

ONE NIL: THE IMPACT AND CONSTITUTIONALITY OF THE FAIR PAY TO PLAY ACT

INTRODUCTION

On September 30, 2019, California Governor Gavin Newsom forever changed the landscape of college athletics when he signed into law California Senate Bill 206 (SB-206).¹ Also known as the Fair Pay to Play Act, the bill bans collegiate authorities from declaring student-athletes ineligible because they have earned compensation from the use of their names, images, or likenesses.² The law is not slated to go into effect until 2023, but the ramifications have been immediate.³ Other states' efforts to pass similar legislation have gained momentum, and the National Collegiate Athletic Association ("NCAA") was quick to criticize California's state-specific approach to an apparently national issue.⁴

Prior to the bill's enactment, the NCAA consistently espoused the view that such legislation would be unconstitutional.⁵ After SB-206 became law, the NCAA perhaps seemed to soften its stance somewhat; a Board of Governors meeting resulted in a directive instructing NCAA institutions to create a national structure for the use of name, image, and likeness rights.⁶ In

¹ Alan Blinder, *N.C.A.A. Athletes Could Be Paid Under New California Law*, N.Y. TIMES (Sept. 30, 2019), <https://www.nytimes.com/2019/09/30/sports/college-athletes-paid-california.html>; Allen Kim, *California just passed a law that allows college athletes to get paid*, CNN (Sept. 30, 2019), <https://www.cnn.com/2019/09/30/sport/california-sb-206-ncaa-trnd/index.html>. The bill had passed the state Assembly by a vote of 72-0 and the state Senate by a vote of 39-0. Joe Nocera, *College Athletes May (Finally) Get to Cash In*, BLOOMBERG (Sept. 13, 2019), <https://www.bloomberg.com/opinion/articles/2019-09-13/college-athletes-may-finally-get-to-cash-in>).

² CAL. EDUC. CODE § 67456 (West 2020).

³ See Tyler Tynes, *The Ripple Effects of California's 'Fair Pay to Play' Act*, THE RINGER (Oct. 11, 2019), <https://www.theringer.com/2019/10/11/20909171/california-sb-206-ncaa-pay-college-players> (discussing reactions among stakeholders).

⁴ *Id.* In the weeks after California enacted SB-206, at least nine other states were exploring similar legislation. *Id.*

⁵ See, e.g., *NCAA responds to California Senate Bill 206*, NCAA, (Sept. 11, 2019), <http://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206> (characterizing the proposed bill as "unconstitutional" and a "scheme"); Dan Murphy, *Calif. Senate OKs athlete bill NCAA calls harmful*, ESPN (Sept. 11, 2019), https://www.espn.com/college-sports/story/_/id/27593438/calif-senate-oks-athlete-bill-ncaa-calls-harmful (citing NCAA Chief Legal Officer's assertion that the bill is unconstitutional because of its effects on commerce).

⁶ Dan Murphy, *NCAA clears way for athletes to profit from names, images and likenesses*, ESPN (Oct. 29, 2019), https://www.espn.com/college-sports/story/_/id/27957981/ncaa-clears-way-athletes-profit-names-images-likenesses).

spite of this declaration, the NCAA largely maintains the view that SB-206 is unconstitutional.⁷ In its statement following the conclusion of that Board of Governors meeting, the NCAA asserted that California’s law “likely is unconstitutional” and that it will explore “all potential next steps”⁸

This paper examines the impact of SB-206 on the NCAA’s conception of amateurism and scrutinizes potential constitutional arguments against the legislation.⁹ The paper argues that constitutional challenges are at least viable, though by no means promising.¹⁰ Part I of this paper traces the legal history of amateurism in collegiate athletics.¹¹ Part II looks at SB-206 in detail and considers its impacts on amateurism.¹² Part III discusses the potential legal challenges the NCAA might consider and suggests that—in addition to a possible Commerce Clause argument—the NCAA might consider challenging SB-206 on First Amendment grounds.¹³

I. AMATEUR HOUR: A BRIEF LEGAL HISTORY OF AMATEURISM IN THE NCAA

Under NCAA rules, only amateur student-athletes are eligible to participate in intercollegiate athletics.¹⁴ An athlete who loses amateur status therefore cannot take part in NCAA competitions.¹⁵ NCAA Bylaws enumerate seven actions that will lead to the termination of an athlete’s amateur status; among these are use of athletic skill for pay, acceptance of a future promise of pay, and entrance into an agreement with an agent.¹⁶

American courts have long embraced the NCAA’s conception of amateurism.¹⁷ In the seminal 1984 case of *NCAA v. Board of Regents*, Justice Stevens articulated the immense deference given to the NCAA by the

⁷ *Questions and Answers on Name, Image and Likeness*, NCAA.ORG (Oct. 29, 2019), <http://www.ncaa.org/questions-and-answers-name-image-and-likeness>).

⁸ *Id.*

⁹ See *infra* notes 14–67 and accompanying text.

¹⁰ See *infra* notes 14–67 and accompanying text.

¹¹ See *infra* notes 14–29 and accompanying text.

¹² See *infra* notes 30–41 and accompanying text.

¹³ See *infra* notes 42–67 and accompanying text.

¹⁴ NCAA Bylaw 12.01.1. The “Principle of Amateurism,” one of the NCAA’s sixteen guiding principles, explains that “participation should be motivated primarily by education ... and student-athletes should be protected from exploitation by professional and commercial enterprises.” NCAA Const. art. II.

¹⁵ NCAA Bylaw 12.1.2.

¹⁶ *Id.* An athlete will also lose amateur status for signing a contract to play professionally, receiving financial assistance based on athletic skill, competing on a professional team, or entering into a professional draft. *Id.*

¹⁷ See Tibor Nagy, *The Blind Look Rule of Reason: Federal Courts’ Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 343 (2004-2005) (explaining that courts tend to view NCAA amateurism rules as reasonable).

Supreme Court.¹⁸ In dicta, he explained that “[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports” and “[t]here can be no question but that it needs ample latitude to play that role.”¹⁹ Federal courts solidified this deferential approach over several decades.²⁰ In *McCormack v. NCAA*, a 1988 antitrust lawsuit over constraints on student-athlete compensation, the Fifth Circuit echoed the Supreme Court’s sentiment from *Board of Regents*.²¹ Specifically, it noted that the NCAA’s “eligibility rules create the product and allow its survival in the face of commercializing pressures.”²² In 1992, in *Banks v. NCAA*, the Seventh Circuit similarly disposed of another antitrust challenge to the NCAA’s model.²³ Responding to an attack against the ban on hiring agents and entering professional drafts, the court explained that “[e]limination of the no-draft and no-agent rules would fly in the face of the NCAA’s amateurism requirements.”²⁴

The immense deference afforded to the NCAA by federal courts finally began to erode in 2014, when the U.S. District Court for the Northern District of California issued its ruling in *O’Bannon v. NCAA*.²⁵ In the holding, Judge Wilken attacked the NCAA’s longstanding use of the Supreme Court’s famous dicta to justify unfettered discretion over amateurism, stating that *Board of Regents* “does not stand for the sweeping proposition that student-athletes must be barred . . . from receiving any monetary compensation for the commercial use of their names, images, and likenesses.”²⁶ Although the Ninth Circuit vacated a portion of Judge Wilken’s order—that schools be allowed to set aside money and eventually pay certain student-athletes for the use of their names, images, and likenesses—the court left a significant portion of her holding intact.²⁷ The Ninth Circuit affirmed that the NCAA’s amateurism rules violated federal antitrust laws.²⁸ It was the first time a court had deemed

¹⁸ *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984).

¹⁹ *Id.* The Court struck down a 1981 college football television plan on the grounds that its anticompetitive nature violated § 1 of the Sherman Act, but Justice Steven’s dicta became critical in subsequent cases involving the notion of amateurism. *Id.*; see Nagy, *supra* note 17, at 341–42 (characterizing Justice Steven’s dicta as the “final word” on amateurism).

²⁰ See Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 347–48 (2007).

²¹ See *McCormack v. NCAA*, 845 F.2d 1338, 1344 (5th Cir. 1988) (quoting the Supreme Court’s stance on amateurism).

²² *Id.* at 1345.

²³ See *Banks v. NCAA*, 977 F.2d 1081, 1093–94 (7th Cir. 1992).

²⁴ *Id.* at 1092.

²⁵ 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/>.

²⁶ *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 999 (Cal. N.D. 2014), *vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

²⁷ Solomon, *supra* note 25.

²⁸ *O’Bannon v. NCAA*, 802 F.3d 1049, 1079 (9th Cir. 2015).

the NCAA's amateurism rules unconstitutional, and it helped lay the foundation for the California legislature to get its own say in defining the bounds of amateurism.²⁹

II. CALIFORNIA GOLD RUSH: UNDERSTANDING THE FAIR PAY TO PLAY ACT

Originally authored by California Senator Nancy Skinner, SB-206 sailed through the state legislature before ultimately becoming law.³⁰ The operative provision of the statute—Section 2—makes certain actions by universities, conferences, the NCAA, and other authorities illegal.³¹ Specifically, under the law, “[a] postsecondary educational institution shall not uphold any rule” that prevents a student-athlete “from earning compensation as a result of the use of the student’s name, image, or likeness.”³² Similarly, “[a]n athletic association,”—such as the NCAA—“conference, or other group” may not prevent student-athletes from participating in college sports because they have earned compensation from the use of their names, images, or likenesses.³³ The law also bars schools, conferences, the NCAA, and similar authorities from preventing a student from participating in college sports as a result of having hired an agent.³⁴

On its face, the Act—written largely in the negative—does not compel any particular action from the NCAA or its member institutions.³⁵ The mechanism of the law instead rests on the prevention of certain actions by those authorities.³⁶ In reality, however, the law threatens to undermine the uniformity of the NCAA’s standards and may require the NCAA to rework its entire approach to amateurism.³⁷ California has effectively created its own

²⁹ Michael McCann, *NCAA Amateurism to Go Back Under Courtroom Spotlight in Jenkins Trial*, SPORTS ILLUSTRATED (Apr. 2, 2018, <https://www.si.com/college/2018/04/02/ncaa-amateurism-trial-judge-wilken-martin-jenkins-scholarships>) [hereinafter McCann, *Back Under Courtroom Spotlight*]; see Michael McCann, *Could 'Fair Pay to Play Act' Pave Way Toward End of Amateurism in Collegiate Athletics?*, SPORTS ILLUSTRATED (May 25, 2019, <https://www.si.com/college/2019/05/25/california-fair-pay-play-act-end-ncaa-amateurism>) [hereinafter McCann, *End of Amateurism*] (suggesting that SB-206 is a codification of the plaintiffs’ victory in *O’Bannon*).

³⁰ Tynes, *supra* note 3.

³¹ See CAL. EDUC. CODE § 67456 (West 2020). Interestingly, the law proscribes certain actions but does not identify any enforcement mechanism; consequences for violating the law remain a hypothetical. See *id.*

³² *Id.* § 67456(a)(1). A late amendment to the bill requires that athletes refrain from entering sponsorship contracts that conflict with the athlete’s team contract. *Id.* § 67456(e)(1).

³³ *Id.* § 67456(a)(2). The statute names the NCAA—and no other entities—as an example of the type of organization to which the law applies. *Id.*

³⁴ *Id.* § 67456(c)(1).

³⁵ See generally CAL. EDUC. CODE § 67456.

³⁶ See *id.*

³⁷ McCann, *End of Amateurism*, *supra* note 29.

definition of amateurism, one that stands diametrically opposed to that of the NCAA.³⁸ Crucially, the statute signals the end of an era for the NCAA.³⁹ For decades, the organization had enjoyed largely unfettered control over the definition of amateurism, subject only to occasional—albeit recently increasing—scrutiny from the courts.⁴⁰ With the passage of SB-206, California legislators have launched a debate as to whether it should be the States, and not the NCAA, that define what amateurism entails.⁴¹

III. SEE YOU IN COURT? HOW THE NCAA MIGHT ARGUE UNCONSTITUTIONALITY

Given what is at stake for the NCAA, it is no surprise that the organization is exploring potential strategies for negating the Fair Pay to Play Act before the law begins to operate in 2023.⁴² If the NCAA stands by its previous comments, one avenue it may pursue is a challenge to the Act's constitutionality.⁴³ Such a lawsuit could be mounted using a number of legal arguments; this paper addresses two possibilities: a Commerce Clause challenge and a First Amendment freedom of association challenge.⁴⁴

Although the NCAA has not yet mounted a formal challenge to SB-206, it has publicly hinted at what its preferred legal argument might be.⁴⁵ In September 2019, the NCAA's Chief Legal Officer suggested the bill violates the Constitution because it impermissibly impacts interstate commerce.⁴⁶ The NCAA similarly hinted at this contention in its latest letter to Governor

³⁸ Compare CAL. EDUC. CODE § 67456(a)(2), (c)(1) (making it illegal in California to revoke eligibility for hiring an agent or earning compensation from use of name, image, or likeness), with NCAA Bylaw 12.1.2 (revoking amateur status, and thus eligibility, for taking compensation or hiring an agent).

³⁹ See McCann, *End of Amateurism*, *supra* note 29 (detailing the possible fallout from SB-206).

⁴⁰ See Nagy, *supra* note 17, at 343 (highlighting the deference courts have historically given to the NCAA); McCann, *Back Under Courtroom Spotlight*, *supra* note 29 (noting a recent surge in litigation over amateurism).

⁴¹ See Murphy, *supra* note 6 (discussing the many states getting involved).

⁴² McCann, *End of Amateurism*, *supra* note 29.

⁴³ See NCAA responds to California Senate Bill 206, *supra* note 5.

⁴⁴ See *infra* notes 45–67 and accompanying text.

⁴⁵ See Murphy, *supra* note 5 (noting comments made by NCAA Chief Legal Officer Donald Remy). Remy also holds the title of COO and acts as the second-in-command behind President Mark Emmert. NCAA Leadership Team, NCAA, <http://www.ncaa.org/about/who-we-are/office-president/ncaa-leadership-team> (last visited Feb. 23, 2020).

⁴⁶ Murphy, *supra* note 5.

Newsom.⁴⁷ The argument, as articulated by scholars, is that SB-206 is unconstitutional because it violates the dormant Commerce Clause.⁴⁸

The dormant Commerce Clause is an “implied requirement” within Article I, Section 8, Clause 3 of the U.S. Constitution that “prohibits the states from imposing restrictions that benefit in-state economic interests at out-of-state interests’ expense.”⁴⁹ State regulations may not “directly discriminate against interstate commerce” in this manner.⁵⁰ The NCAA’s dormant Commerce Clause argument against SB-206 would be that it puts California’s commercial interests above out-of-state commercial interests by allowing compensation for use of names, images, or likenesses in California while barring it in other states.⁵¹

A dormant Commerce Clause argument would necessarily invoke Ninth Circuit precedent favorable to the NCAA from the 1993 case *NCAA v. Miller*.⁵² In *Miller*, the NCAA challenged a Nevada law requiring the NCAA to provide certain procedural due process protections for Nevada parties subject to enforcement proceedings.⁵³ The Ninth Circuit determined that the Nevada statute violated the Commerce Clause *per se* because it was directed solely at an interstate organization and would have profound effects on the NCAA’s interstate commerce.⁵⁴

Despite the promising precedent, the dormant Commerce Clause argument is vulnerable this time around.⁵⁵ In *Miller*, the court explained that the “critical inquiry” for such a Commerce Clause argument “is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.”⁵⁶ As written, the California statute is directed only towards

⁴⁷ See *NCAA responds to California Senate Bill 206*, *supra* note 5 (“It isn’t possible to resolve the challenges of today’s college sports environment in this way—by one state taking unilateral action.”).

⁴⁸ See, e.g., Will Jarvis, *A California Bill Would Put College Athletes on a Collision Course With the NCAA — and Their Universities*, CHRON. OF HIGHER EDUC. (June 25, 2019), <https://www.chronicle.com/article/A-California-Bill-Would-Put/246562>); Chris Sagers, *Letter to Gavin Newsom in Reply to the NCAA: Constitutionality of California SB 206, the “Fair Pay to Play Act”*, (Cleveland State University Research Paper, 2019), <https://ssrn.com/abstract=3460551>.

⁴⁹ 15A AM. JUR. 2D *Commerce* § 102 (2020).

⁵⁰ *Id.*

⁵¹ Charles Anzalone, *California bill to pay college athletes runs afoul of Constitution*, U. AT BUFFALO (June 27, 2019, <http://www.buffalo.edu/ubnow/stories/2019/06/drew-paying-athletes.html>).

⁵² See *id.*

⁵³ *NCAA v. Miller*, 10 F.3d 633, 637 (9th Cir. 1993).

⁵⁴ *Id.* at 638.

⁵⁵ Ethan Bauer, *Should college athletes be paid for their names and images? Where college sports could go from here*, DESERET NEWS (Oct. 1, 2019, <https://www.deseret.com/indepth/2019/9/19/20871318/college-athletes-paid-for-their-names-and-images-college-sports-terrelle-pryor-tattoogate>).

⁵⁶ *Miller*, 10 F.3d at 639.

conduct within the state and applies to in-state and out-of-state entities alike.⁵⁷ Under longstanding Supreme Court precedent, “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”⁵⁸ Thus, the California statute would likely be subject to this balancing test and very well may stand.⁵⁹

The NCAA might instead consider challenging SB-206 using a First Amendment freedom of association argument.⁶⁰ Freedom of association is “the right of individuals to associate with whom they please.”⁶¹ It extends to private corporations and encompasses the right of an association to set its own criteria for choosing its members.⁶² The freedom of association right is not specifically identified in the Constitution, but courts have consistently held that it derives from or is inherently part of the individual rights enumerated in the First Amendment and that it applies to the States through the Fourteenth Amendment.⁶³

In short, a freedom of association argument against SB-206 would contend that the bill unconstitutionally forces the NCAA to associate with parties that it would otherwise avoid.⁶⁴ In the seminal Supreme Court case *Boy Scouts of America v. Dale*, the Court explained that “forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”⁶⁵ The NCAA could argue that the California statute demands both (a) forced inclusion of unwanted student-athletes whose public endorsements are significantly undermining the NCAA’s expression of amateurism and (b) forced inclusion of unwanted member schools that are not upholding the NCAA’s rules.⁶⁶ Such a claim may also face significant obstacles because freedom of association can “be overridden ‘by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.’”⁶⁷

⁵⁷ See CAL. EDUC. CODE § 67456 (West 2020).

⁵⁸ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

⁵⁹ See *id.*

⁶⁰ See *infra* notes 61–67 and accompanying text.

⁶¹ 16A AM. JUR. 2D *Constitutional Law* § 578 (2020).

⁶² *Id.* §§ 584, 585.

⁶³ *Id.* §§ 578, 579.

⁶⁴ See CAL. EDUC. CODE § 67456 (West 2020); *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (setting forth the current test for freedom of association and its limitations).

⁶⁵ *Dale*, 530 U.S. at 648.

⁶⁶ See CAL. EDUC. CODE § 67456 (West 2020), *Dale*, 530 U.S. at 648.

⁶⁷ *Dale*, 530 U.S. at 648 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

CONCLUSION

Should the NCAA choose to challenge the constitutionality of SB-206, it might do so through a dormant Commerce Clause claim or a First Amendment freedom of association claim. Though both arguments face considerable challenges, California—and other states pursuing similar legislation—would be well served to prepare for such lawsuits. The fight for control over amateurism could very well hinge on how the courts define the constitutional limits surrounding these name, image, and likeness statutes.

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