports Illustrated* (June 29, 2021). Available: https://www.si.com/nfl/2021/06/29/business-of-football-supreme-court-unanimpous-ruling

Browndorf, C. (2021). A perfect storm: transfer restrictions, pay-for-play, and the future of collegiate athletics. *Mississippi Sports Law Review*, 5: 5-41.

Cohen, S. (2021). Supreme Court charts path to greater benefits for collegiate athletes. *Maine Wire* (July 1, 2021). Available: https://www.themainewire.com/2021/07/supreme-court-charts-path-to-greater-benefits-for-collegiate-athletes/

Delle Donne, M. & Hunter, R.J. (2021). An essay on the NCAA, amateurism, and the student-athlete: protecting their greatest asset. *Journal of Business and Social Science Review*, 2(5):1-15.

Eberspacher, S. & Edel, M.D. (2921). National Collegiate Athletic Association v. Alston. *The National Law Review*, XI(185). Available: https://www.natlawreview.com/article/national-collegiate-athletic-association-v-alston

Edelman, M. (2014). The District Court decision in O'Bannon v. National Collegiate Athletic association: a small step forward for college-athlete rights, and a gateway for far greater change. *Washington and Lee Law Review*, 71(4): 2319-2364.

Feigenbaum, J. (2019). From broke to bespoke: providing financial security to student-athletes within the confines of amateurism. *Arizona State University Sports & Entertainment Law Journal*, 8(2): 1-25.

Forde, P. (2021). NCAA NIL landscape already proving to quell naysayers. *Sports Illustrated* (July 3, 2021). Available: https://www.si.com/college/2021/07/01/ncaa-nil-reaction-criticism-athlete-benefits

Hunter, R.J. & Shannon, J.H. (2016) Is the Northwestern case a real "game changer" for intercollegiate athletics: a non-decision decision. *Western State Law Review*, 43: 155-198.

Kaplan, D. (2021). As NIL era arrives, marketing of college athletes is about to become Wild West of sports business world. *The Athletic* (June 29, 2021). Available: https://theathletic.com/2678966/2021/06/29/as-nil-era-arrives-marketing-of-college-athletes-is-about-to-become-wild-west-of-sports-business-world

Kastner, W.D. & Yeung, S.W. What does the future hold for college athletics after the Supreme Court decision in NCAA v. Alston? *Schnader Harrison Segal & Lewis LLP.com* Available: https://www.schnader.com/blog/what-does-the-future-hold-for-college-athletics-after-the-supreme-court-decision-in-ncaa-v-alston/

Knoester C. & Rispath, B.D. (2020). Should college athletes be allowed to be paid? A public opinion analysis. *Sociology of Sport Journal* (November 23, 2020). Available: http://xrgvuxvd.com/view/journals/ssj/aop/article-10.1123-ssj.2020-0015/article-10.1123-ssj.2020-0015.xm

Mannion, K. (2017). NCAA amateurism rules promote integrity at a price. *Juris Magazine* (Duquesne University Blog) (October 21, 2017). Available: https://sites.law.duq.edu/juris/2017/10/21/ncaa-amateurism-rules-promote-integrity-at-a-price/

McCollough, J.B. (2021). Congress now won't save NCAA from athlete rights reckoning. *LA Times* (January 10, 2021). Available: https://www.latimes.com/sports/story/2021-01-09/congress-ncaa-nil-student-athletes

Moore-Willis, T.Y. (2018). Locally famous, nationally vindicated: a comprehensive analysis of likeness-based recovery avenues for student-athletes under the right of publicity and Lanham Act. *Boston University Journal of Science and Technology*, 24(1): 135-169.

O'Brien, T. (2015). Antitrust, amateurism rule in O'Bannon case. *College Athletics and the Law*, 12(8): 6.

O'Brien C. (2021). After years of stagnation, NCAA needs fresh leadership. *The Daily Illini* (April 15, 2021). Available: https://dailyillini.com/sports/2021/04/15/column-after-years-of-stagnation-ncaa-needs-fresh-leadership/

Ramsey, K. (2020). NCAA suffers blow in Alston v. NCAA scholarship cost of attendance case. *Business of Sports* (June 8, 2020). Available: https://unafraidshow.com/ncaa-suffers-blow-in-alston-v-ncaa-appeal-cost-of-attendance/

Randall, T. (2021). NCAA v. Alston case: Supreme Court strikes down NCAA rules restricting benefits to student-athletes. *Higher Education Law Reports* (June 30, 2021) Available: https://www.jdsupra.com/legalnews/ncaa-v-alston-case-8094242/

Scully, T. (1985). NCAA v. Board of Regents of the University of Oklahoma: the NCAA's television plan is sacked by the Sherman Act. *Catholic University Law Review*, 34(3): 857-887).

Sherman Antitrust Act. 15 U.S.C. Sections 1-7 (1890).

Smith, C. (2015). Full cost of attendance: what will it mean for power five players? Saturday Down South (April 15, 2015). Available: https://www.saturdaydownsouth.com/sec-football/full-cost-of-attendance-explained/

Strauss, B. (2015) N.L.R.B. rejects Northwestern football players' union bid. *New York Times* (August 17, 2015). Available: https://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrb-says-northwestern-football-players-cannot-unionize.html

Tumminello, T. (2018). The changing face of college athletics: O'Bannon and cost of attendance. *Taylor Porter.com* (January 16, 2018). Available: https://www.taylorporter.com/blog/post/the-changing-face-of-college-athletics-obannon-and-cost-of-attendance

CASES:

Northwestern University and College Athletes Players Association. Case Number 13-12359 (August 17, 2015). National Labor Relations Board.

NCAA v. Alston. No. 20-512. Certiorari to the United States Court of Appeals for the 9th Circuit. Argued March 31, 2021, decided June 21, 2021 (United States Supreme Court).

NCAA v. Regents of the University of Oklahoma. 468 U.S. 85 (1984). United States Supreme Court.

O'Bannon v. NCAA. 802 F.3d 1049 (2015). United States Court of Appeals for the 9th Circuit.

APPENDIX- FULL RECORD OF NCAA v. ALSTON

Title:	**National Collegiate Athletic Association, Petitioner v. Shawne Alston, et al.**
Docketed:	October 19, 2020
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(19-15566, 19-15662)
Decision Date:	May 18, 2020

DATE	PROCEEDINGS AND ORDERS
Oct 15 2020	Petition for a writ of certiorari filed. (Response due November 18, 2020)
Nov 09 2020	Brief of respondents Shawne Alston, et al. in opposition filed.
Nov 13 2020	Brief amicus curiae of Sam C. Ehrlich filed.
Nov 18 2020	Brief amici curiae of Antitrust Law And Business School Professors filed.
Nov 18 2020	Brief amici curiae of Antitrust Economists filed. (Distributed)
Nov 24 2020	DISTRIBUTED for Conference of 12/11/2020.
Nov 24 2020	Reply of petitioner National Collegiate Athletic Association filed. (Distributed)
Dec 16 2020	Petition GRANTED. The petition for a writ of certiorari in No. 20-520 is granted. The cases are consolidated, and a total of one hour is allotted for oral argument.
Dec 16 2020	Because the Court has consolidated these cases for briefing and oral argument, future filings and activity in the cases

	will now be reflected on the docket of No. 20-512. Subsequent filings in these cases must therefore be submitted through the electronic filing system in No. 20-512. Each document submitted in connection with one or more of these cases must include on its cover the case number and caption for each case in which the filing is intended to be submitted. Where a filing is submitted in fewer than all of the cases, the docket entry will reflect the case number(s) in which the filing is submitted.
Dec 21 2020	Motion to dispense with printing the joint appendix filed by petitioners National Collegiate Athletic Association.
Jan 08 2021	Blanket Consent filed by Respondent, Shawne Alston, et al.
Jan 11 2021	Motion to dispense with printing the joint appendix filed by petitioners GRANTED.
Jan 27 2021	Brief amicus curiae of Sam C. Ehrlich in support of neither party filed.
Feb 01 2021	SET FOR ARGUMENT on Wednesday, March 31, 2021.
Feb 01 2021	Brief of petitioner National Collegiate Athletic Association filed (in 20-512).
Feb 01 2021	Brief of petitioners American Athletic Conference, et al. filed (in 20-520).
Feb 04 2021	Record requested from the U.S.C.A. 9th Circuit.
Feb 04 2021	Record from the U.S.C.A. 9th Circuit is electronic and located on Pacer. Part of the record is SEALED and has been electronically filed.
Feb 05 2021	Blanket Consent filed by Petitioner, The Big Ten Conference, Inc.
Feb 05 2021	Brief amicus curiae of National Federation Of State High School Associations filed (in 20-512).
Feb 08 2021	Brief amici curiae of American Council on Education and Ten Other Higher Education Associations filed. VIDED.
Feb 08 2021	Brief amicus curiae of Thomas B. Nachbar filed.
Feb 08 2021	Brief amici curiae of Antitrust Law And Business School Professors filed.
Feb 08 2021	Brief amici curiae of Antitrust Economists filed.

Feb 08 2021	Brief amici curiae of Georgia, et al. filed.
Feb 08 2021	Brief amici curiae of Former Student-Athletes filed.
Feb 18 2021	Application (20A145) to extend the time to file the reply briefs on the merits from 2 p.m., March 19, 2021 to 2 p.m., March 21, 2021, submitted to Justice Kagan.
Feb 22 2021	CIRCULATED.
Feb 24 2021	Application (20A145) denied by Justice Kagan.
Mar 03 2021	Brief of respondents Shawne Alston, et al. filed. (Distributed)
Mar 09 2021	Brief amici curiae of 65 Professors of Law, Business, Economics, and Sports Management filed. (Distributed)
Mar 10 2021	Brief amicus curiae of the United States filed. (Distributed)
Mar 10 2021	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 10 2021	Brief amicus curiae of Advocates for Minor Leaguers filed. (Distributed)
Mar 10 2021	Brief amici curiae of Historians filed. (Distributed)
Mar 10 2021	Brief amici curiae of Sports Economists filed. (Distributed)
Mar 10 2021	Brief amici curiae of Former NCAA Executives filed. (Distributed)
Mar 10 2021	Brief amici curiae of African American Antitrust Lawyers filed. (Distributed)
Mar 10 2021	Brief amicus curiae of American Antitrust Institute filed. (Distributed)
Mar 10 2021	Brief amici curiae of Dr. Ellen J. Staurowsky, Dr. Eddie Comeaux, et al. filed. (Distributed)
Mar 10 2021	Brief amici curiae of Arizona, et al. filed. (Distributed)
Mar 10 2021	Brief amici curiae of O'Bannon Plaintiff Class Representatives filed. (Distributed)
Mar 10 2021	Brief amici curiae of Players Associations of the National Football League, et al. filed. (Distributed)

Mar 10 2021	Brief amici curiae of Open Markets Institute, et al. filed. (Distributed)
Mar 10 2021	Brief amicus curiae of The Committee to Support the Antitrust Laws filed. (Distributed)
Mar 19 2021	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 19 2021	Reply of petitioner National Collegiate Athletic Association filed (in 20-512). (Distributed)
Mar 19 2021	Reply of petitioners American Athletic Conference, et al. filed (in 20-520). (Distributed)
Mar 31 2021	Argued. For petitioners: Seth P. Waxman, Washington, D. C. For respondents: Jeffrey L. Kessler, New York, N. Y.; and Elizabeth B. Prelogar, Acting Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
Jun 21 2021	Adjudged to be AFFIRMED. Gorsuch, J., delivered the opinion for a unanimous Court. Kavanaugh, J., filed a concurring opinion.