University of the Pacific Law Review

Volume 52 | Issue 3 Article 12

1-10-2021

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I. INTRODUCTION

Kevin Ware's leg snapped like a toothpick in the jaws of an alligator.[1] During the 2013 National Collegiate Athletic Association ("NCAA") March Madness quarterfinals, the Louisville defender leapt towards a Duke player to contest the jump shot, just as he had done thousands of times before.[2] At this point in his basketball career, he was garnering attention and competing for a spot in the 2013

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1. Sam Riches, '*Basketball is Everything': How Kevin Ware Keeps Healing and Playing*, THE ATHLETIC (Mar. 11, 2019), https://theathletic.com/839842/2019/03/11/basketball-is-everything-how-kevin-ware-keeps-healing-and-playing (on file with the *University of the Pacific Law Review*).

2. *Id.*

National Basketball Association ("NBA") draft.[3] March Madness is an extended job interview for college basketball players trying to enter the NBA.[4] Ware had been doing well.[5] What happened next, however, forever changed his career.[6] As Ware landed from contesting that jump shot, his leg snapped.[7] His tibia protruded several inches through his skin.[8]

Thankfully, this injury did not end Ware's career.[9] He became a household name.[10] He became the most searched for name on Google in 2013, which was not a slow sports news year by any means.[11] Adidas sold a shirt online in Louisville's colors with Ware's number, 24, until it received enormous public backlash for the profits it was making.[12] Yet Ware could not capitalize on his newfound fame.[13] Under the NCAA's amateurism rules, student-athletes cannot receive compensation for their name, image, or likeness.[14] Ware was a national sensation, but the NCAA prevented him from making a profit off his fame.[15] Meanwhile, Adidas could have potentially made millions from Ware's image.[16] Unfortunately, Ware never made it to the NBA.[17] Today, he continues to play basketball overseas, but he will never earn as much as he potentially could have during that fateful spring.[18]

States have debated promulgating legislation that would require universities and intercollegiate athletic associations—like the NCAA—to pay student-athletes for profiting from their name, image, and likeness.[19] California enacted such a law

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3. *Id.*

4. Ayush Batra, *NCAA Tournament Effect on Draft Prospects*, MEDIUM (Apr. 11, 2020), https://medium.com/@batraayush/ncaa-tournament-effect-on-draft-prospects-f004cad29c8d (on file with the *University of the Pacific Law Review*).

5. Riches, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* (describing how Ware was the most searched-for name on Google during 2013).

11. *See* Riches, *supra* note 1 (detailing another news event that year where, on an infamous *Oprah* show, Lance Armstrong admitted to doping while winning seven Tour de France races).

12. *Id.*

13. NCAA, DIVISION 1 MANUAL 63 (2019) (describing how individuals lose amateur status for variety of pay related reasons).

14. *Id.*

15. *Id.*; Riches, *supra* note 1; Dan Wolken, *Adidas Halts Sales of Kevin Ware-Inspired No. 5 Shirts*, USA TODAY SPORTS, (Apr. 6, 2013, 12:33 P.M.), https://www.usatoday.com/story/sports/ncaab/2013/04/05/louisville-cardinals-kevin-ware-adidas-jersey/2057057/ (on file with the *University of the Pacific Law Review*) ("[B]ut as far as profits and everything, it kind of sucks, him being in college that he can't really see any of it.") (quoting Peyton Silva).

16. *See* Riches, *supra* note 1 (describing how Adidas was selling t-shirts with Ware's number on them but had to stop selling them because the NCAA prohibits selling merchandise with a player's likeness or name).

17. *Id.*

18. *See id.* (describing how Ware played in Finland, Czech Republic, Greece, Mexico, and Canada).

19. Jabari Young, *Florida and NY Push Bills to Compete with California's NCAA 'Pay to Play' Law*, CNBC: SPORTS (Oct. 24, 2019, 5:19 PM), https://www.cnbc.com/2019/10/24/florida-and-ny-push-bills-to-

on September 30, 2019.[20] The law, dubbed the Fair Pay to Play act, enables student-athletes to profit from their name, image, and likeness while simultaneously preventing the NCAA from retaliating against the students or universities for doing so.[21]

Some legal commentators anticipated that the NCAA would sue California and claim the law violates the Dormant Commerce Clause.[22] The U.S. Constitution's delegation of regulatory authority over interstate commerce has long been understood to contain negative implications that preclude state attempts to regulate interstate commerce by discriminating against interstate commerce.[23] However, the NCAA capitulated and instead instituted a policy change that permits student-athletes to profit from their name, image, and likeness.[24] The NCAA's new policy has yet to take form because of the NCAA's structure, so the policy's implications are uncertain.[25] What remains unclear is how the NCAA will engage with states when laws like Fair Pay to Play are incompatible with the NCAA bylaws.[26]

The NCAA could challenge laws that are incompatible with its own bylaws under the Dormant Commerce Clause because any regulation that changes the way the NCAA enforces its bylaws may have an extraterritorial effect.[27] In turn, states may argue that the NCAA's bylaws violate antitrust principles; however, NCAA's amateurism bylaws have repeatedly survived antitrust litigation.[28]

The NCAA's ability to enforce its bylaws uniformly prevents any state from regulating the NCAA, thus potentially rendering laws that conflict with NCAA

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compete-with-californias-ncaa-pay-to-play-law.html (on file with the *University of the Pacific Law Review*); Tyler Tynes, *The Ripple Effect of California's 'Fair Pay to Play' Act*, THE RINGER (Oct. 11, 2019, 6:55 AM), https://www.theringer.com/2019/10/11/20909171/california-sb-206-ncaa-pay-college-players (on file with the *University of the Pacific Law Review*).

20. Rodger Sherman, *The Fair Pay to Play Act Has Been Signed. Now the NCAA Must Address a Question to Which It's Never Had a Good Answer*, THE RINGER (Oct. 1, 2019, 8:38 AM), https://www.theringer.com/2019/10/1/20892842/fair-pay-to-play-act-college-sports-california-law-gavin-newsom (on file with the *University of the Pacific Law Review*).

21. CAL. EDUC. CODE § 67456(a)–(h) (West 2020).

22. *See* Charles Anzalone, *California Bill to Pay College Athletes Runs Afoul of Constitution, UB Sports Law Expert Says*, U. BUFFALO (June 27, 2019), http://www.buffalo.edu/news/tipsheets/2019/005.html (on file with the *University of the Pacific Law Review*) ("The rationale in the NCAA v. Miller ruling was that requiring the NCAA to implement different standards across potentially 50 different state jurisdictions would interfere with interstate commerce, Drew says.").

23. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090 (2018).

24. *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019, 1:08 PM), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities (on file with the *University of the Pacific Law Review*).

25. *Id.*

26. Michael McCann, *Key Questions, Takeaways from the NCAA's NIL Announcement*, SPORTS ILLUSTRATED, (Oct. 29, 2019), https://www.si.com/college/2019/10/30/ncaa-name-image-likeness-announcement-takeaways-questions (on file with the *University of the Pacific Law Review*) ("[T]he devil is in the details.").

27. *See* NCAA v. Miller, 10 F.3d 633, 634 (9th Cir. 1993) (holding so); *see also* Anzalone, *supra* note 22 ("The rationale in the NCAA v. Miller ruling was that requiring the NCAA to implement different standards across potentially 50 different state jurisdictions would interfere with interstate commerce, Drew says.").

28. O'Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015).

bylaws unconstitutional.[29] This Comment argues that in the event of a conflict between California's Fair Pay to Play Act and the NCAA's new name, image, and likeness bylaws, a court would likely hold California's law unconstitutional unless California can demonstrate that the NCAA's bylaws are invalid under antitrust principles.[30] Part II describes the NCAA's structure, relevant legal history, and controversy.[31] Part III analyzes the NCAA's current ability to enforce its bylaws and argues that state regulations—like Fair Pay to Play—will not withstand Dormant Commerce Clause challenges.[32] Finally, Part IV concludes with a discussion of the future of the NCAA and state laws like Fair Pay to Play.[33]

II. NCAA'S STRUCTURAL AND LEGAL BACKGROUND

The NCAA has a controversial history.[34] States, universities, and individuals alike have all sued the NCAA regarding a variety of issues.[35] Relevant to this Comment's analysis, plaintiffs have used antitrust principles to attack various NCAA bylaws.[36] Also, the NCAA has sued states under the Dormant Commerce Clause.[37] Section A outlines the NCAA's general structure and organization.[38] Section B discusses the NCAA's relevant antitrust litigation.[39] Section C discusses the NCAA's Dormant Commerce Clause litigation.[40] Finally, Section D discusses the background of California's Fair Pay to Play Act.[41]

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29. *Compare Miller*, 10 F.3d at 638–40 (analyzing the Nevada statute under the extraterritoriality doctrine), *with* CAL. EDUC. CODE § 67456(a)(3) (West 2020) (detailing a provision preventing the NCAA from retaliating). *See also* Anzalone, *supra* note 22 ("The rationale in the NCAA v. Miller ruling was that requiring the NCAA to implement different standards across potentially 50 different state jurisdictions would interfere with interstate commerce, Drew says.").

30. *Compare Miller*, 10 F.3d 633 (holding state regulations that affect the NCAA's bylaws violate the dormant commerce clause), *and O'Bannon*, 802 F.3d at 1074 (holding the amateur nature of collegiate sports increases the appeal of college sports, therefore a pro-competitive effect), *with Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, *supra* note 24 (directing each Division to adopt bylaws that would refute amateurism). *See also infra* Part III (making the same argument).

31. *Infra* Part II.

32. *Infra* Part III.

33. *Infra* Part IV.

34. Joshua Senne, *A Review of the NCAA's Business Model, Amateurism, and Paying the Players*, SPORTS J., https://thesportsjournal.org/article/a-review-of-the-ncaas-business-model-amateurism-and-paying-the-players (last visited Sept. 17, 2019) (on file with the *University of the Pacific Law Review*).

35. *Important NCAA Lawsuits*, ATHNET, https://www.athleticscholarships.net/important-ncaa-lawsuits.htm (last visited Oct. 26, 2019) (on file with the *University of the Pacific Law Review*).

36. *E.g.*, NCAA v. Bd. of Regents, 468 U.S. 85, 85 (1984) (providing an example of an antitrust lawsuit); O'Bannon v. NCAA, 302 F.3d 1049, 1050 (9th Cir. 2015) (providing an example of an antitrust lawsuit).

37. NCAA v. Miller, 10 F.3d 633, 634 (9th Cir. 1993) (providing an example of a dormant commerce clause lawsuit).

38. *Infra* Section II.A.

39. *Infra* Section II.B.

40. *Infra* Section II.C.

41. *Infra* Section II.D.

A. National Collegiate Athletic Association

The NCAA is a not-for-profit organization comprising over 1,200 institutions—colleges, universities, and athletic conferences.[42] These member institutions sign contracts to uphold and enforce the NCAA's bylaws.[43] For the most part, every institution belongs to one of three divisions—Division I, II, or III.[44] The NCAA Board of Governors exercises general oversight over the predominately autonomous divisions.[45] The Board of Governors votes on and implements bylaws on issues concerning college athletics—e.g., collegiate amateurism.[46]

Division I underwent a structural change in 2014 that gave Power Five athletic conferences more autonomy within the NCAA's general structure.[47] This structural change allowed the SEC, Big Ten, Big 12, ACC, and Pac-12 to provide student-athletes scholarships covering the entire cost of attendance.[48] Amateurism requirements still apply to student-athletes in these conferences, but students receive substantially more in scholarship than the student-athletes in other conferences.[49]

The NCAA has repeatedly drawn ire from student-athletes, sports critics, and legal commentators alike for its refusal to repeal its amateurism bylaws.[50] But the NCAA counters that its product depends on collegiate amateurism—i.e., highly competitive sports played by college students for the love of the game instead of for money.[51]

Much criticism results from a perception that student-athletes are no longer true amateurs because they receive payments through illicit channels for picking certain schools.[52] For example, the FBI is currently investigating several schools

42. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND SUBSIDIARIES: CONSOLIDATED FINANCIAL STATEMENTS AS OF AND FOR THE YEARS ENDED AUGUST 31, 2018 AND 2017, SUPPLEMENTARY INFORMATION FOR THE YEAR ENDED AUGUST 31, 2018, AND INDEPENDENT AUDITORS' REPORT 7 (on file with the *University of the Pacific Law Review*).

43. *See NCAA Board of Governors*, NCAA, https://www.ncaa.org/governance/committees/ncaa-board-governors (last visited Oct. 26, 2019) (on file with the *University of the Pacific Law Review*) (describing the relationship between the NCAA and member institutions); *see also* NCAA v. Miller, 10 F.3d 633, 636 (9th Cir. 1993) ("As a condition of membership, each institution is obligated to apply and enforce all NCAA legislation related to its own athletic programs.").

44. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND SUBSIDIARIES: CONSOLIDATED FINANCIAL STATEMENTS, *supra* note 42.

45. *NCAA Board of Governors*, *supra* note 43.

46. *Id.*; *see Miller*, 10 F.3d at 634 (describing the procedure for adopting policies).

47. *See Fairness and Integrity*, NCAA, http://www.ncaa.org/about/what-we-do/fairness-and-integrity (last visited Oct 26, 2019) (on file with the *University of the Pacific Law Review*) (describing the NCAA's Power Five conferences: Southeastern Conference [SEC]; Big Ten Conference; Big 12 Conference; Atlantic Coast Conference; and the Pacific 12 Conference).

48. *Id.*

49. *Id.*

50. Senne, *supra* note 34; Tynes, *supra* note 19.

51. Sherman, *supra* note 20.

52. Marc Tracy, *N.C.A.A. Coaches, Adidas Executive Face Charges; Pitino's Program Implicated*, N.Y.

that directed sports apparel companies to pay student-athlete's families to secure the student-athlete's enrollment at that school.[53]

Others criticize the NCAA's amateurism model as unfair enrichment because the NCAA makes billions of dollars in revenue annually, and none of the student-athletes receive compensation for their athletic performance.[54] The NCAA responds by claiming access to education is sufficient compensation.[55] The organization points to many student-athletes who receive full scholarships and to students in Power Five conferences who receive scholarships higher than tuition.[56]

While this argument has merits, many overlook the real reason some student-athletes are in college.[57] Student-athletes who are talented enough to play in professional basketball and football leagues after graduating high school must play one or three years, respectively, in collegiate athletics before they can enter those leagues.[58] These student-athletes are the ones who have the most to gain from laws like California's Fair Pay to Play Act.[59]

B. The NCAA is a Monopoly

The NCAA has litigated antitrust lawsuits for the better part of a century.[60] To better understand the legal posture surrounding the NCAA's and its opponents' positions, Subsection 1 provides background on antitrust law.[61] Then, Subsection 2 discusses the principle NCAA antitrust case, *NCAA v. Oklahoma Board of Regents*.[62] Finally, Subsection 3 discusses *O'Bannon v. NCAA*, where the Ninth Circuit applied antitrust principles to the NCAA's amateurism bylaws.[63]

TIMES, (Sept. 26, 2017) https://www.nytimes.com/2017/09/26/sports/ncaa-adidas-bribery.html (on file with the *University of the Pacific Law Review*).

53. *Id.* (describing the FBI investigating University of Arizona head coach Sean Miller, former Louisville head coach Rick Pitino, and others in this scheme).

54. Senne, *supra* note 34.

55. Sherman, *supra* note 20.

56. Christopher Smith, *Full Cost of Attendance: What Will it Mean for Power Five Players?*, SATURDAY DOWN SOUTH, https://www.saturdaydownsouth.com/sec-football/full-cost-of-attendance-explained/ (last visited Feb. 1, 2020) (on file with the *University of the Pacific Law Review*).

57. Senne, *supra* note 34.

58. *The Rules of the Draft*, NAT'L FOOTBALL LEAGUE, https://operations.nfl.com/the-players/the-nfl-draft/the-rules-of-the-draft/ (last accessed May 29, 2020) (on file with the *University of the Pacific Law Review*) (discussing NFL draft eligibility); Rachel Stark-Mason, *The One-and-Done Dilemma*, NCAA: CHAMPION MAG., https://www.ncaa.org/static/champion/the-one-and-done-dilemma (last visited Apr. 29, 2020) (on file with the *University of the Pacific Law Review*) (discussing NBA draft eligibility).

59. Sherman, *supra* note 20; *The Ryen Russillo Podcast: CFB Check-in and the Fair Pay to Play Act with Danny Kanell*, THE RINGER (Oct. 2, 2019) (downloaded using Spotify).

60. *See* Joy Blanchard, *Flag on the Play: A Review of Antitrust Challenges to the NCAA. Could the New College Football Playoff Be Next?*, 15 VA. SPORTS & ENT. L.J. 1, 3 (2015) ("I will review some representative and significant challenges to the authority of the NCAA.").

61. *Infra* Section II.B.1.

62. *Infra* Section II.B.2.

63. *Infra* Section II.B.3.

1. Sherman Antitrust Act

To combat monopolies, Congress passed the Sherman Antitrust Act of 1890 ("Sherman Act") outlawing every and any contract—with or without a conspiracy—that restrains trade or interstate commerce.[64] While the Sherman Act purports to outlaw every restraint on trade, the Court in *Standard Oil Co. v. U.S.* held the act merely outlaws unreasonable restraints on trade.[65] The Court later reasoned that all contracts are essentially restraints on trade; therefore, the Sherman Act could not mean all contracts are unlawful.[66]

The Court differentiated between restraints on trade that are *inherently* unreasonable and those which may be unreasonable.[67] Inherently unreasonable restraints are subject to a *per se* rule of invalidity.[68] Thus, the rule of reason is the legal principle courts use to determine whether non-inherently unreasonable trade restraints are, in fact, unreasonable.[69] The rule of reason has three prongs: (1) what are the activities' anticompetitive effects; (2) does the activity have a pro-competitive purpose; and finally, (3) are there less restrictive alternatives than the activity in question.[70]

2. First Foray into Antitrust Litigation

In *NCAA v. Oklahoma Board of Regents*, the Supreme Court first determined that the NCAA was subject to the Sherman Act.[71] The NCAA's bylaws were effectively horizontal trade restraints, which case law generally holds are inherently unreasonable and subject to the *per se* rule.[72] However, the Court invalidated the NCAA's television broadcasting rules by applying the rule of reason instead.[73]

In dicta, the *Oklahoma Board of Regents* Court commented on the value of collegiate amateurism to the NCAA's product and the need to enable the NCAA's goals when scrutinizing its bylaws.[74] This non-binding language in the Court's

64. 15 U.S.C. § 1 (2020).

65. PHILLIP AREEDA, FED. JUDICIAL CENT., THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES (1981) (referencing Standard Oil Co. v. U.S., 221 U.S. 1 (1911)).

66. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) ("[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains.").

67. *Id.* at 238–39 (1918).

68. *Id.*

69. AREEDA, *supra* note 65.

70. *Id.*

71. NCAA v. Bd. of Regents, 468 U.S. 85 (1984).

72. *See id.* at 99 (defining horizontal trade constraints and stating: "By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade").

73. *Id.*

74. *Id.*

opinion set the stage for the Dormant Commerce Clause litigation.[75]

3. Amateurism and Antitrust

Recently, in *O'Bannon v. NCAA*, former college student-athletes challenged the NCAA's amateurism bylaws under the Sherman Act.[76] In that case, the Ninth Circuit held that the NCAA's amateurism bylaws violated antitrust law as unreasonable restraints on trade.[77] The NCAA argued that the Supreme Court's decision in *Oklahoma Board of Regents* protected their bylaws from antitrust requirements.[78] The Ninth Circuit disagreed with the NCAA's legal theory and admonished the NCAA for relying on dicta.[79] But the circuit panel also disagreed with the district court's application of the rule of reason.[80] Specifically, it disagreed with the least restrictive means analysis—determining that name, image, and likeness bylaws were a more restrictive alternative compared to allowing students-athletes to receive scholarships up to the full cost of attendance.[81] By upholding the amateurism bylaws, the Ninth Circuit allowed the NCAA to impose bylaw uniformity across all member institutions and states.[82]

C. The NCAA and the Dormant Commerce Clause

In a series of highly contentious lawsuits, the NCAA defeated two lawsuits involving the State of Nevada.[83] On November 28, 1972, the NCAA began an investigation into the University of Nevada, Las Vegas men's basketball head coach Jerry Tarkanian.[84] The NCAA accused Tarkanian of, among other things, violating numerous recruiting bylaws.[85] At the end of the investigation, the NCAA imposed sanctions and required that the university fire Tarkanian.[86] Tarkanian then

75. *See* NCAA v. Miller, 63 F.3d 633, 638–39 (9th Cir. 1993) (citing the Court's dicta and using it to find extraterritorial effects).

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

77. *Id.* at 1063 (9th Cir. 2015) ("Quoting heavily from the language in *Board of Regents* that we have emphasized, the NCAA contends that any Section 1 challenge to its amateurism rules must fail as a matter of law because the *Board of Regents* Court held that those rules are presumptively valid.").

78. *Id.*

79. *Id.* at 1063.

80. *Id.* ("*Board of Regents*, in other words, did not approve the NCAA's amateurism rules as categorically consistent with the Sherman Act."); *id.* at 1074 ("[I]t clearly erred when it found that allowing students to be paid compensation for their NILs is virtually as effective as the NCAA's current amateur-status rule.").

81. O'Bannon v. NCAA, 802 F.3d 1049, 1074 (9th Cir. 2015).

82. *Id.* ("[T]he Supreme Court has admonished that we must generally afford the NCAA 'ample latitude' to superintend college athletics.").

83. NCAA v. Tarkanian, 488 U.S. 179 (1988); NCAA v. Miller, 10 F.3d 633 (9th Cir. 1993).

84. *Tarkanian*, 488 U.S. at 185 ("On November 28, 1972, the Committee on Infractions notified UNLV's president that it was initiating a preliminary inquiry into alleged violations of NCAA requirements by UNLV.").

85. *Id.* at 185.

86. *Id.* at 187 ("Tarkanian . . . was to 'be completely severed of any and all relations, formal or informal, with the University's Intercollegiate athletic program during the period of the University's NCAA probation.'").

sued the NCAA, claiming the NCAA was a state actor and therefore must follow Fourteenth Amendment Due Process requirements.[87] The Nevada State Supreme Court agreed with Tarkanian, but the NCAA appealed the judgement once more.[88]

The United States Supreme Court held the NCAA was not a state actor and therefore did not need to follow constitutional due process procedures.[89] In response to the Supreme Court's holding, Nevada passed a statute that imposed due process requirements on the NCAA; in response, the NCAA sued the state.[90]

In *NCAA v. Miller*, a Ninth Circuit panel sided with the NCAA and invalidated the Nevada Statute under the Dormant Commerce Clause.[91] The Statute required the NCAA to meet certain procedural due process requirements when investigating and adjudicating matters within the NCAA bylaws.[92] For example, the Statute required the NCAA to provide notice of pending sanctions and an opportunity for a hearing.[93] The NCAA's bylaws did not include many of the protections afforded by the Statute.[94] If a NCAA investigation did not comply with the Statute's requirements, a state court could enjoin the NCAA proceedings.[95] Thus, the NCAA would have to follow these requirements when investigating coaches for alleged misconduct—misconduct like what Jerry Tarkanian was accused of, fined for, and fired for committing.[96]

The Ninth Circuit panel in *Miller* held the Statute discriminated against interstate commerce because the practical effect of the statute was extraterritorial and therefore *per se* invalid under the Dormant Commerce Clause.[97] As stated earlier, the Dormant Commerce Clause prevents states from passing legislation that discriminates against interstate commerce.[98] Examples of discrimination

87. *Id.* at 188 ("Tarkanian consequently filed a second amended complaint adding the NCAA.").

88. *Id.* at 190 ("As a predicate for its disposition, the State Supreme Court held that the NCAA had engaged in state action.").

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

90. NCAA v. Miller, 10 F.3d 633, 637 (9th Cir. 1993) ("In 1991, the Nevada legislature enacted the Statute.").

91. *Id.* at 640 ("In short, when weighed against the Constitution, the Statute must be found wanting. It violates the Commerce Clause.").

92. *Id.* at 637 ("Essentially, the Statute requires any national collegiate athletic association to provide a Nevada institution, employee, student-athlete, or booster who is accused of a rules infraction with certain procedural due process protections during an enforcement proceeding in which sanctions may be imposed.").

93. NEV. REV. STAT. ANN. § 398.155 (West 2020), *invalidated by* NCAA v. Miller, 10 F.3d 633 (9th Cir. 1993).

94. *Miller*, 10 F.3d at 637.

95. *See Miller*, 10 F.3d at 637 (holding that the Nevada statute was unconstitutional); *see also* NEV. REV. STAT. ANN. § 398.245 (West 2020), *invalidated by* NCAA v. Miller, 10 F.3d 633 (9th Cir. 1993).

96. *Miller*, 10 F.3d at 637 ("Essentially, the Statute requires any national collegiate athletic association to provide a Nevada institution, employee, student-athlete, or booster who is accused of a rules infraction with certain procedural due process protections during an enforcement proceeding in which sanctions may be imposed.").

97. *Id.* at 639 ("That sort of extraterritorial effect is forbidden by the Commerce Clause.").

98. South Dakota v. Wayfair, 138 S. Ct. 2080 (2018).

include erecting trade barriers, economic protectionism, or attempting to regulate outside the state's borders.[99] When a statute discriminates against interstate commerce, courts apply a rigorous test of "virtually *per se* . . . invalidity."[100]

The Ninth Circuit panel rejected the district court's less scrutinizing analysis and reasoned the NCAA inextricably involves interstate commerce; therefore, any state regulation that affects the NCAA's bylaws will affect interstate commerce.[101] Nevada argued its statute did not aim to affect interstate commerce but rather sought to protect its own citizens.[102] However, the panel found that because the Statute only targeted the NCAA, it did primarily affect interstate commerce.[103]

The panel recognized that the NCAA needed to impose its bylaws uniformly to uphold its model, so any state law that impacted those bylaws would require the NCAA to change its bylaws across the entire United States.[104] Relying heavily on the NCAA's regulatory structure, which encompasses all collegiate athletics, the panel found that *inconsistent regulations* would impair the NCAA's product—i.e., collegiate amateurism.[105] Because the only way to maintain the integrity of its product is through *bylaw uniformity*, the Nevada Statute would force the NCAA to impose the Nevada due process requirements in other states.[106] This was an unconstitutional extraterritorial effect.[107] Therefore, the Nevada Statute was a *per se* violation of the dormant commerce clause.[108]

In the aftermath of this lawsuit, many legal commentators assumed that *Miller* prevented states from regulating the NCAA.[109] California sought to challenge this

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99. Brown-Forman Distilling Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579–80 (1986) (discussing the principles that illuminate the dormant commerce clause analysis).

100. *Wayfair*, 138 S. Ct. at 2091 ("State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'").

101. *Miller*, 10 F.3d at 640 ("If the procedures of the NCAA are "'to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable . . .' In short, when weighed against the Constitution, the Statute must be found wanting. It violates the Commerce Clause.") (citation omitted) (quoting S. Pac. Co. v. Arizona, 325 U.S. 761, 771 (1945)).

102. *Id.* at 640.

103. *Id.*

104. *Id.* ("If the procedures of the NCAA are 'to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable . . .' In short, when weighed against the Constitution, the Statute must be found wanting. It violates the Commerce Clause.") (citation omitted).

105. *Id.* at 638 ("The Statute would have a profound effect on the way the NCAA enforces its rules and regulates the integrity of its product. The district court found that in order for the NCAA to accomplish its goals, the 'enforcement procedures must be applied even-handedly and uniformly on a national basis.'").

106. *Miller*, 10 F.3d at 638 ("The Statute would have a profound effect on the way the NCAA enforces its rules and regulates the integrity of its product. The district court found that in order for the NCAA to accomplish its goals, the 'enforcement procedures must be applied even-handedly and uniformly on a national basis.'").

107. *Id.* at 639 ("In this way, the Statute could control the regulation of the integrity of a product in interstate commerce that occurs wholly outside of Nevada's borders. That sort of extraterritorial effect is forbidden by the Commerce Clause.").

108. *Id.* at 640 ("The Statute directly regulates interstate commerce and runs afoul of the Commerce Clause both because it regulates a product in interstate commerce beyond Nevada's state boundaries.").

109. *See* Peter C. Carstensen & Paul Olszowka, *Antitrust Law, Student-Athletes, And the NCAA: Limiting the Scope and Conduct of Private Economic Regulation*, 1995 WIS. L. REV. 545, 560 ("Therefore, it held that the Commerce Clause precluded individual states from adopting legislation that imposes special protections for

theory when California State Senator Nancy Skinner introduced SB 206.[110]

D. Fair Pay to Play and NCAA Change of Heart

On September 30, 2019, California Governor Gavin Newsom signed the Fair Pay to Play Act on Lebron James's television show *The Shop*.[111] Under the law, student-athletes can seek endorsement deals and profit from their name, image, and likeness.[112] Further, the law explicitly prohibits universities, colleges, and interstate collegiate athletic organizations—like the NCAA—from penalizing student-athletes who sign endorsements and profit from their name, image, and likeness.[113] Fair Pay to Play also prevents organizations like the NCAA from retaliating against California student-athletes, colleges, and universities who comply with the law.[114] The law is not without its limits—it still prohibits high school student athletes from signing endorsement deals and profiting from their name, image, or likeness .[115] The law is scheduled to take effect in 2023.[116]

The NCAA and universities intensely lobbied against the bill.[117] Many universities feared they would be expelled from the NCAA and lose revenue sharing income.[118] The NCAA threatened to sue California if the bill became a

student-athletes, coaches, or even universities within its borders from NCAA regulations.").

110. Jason Scott, *California Lawmaker Introduces 'Fair Pay to Play Act'*, ATHLETIC BUS. (Feb. 2019), https://www.athleticbusiness.com/college/california-lawmaker-introduces-fair-pay-to-play-act.html (on file with the *University of the Pacific Law Review*); *see also* Marcus Thompson II, *Thompson: New Bill Seeks to Allow California Collegiate Athletes to Get Paid For Use of Their Name, Image, and Likeness*, THE ATHLETIC (Feb. 4, 2019), https://theathletic.com/800397/2019/02/04/thompson-new-law-seeks-to-allow-california-collegiate-athletes-to-get-paid-for-use-of-their-name-image-and-likeness/ (on file with the *University of the Pacific Law Review*).

111. Sherman, *supra* note 20.

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

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *See* Steve Berkowitz, *NCAA Says California Schools Could Be Banned from Championships If Bill Isn't Dropped*, USA TODAY: SPORTS (Jun. 24, 2019, 8:56 AM), https://www.usatoday.com/story/sports/2019/06/24/ncaa-california-schools-could-banned-championships-over-bill/1542632001/ (on file with the *University of the Pacific Law Review*) (reporting on a letter the NCAA sent threatening to prohibit California schools from participating in the NCAA championships if the law passed); *see also* Senate Rules Committee, Floor Analysis of SB 206, at 7 (Sept. 9, 2019) (listing several California colleges as opposing the law); Alan Blinder, *N.C.A.A. Athletes Could Be Paid Under New California Law*, N.Y. TIMES (Oct. 1, 2019) (on file with the *University of the Pacific Law Review*) ("Both the N.C.A.A. and the Pac-12 lobbied against the measure, as did several powerful universities, including California, Stanford, and Southern California.").

118. Assembly Committee on Arts, Entertainment, Sports, Tourism, and Internet Media, Hearing Analysis of SB 206, at 2 (June 25, 2019).

law.[119] Many legal commentators predicted such a lawsuit.[120] However, the NCAA was engaged in a months-long study regarding shifting stances on its amateurism policy.[121] The Commission was due to release its findings in October 2019.[122] Then, on October 29, 2019, the NCAA shocked the sports world and refrained from suing California.[123]

As a result of the NCAA's study, the NCAA capitulated.[124] Instead of suing, it decided to allow each conference to permit student athletes to receive compensation for their name, image, and likeness.[125] However, there was a caveat in the NCAA's announcement.[126] The new name, image, and likeness bylaws must comport with the purpose of college athletics.[127] Sports critics speculate that this seemingly innocuous language means the NCAA is not fully abandoning its amateurism policies.[128] It may even be likely that the NCAA is setting a floor that may conflict with California's law.[129]

III. ANALYSIS

Observers have varying opinions regarding why the NCAA shifted away from amateurism.[130] Some cite pressure from a federal bill that would take away the NCAA's tax-exempt status.[131] However, that bill remains stagnant in the House

119. *See* J. Brady McCollough, *NCAA Makes Move on Name, Image and Likeness Use, But There's a Long Way To Go*, L.A. TIMES: SPORTS (Oct. 29, 2019, 11:34 AM), https://www.latimes.com/sports/story/2019-10-29/ncaa-athletes-nil-college-athletes-profit-name-image-likeness (on file with *The University of the Pacific Law Review*) ("NCAA called California's Senate Bill 206 'unconstitutional' and an 'existential threat.'").

120. *See* Scott, *supra* note 110 ("It's likely that if these bills pass, a standoff between the lawmakers and the collegiate sports governing body would ensue."); *see also* Sherman, *supra* note 20 ("[T]he bill was 'harmful, and we believe, unconstitutional.'").

121. *See* Michelle Brutlag Hosick, *NCAA Working Group to Examine Name, Image and Likeness*, NCAA (May 14, 2019, 2:40 PM), http://www.ncaa.org/about/resources/media-center/news/ncaa-working-group-examine-name-image-and-likeness (on file with the *University of the Pacific Law Review*) (announcing the beginning of the working group).

122. *Id.*

123. *See Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, *supra* note 24 (discussing process to allow athletes to profit from name, image, and likeness).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *See* Tim Sullivan, *As NCAA Changes Image, Likeness Rule, the Delaying Will Go Until Government Intervenes*, USA TODAY (Oct. 30, 2019, 11:20 AM), https://www.usatoday.com/story/sports/ncaaf/2019/10/30/ncaa-changes-names-image-likeness-rule-athletes-its-own-terms/4096410002/ (on file with the *University of the Pacific Law Review*) (opining that the NCAA is changing on its own terms and will not stop fighting NIL progress); *see also* McCollough, *supra* note 119 ("'The devil's in the details,' Skinner said. 'For example, what does the NCAA mean by "consistent with the collegiate model"?'").

129. McCollough, supra note 119.

130. *See* McCann, *supra* note 26 (discussing why the NCAA shifted away from amateurism).

131. Student-Athlete Equity Act of 2019, H.R. 1804, 116th Cong. (2019); *see also* Sullivan, *supra* note 128 (discussing a federal bill that would remove the NCAA's tax-exempt status).

Ways and Means Committee.[132] Others claimed the reason was changing social norms.[133] Still, more claim California's law forced the NCAA to change.[134]

Regardless, the new rules have yet to take form, so it is unclear whether they will conflict with California's law.[135] If they do conflict, the NCAA may still sue California under a Dormant Commerce Clause theory.[136] Before the NCAA shifted, some legal critics anticipated that the NCAA would immediately sue California because *Nat'l Collegiate Athletic Ass'n v. Miller* likely controlled the case against California.[137]

This Part argues that in the event of a conflict between California's Fair Pay to Play Act and the new NCAA bylaws, California's law would likely not withstand a legal challenge.[138] Section A discusses how the NCAA applies its bylaws uniformly and the implications of such a reality.[139] Section B analyzes the potential Dormant Commerce Clause implications uniformity imposes on the states.[140]

A. Uniformity's Shaky Logic

An overwhelming amount of legal scholarship has concluded that the *O'Bannon* court's application of the rule of reason was flawed.[141] This Comment does not seek to parrot those arguments but seeks merely to summarize the effect of *O'Bannon*'s holding.[142]

The NCAA's ability to impose its bylaws uniformly across the nation stems from antitrust law.[143] To understand why, a discussion regarding the *O'Bannon*

132. H.R. 1804.

133. *See* Michael Ricciardelli, *American Public Supports College Athletes Receiving Endorsement Money for 'Image and Likeness,' as Approved in California This Week*, SETON HALL SPORTS POLL (Oct. 3, 2019), http://blogs.shu.edu/sportspoll/2019/10/03/american-public-supports-college-athletes-receiving-endorsement-money-for-image-and-likeness-as-approved-in-california-this-week/ (on file with the *University of the Pacific Law Review*) (finding 60% of American public favor student athlete profiting from name, image, and likeness).

134. McCann, *supra* note 26.

135. *See id.* (discussing the future of California's law and whether it will conflict with NCAA rules).

136. *Id.*

137. *See* Anzalone, *supra* note 22 ("'As California is in the 9th Circuit,' says Drew, 'the Miller precedent presumably would control, and the pending legislation would be declared unconstitutional if challenged in court.'").

138. *Infra* Sections III.A–B.

139. *Infra* Section III.A.

140. *Infra* Section III.B.

141. *Accord* Andrea Cristiani Closa, Note, *Corruption and College Sports: A Love Story*, 42 HASTINGS COMM. & ENT. L.J. 17 (2020) (discussing the flaws in O'Bannon's decisional logic); *cf.* Joseph Davison, Article, *Throwing the Flag on Pay-for-play: The O'Bannon Ruling and the Future of Paid Student-Athletes*, 11 WASH. J.L., TECH. & ARTS 155 (arguing that O'Bannon court did not adequately squash name, image and likeness propositions); Christopher Sagers & Michael A. Carrier, O'Bannon v. National Collegiate Athletic Association*: Why the Ninth Circuit Should Not Block the Floodgates of Change in College Athletics*, 71 WASH. & LEE L. REV. ONLINE 299 (2015).

142. *Infra* Sections III.A–B.

143. NCAA v. Miller, 10 F.3d 633, 638–39 (1993) ("[E]nforcement procedures must be applied even

court's application of the rule of reason is necessary.[144] As stated earlier, the rule of reason has three central components.[145] First, what are the anticompetitive effects of the controversial rule; second, are there any procompetitive purposes the rule is trying to advance; and third, are there any less restrictive alternatives to the rule in controversy.[146]

The court in *O'Bannon* deferred to the NCAA's purpose—promoting amateurism in collegiate athletics—in finding a procompetitive purpose in the amateurism bylaws.[147] The court focused extensively on collegiate amateurism as the driving procompetitive purpose of the amateurism bylaws.[148] Relying heavily on the district court's findings that the "amateur nature of collegiate sports increases their appeal to consumers," the court determined that *amateurism bylaws promote the market.*[149]

But things change.[150] The court of public opinion has shifted, and most Americans now prefer compensating student athletes.[151] A recent study by Seton Hall University demonstrated that 60% of the American public are in favor of student-athletes receiving compensation for their name, image, and likeness as the Fair Pay to Play Act provides.[152]

Similarly, California is not the only state pressuring the NCAA to change its amateurism bylaws.[153] States like New York, Florida, and South Carolina have considered legislation like California's law.[154] Perhaps collegiate sports appeal to consumers for reasons other than amateurism.[155] Indeed, the district court in *O'Bannon* found such reasons, including loyalty to one's alma matter or regional ties.[156]

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handedly and uniformly on a national basis. That finding is not only correct, but it is also consistent with the Supreme Court's statement that the integrity of the NCAA's product cannot be preserved "except by mutual agreement[.]") (internal citations omitted) (quoting NCAA v. Bd. of Regents, 468 U.S. 85, 102 (1984)).

144. *See* Closa, *supra* note 141 (discussing the flaws in O'Bannon's decisional logic).

145. AREEDA, *supra* note 65.

146. *Id.*

147. O'Bannon v. NCAA, 802 F.3d 1049, 1074 (9th Cir. 2015) ("[T]he Supreme Court has admonished that we must generally afford the NCAA 'ample latitude' to superintend college athletics.").

148. *Id.*

149. *Id.* at 1073–74.

150. Ricciardelli, *supra* note 133.

151. *Id.*; *see also* Tynes, *supra* note 19 (citing the Seton Hall University study and arguing that California's bill may have created national momentum in the court of public opinion).

152. Ricciardelli, *supra* note 133.

153. *See* Charlotte Carrol, *Tracking NCAA Fair Play Legislation Across the Country*, SPORTS ILLUSTRATED (Oct. 2, 2019), https://www.si.com/.amp/college/2019/10/02/tracking-ncaa-fair-play-image-likeness-laws (on file with the *University of the Pacific Law Review*) (tracking the progress of legislation similar to California's law in 9 states and in Congress).

154. *Id.*

155. Closa, *supra* note 141 ("[C]onsumer demand for FBS football and Division I basketball-related products is not driven by [amateurism] but instead by other factors, such as school loyalty and geography.").

156. O'Bannon v. NCAA, 802 F.3d 1049, 1082 (Thomas, S. dissenting) ("[C]onsumer demand for FBS football and Division I basketball-related products is not driven by [amateurism] but instead by other factors, such as school loyalty and geography.").

Furthermore, the NCAA's policies have changed.[157] The district court found that the NCAA's amateurism justification was weak due to how malleable its definition of "amateurism" has been over the course of the NCAA's history.[158] Now that the NCAA changed its amateurism policy again, potentially abolishing it altogether, it is doubtful that amateurism can stand as a procompetitive purpose.[159] This may be why the NCAA included the caveat "consistent with the purposes of collegiate athletics" in its announcement.[160]

The NCAA needs a strong procompetitive purpose to survive a rule of reason analysis, and if its previous purpose no longer exists, the NCAA's ability to impose bylaws uniformly may vanish.[161] The Ninth Circuit, and the Northern District of California to a lesser extent, found that amateurism was the most meaningful procompetitive purpose in the NCAA's rule of reason analyses.[162] Now, amateurism is gone.[163] Whatever new eligibility bylaws the NCAA adopts, it remains to be seen whether those bylaws could withstand an antitrust lawsuit.[164]

B. Dormant Commerce Clause

The Constitution grants Congress the power to "regulate [c]ommerce . . . among the several states[.]"[165] The Supreme Court has interpreted this affirmative grant of authority to contain negative implications for states.[166] Known as the Dormant Commerce Clause, the modern formulation of the doctrine is designed to prevent economic balkanization.[167] The Dormant Commerce Clause is usually formulated as follows: state regulations that facially discriminate against interstate commerce are *per se* invalid.[168] However, regulations that are facially neutral and only incidentally burden interstate commerce are invalid *only* if the burden imposed is clearly excessive in relation to the local benefits—also known as the

157. *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, *supra* note 24.

158. *See* Closa, *supra* note 141 (discussing the malleability of the NCAA's amateurism definition).

159. *See O'Bannon*, 802 F.3d at 1053 (9th Cir. 2015) (relying on amateurism as the procompetitive purpose).

160. McCann, *supra* note 26.

161. *O'Bannon*, 802 F.3d at 1082 (Thomas, S. dissenting); *see also* McCann, *supra* note 26 (noting the problems now facing the NCAA).

162. *O'Bannon*, 802 F.3d at 1073–74.

163. *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, *supra* note 24.

164. *See* McCann, *supra* note 26 (discussing the future viability of the NCAA bylaws under antitrust litigation).

165. U.S. CONST. art. 1, § 8, cl. 3.

166. Gibbons v. Ogden, 22 U.S. 1 (1824).

167. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 8.1(b), at 338 (8th ed. 2010) ("The Court has long recognized that the purpose of the commerce clause was to eradicate interstate trade barriers, and to prohibit Balkanization of the Union in economic matters.").

168. South Dakota v. Wayfair, Inc. 138 S. Ct. 2080, 2091 (2018) (formulating the foundational principles for dormant commerce clause analysis by analyzing the 200-plus year line of precedent).

Pike balancing test.[169] The aforementioned two-part test is generally the dominant rule.[170] There are variations of the general rule, like the extraterritoriality doctrine.[171]

By analyzing the California Statute in the context of *Miller* and Supreme Court precedent, this Section argues that the California Statute is likely unconstitutional.[172] The analysis is split into two parts.[173] Subsection 1 analyzes the Statute's provisions targeting California actors.[174] Subsection 2 examines the other provisions, which also target interstate actors like the NCAA.[175]

1. California Actors: Student-Athletes and Universities

Codified at California Education Code § 67456, the Fair Pay to Play Act has thirteen provisions.[176] Of those thirteen, nine primarily target the actions of in-state actors—i.e., student-athletes and universities.[177] As stated earlier, state regulations that facially discriminate against interstate commerce by drawing an in-state versus out-of-state line are virtually *per se* invalid.[178] These provisions do not facially discriminate against interstate commerce because they are targeting only in-state actors, not entities engaged in interstate commerce.[179] By their terms, these nine provisions aim to control the conduct of in-state actors.[180]

However, these provisions incidentally burden interstate commerce because these in-state actors are engaged in collegiate athletics—an area courts have traditionally held as interstate commerce.[181] Thus, these provisions are not subject to the strict virtually *per se* invalidity test, but rather the *Pike* balancing test.[182] The provisions do not facially discriminate against interstate commerce but are merely

169. *Id.*

170. *Id.* at 2090–91 (identifying modern formulations of dormant commerce clause precedent as the dominant rule).

171. *Id.* at 2091 (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986), an extraterritoriality case).

172. *Infra* Subsections III.B.1–2.

173. *Infra* Subsections III.B.1–2.

174. *Infra* Subsection III.B.1.

175. *Infra* Subsection III.B.2.

176. CAL. EDUC. CODE § 67456(a)–(h) (West 2020).

177. EDUC. § 67456(a)(1) (focusing on in-state post-secondary institutions); *id.* (c)(2) (regulating in-state sports agents); *id.* (c)(3) (regulating in-state conduct of sports agents); *Id.* (d) (regulating in-state post-secondary institutions); *id.* (e)(1) (regulating in-state student-athletes); *id.* (e)(2) (regulating in-state student-athletes); *id.* (e)(3) (regulating in-state student-athletes and post-secondary institutions); *id.* (f) (regulating collegiate sport team's intra-team contracts); *id.* (g) (section only applies solely to in-state universities and colleges); *id.* (h) (operative date).

178. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).

179. *Compare* NEV. REV. STAT. ANN. §§ 398.155–398.255 (West 2020) (containing the provision which *Miller* invalidated), *with* CAL. EDUC. CODE § 67456 (regulating both in-state and out-of-state actors).

180. EDUC. § 67456.

181. NCAA v. Miller, 10 F.3d 633, 638 (9th Cir. 1993).

182. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018) (citing circumstances where state regulations would be subject to *Pike* balancing).

an incidental burden on interstate commerce.[183]

The Supreme Court recently described the *Pike* balancing test in *South Dakota v. Wayfair, Inc.*[184] "State laws that regulate even-handedly to effectuate a legitimate local public interest will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[185] The balancing test clearly favors the state because of the deference given to state governments.[186]

In the test's namesake case, *Pike v. Bruce Church, Inc.*, the Court determined the validity of Arizona's Fruit and Vegetable Standardization Act ("Standardization Act").[187] Arizona required fruit and vegetable producers to meet certain quality and packaging standards to prevent shipping inferior or deceptively packaged produce.[188] The Standardization Act was only aimed at fruits and vegetables grown in and shipped from Arizona.[189] Also, the Standardization Act prohibited producers from shipping produce from Arizona into another state for packaging and distribution from that state.[190] The Court held that the State's interests were "minimal at best," merely ensuring Arizona farmers shipped high-quality produce in packages labelled "from Arizona" to protect Arizona agriculture's reputation.[191] The State's interests were not related to Arizona's police power, health, safety, and welfare power, fields where local regulation is plenary.[192]

However, the burden on the produce grower required a capital expenditure of $200,000.[193] The produce grower shipped high-quality cantaloupes, and thus did not meet the kind of problem Arizona envisioned the Standardization Act to address.[194] The Court balanced the State's interest in protecting its agricultural reputation against the individual's capital investment and found that the Standardization Act was indeed unconstitutional.[195]

Here, it is uncertain if California's law can be properly characterized as directed to a legitimate local concern.[196] The law may not relate to an area where

183. Letter from Christopher Sagers, Distinguished Professor of Law, Cleveland State University, to Gavin Newsom, Governor of California (Sept. 24, 2019) (on file with the *University of the Pacific Law Review*).

184. *Wayfair*, 138 S. Ct. 2080.

185. *Id.* at 2091 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

186. NOWAK & ROTUNDA, *supra* note 167, at § 8.1(b), at 341 ("The balancing test used in dormant commerce clause cases favors the government, as indicated by the quotation from the *Pike* majority opinion.").

187. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

188. *Id.* at 142–43.

189. *Id.*

190. *Id.*

191. *Id.* at 143.

192. *See Pike*, 397 U.S. at 143 (rejecting state's interests as insufficient).

193. *Id.* at 144.

194. *Id.*

195. *Id.* at 146.

196. *Compare* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 342 (2007) (state regulation related to the health, safety, and welfare of the two counties), *with* Erwin Chemerinsky,

courts have long recognized local (i.e., state) control.[197] The authors—and the Governor—believe the law protects student-athlete's civil rights.[198] Fair Pay to Play levels a playing field where similarly situated students can profit from their name, image, and likeness, but student-athletes are prohibited from doing so.[199] These are undoubtedly vaunted goals.[200]

The State could characterize its legitimate interest in protecting its student-athletes as promoting the general welfare of the public.[201] The Statute aims to give student-athletes a means to monetary gain while in school.[202] Thus, it is likely the law seeks to protect the State's welfare interest.[203]

Further, in a potential lawsuit, the State does not bear the burden of demonstrating the weight of its legitimate interest.[204] The NCAA would bear the burden of proof in demonstrating that California's interest is slight, or the Statute negligibly protects that interest.[205]

Then, the NCAA would have to demonstrate an actual harm and burden, potentially using a hypothetical booster situation described by many sports commentators.[206] The NCAA would demonstrate that the law's "incidental burden on interstate commerce" is in the form of a competitive advantage in recruiting athletes, which could then bring California schools more championships and more money.[207]

Colleges Make Lots of Money Off of Sports. Why Can't Student Athletes Do the Same?, SACRAMENTO BEE (Sept. 6, 2019, 1:13 PM), https://www.sacbee.com/opinion/california-forum/article234702882.html (on file with the *University of the Pacific Law Review*) (arguing the states interest is basic civil rights).

197. *See Pike*, 397 U.S. at 143 (noting that agricultural reputation is not an area where courts have recognized local sovereignty); *see also United Haulers Ass'n*, 550 U.S. at 345 (holding that waste disposal problems are an area of health, safety and welfare that have been traditionally governed by state law).

198. *See* Blinder, *supra* note 117 (describing Governor Newsom and Senator Skinner's arguments in favor of the law).

199. *Id.*

200. *Id.*

201. *E.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981) (stating that environmental welfare regulation is a legitimate interest); Rocky Mt. Farmers Union v. Corey, 730 F.3d 1070, 1106 (9th Cir. 2013) (regulating motor vehicle emissions relates to the health, safety and welfare of the general public); Rosenblatt v. City of Santa Monica, 940 F.3d 439, 452 (9th Cir. 2019) (regulating land use is within the municipalities police power).

202. *See generally* CAL. EDUC. CODE § 67456 (West 2020) (enabling student-athletes ability to make economic gains from their name, image, and likeness).

203. Chemerinsky, *supra* note 196.

204. *See* NOWAK & ROTUNDA, supra note 167, § 8.1(b), at 341 ("First, the burden of proof is placed on persons who challenge nondiscriminatory state laws under negative commerce clause principles.").

205. *See id.* ("[T]he person attacking the law must demonstrate the public good produced by the law is so slight that the burden on interstate commerce should be considered truly excessive."); *see also* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 530 (1959) (finding the state regulation related to a legitimate local interest but was not at all effective in protecting that interest).

206. *See* NOWAK & ROTUNDA, *supra* note 167 § 8.1(b), at 341 ("The Court will not invalidate a state law merely because an economist might theoretically find that the cost of the state law to interstate commerce should be considered truly excessive.").

207. Michael McCann, *Does the NCAA's Threat to California Schools' Championships Access Hold Up?*, SPORTS ILLUSTRATED (June 25, 2019), https://www.si.com/college/2019/06/25/ncaa-california-championships-

Sports analysts are split on this issue.[208] Some argue that whatever competitive advantage California has would be short-lived.[209] For example, imagine if a booster—e.g., a wealthy alumni engaged in their alma mater's athletic success—owns a car dealership in Los Angeles.[210] The booster is a proud alumnus of the University of Southern California ("USC") and is tired of watching his beloved Trojan football flounder in the Pac-12.[211] He decides to offer endorsement deals to five star recruits—highly talented high school student-athletes—who will come play at USC.[212] If the booster's plan works, and USC begins to win championships again, then the statute would give California a competitive advantage.[213] Conversely, the booster's plan may fail.[214] There are many other factors to winning championships, and some critics point to these factors as why the booster scenarios would be short-lived.[215]

But assuming the booster's plan works, the NCAA could argue that the competitive advantage harms the overall intercollegiate athletic market because of the law's unequal effects.[216] Championships draw in money through increased coverage and television viewership.[217] The more people watching California schools compete on television results in more money for California schools through television broadcast deals.[218] More championships means more fans, which leads to more revenue for California schools.[219] The NCAA could then

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fair-pay-play-law (on file with the *University of the Pacific Law Review*).

208. *Compare id.* (arguing larger advantages to California schools), *with The Ryen Russillo Podcast: CFB Check-in and the Fair Pay to Play Act with Danny Kanell*, *supra* note 59 (arguing the benefits would be short-lived).

209. *Compare* McCann, *supra* note 207, *with The Ryen Russillo Podcast: CFB Check-in and the Fair Pay to Play Act with Danny Kanell*, *supra* note 59 (arguing the benefits would be short-lived).

210. *The Ryen Russillo Podcast: CFB Check-in and the Fair Pay to Play Act with Danny Kanell*, *supra* note 59 (positing the same hypothetical).

211. *Id.*

212. *Id.*

213. *See generally* Brown-Forman Distillers Corp. v. N.Y. Liquor Auth., 476 U.S. 573 (1986) (holding state laws cannot give in-state residents a competitive advantage over out-of-state residents).

214. *The Ryen Russillo Podcast: CFB Check-in and the Fair Pay to Play Act with Danny Kanell*, *supra* note 59.

215. *Id.*

216. McCann, *supra* note 207.

217. Marc Tracy & Kevin Draper, *Another Season Comes and Goes While Pac-12 Struggles to Keep Up*, N.Y. TIMES (Jan. 2, 2019), https://www.nytimes.com/2019/01/01/sports/rose-bowl-pac12.html (on file with the *University of the Pacific Law Review*); *see* Scott D. Pierce, *SEC's Big TV Deal is Terrible News for Utah and the Pac-12*, SALT LAKE TRIBUNE (Dec. 31, 2019), https://www.sltrib.com/artsliving/2019/12/27/scott-d-pierce-secs-big/ (on file with the *University of the Pacific Law Review*) (noting the television revenue disparity between the Pac-12 and other Power Five conferences and how that results from on the field success in the form of championships).

218. Tracy & Draper, *supra* note 217; *see also* Ralph D. Russo, *Pac-12 Revenue Drops $12 Million, but School Payouts Rise*, KUTV (May 20, 2019), https://kutv.com/sports/college/pac-12-revenue-drops-12-million-but-school-payouts-rise (on file with the *University of the Pacific Law Review*) (noting Pac-12 athletic conference's lag in television revenue compared to the SEC athletic conference and Big Ten athletic conference).

219. *See* Tracy & Draper, *supra* note 217 ("It's a virtuous cycle: better players, better media deals, more money through the conference, more money to spend on your program and coaches and the accouterments that

argue that the law redirects revenue from other states into California and actually does not further California's "general welfare" goals.[220] However, it is important to note that those positing this scenario disagree over its effectiveness.[221] Furthermore, this scenario is merely a hypothetical, and the NCAA would need to demonstrate actual harm first.[222]

A more likely argument the NCAA may make is that the burden the California law imposes is clearly excessive to the local benefit because the NCAA's structure requires uniformity.[223] In *Miller*, the Ninth Circuit admonished the district court for discounting the burden the Nevada Statute subjected the NCAA to because of its uniformity requirements.[224] Here, the NCAA will likely point to other states that are enacting slightly similar name, image, and likeness laws as California's.[225] For example, Colorado recently enacted one such law, and Florida is on the brink of enacting one as well.[226] The NCAA made a very similar and successful argument in *Miller*.[227]

The NCAA must demonstrate that California's law is either not effective in protecting student-athletes or that protecting student athletes is a minimal interest.[228] Then, the NCAA must demonstrate a real harm.[229] While the competitive advantage hypothetical seems far-fetched, the NCAA may also argue that its structural realities require uniformity and having to comply with California's law is clearly overburdensome in relation to the local benefits.[230] If the NCAA successfully does both, it would defeat California's law under the *Pike* balancing test, which is no small feat.[231]

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go along with a good program.") (quoting Warren Zola).

220. *See supra* text accompanying notes 217–19.

221. *Accord The Ryen Russillo Podcast: CFB Check-in and the Fair Pay to Play Act with Danny Kanell*, *supra* note 59 (arguing the benefits would be short-lived).

222. *See* NOWAK & ROTUNDA, *supra* note 167 § 8.1(b), at 341 ("[T]he person attacking the law must demonstrate the public good produced by the law is so slight that the burden on interstate commerce should be considered truly excessive.").

223. NCAA v. Miller, 10 F.3d 633, 638 (9th Cir. 1993).

224. *Id.*

225. *See id.* at 339–40 (showing plaintiffs using the same argument).

226. *See* Carrol, *supra* note 153 (tracking the progress of legislation similar to California's law in 9 states and in Congress).

227. *See Miller*, 10 F.3d at 339–40 (showing plaintiffs using the same argument).

228. *See* NOWAK & ROTUNDA, *supra* note 167 , § 8.1(b), at 341 ("[T]he person attacking the law must demonstrate the public good produced by the law is so slight that the burden on interstate commerce should be considered truly excessive."); *see also* Bibb v. Navajo Freight Lines, Inc., 349 U.S. 520, 530 (1959) (finding the state regulation related to a legitimate local interest but was not at all effective in protecting that interest).

229. NOWAK & ROTUNDA, *supra* note 167, § 8.1(b), at 341.

230. *See Miller*, 10 F.3d at 639 (showing appellants made the same argument).

231. *See* NOWAK & ROTUNDA, *supra* note 167, § 8.1(b), at 341 ("The balancing test used in dormant commerce clause cases favors the government, as indicated by the quotation from the Pike majority opinion.").

2. Nationwide Targets: The NCAA

The four other provisions of California Education Code Section 67456, however, provide serious problems for California.[232] These four provisions, subdivisions (a)(2), (a)(3), (b), and (c)(1), all by their terms regulate the conduct of interstate actors, namely the NCAA.[233] Two of these provisions, subdivisions (a)(2) and (a)(3), facially discriminate against interstate commerce because they only target the conduct of "organization[s] with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association."[234] Thus, in the event of conflict between the NCAA's new bylaws and California's law, the reviewing court would likely have to apply the virtually *per se* invalid test.[235] The second two provisions, subdivisions (b) and (c)(1), do not single out actors engaged in interstate commerce.[236] Rather, the provisions apply to both in-state and out-of-state actors.[237] These provisions would likely still bring the Statute into a variant of the virtually *per se* test.[238]

This general formulation of virtual *per se* invalidity varies depending on the context.[239] At times, the regulation may not draw an in-state versus out-of-state line but rather has the practical effect of discriminating against interstate commerce.[240] In those instances, the extraterritoriality doctrine of the commerce clause can appear.[241] Section a analyzes the California law under a traditional Dormant Commerce Clause analysis.[242] Then, Section b discusses the

232. *Compare Miller*, 10 F.3d at 640 (9th Cir. 1993) (noting the extraterritorial effect of any state regulation of the NCAA), *with* CAL. EDUC. CODE § 67456 (West 2020) (four provisions regulate the NCAA). *See also* Anzalone, *supra* note 22 ("The rationale in the NCAA v. Miller ruling was that requiring the NCAA to implement different standards across potentially 50 different state jurisdictions would interfere with interstate commerce, Drew says.").

233. EDUC. § 67456(a)(2)–(3), (b), (c)(1).

234. EDUC. § 67456(a)(2)–(3).

235. *See Miller*, 10 F.3d at 640 (putting the NCAA at risk of inconsistent regulations violates dormant commerce clause).

236. *See* EDUC. § 67456(b) ("[P]ostsecondary educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics shall not . . ."); *id.* (c)(1) ("[P]ostsecondary educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics shall not . . .").

237. *See* EDUC. § 67456(b) ("[P]ostsecondary educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics shall not . . ."); *id.* (c)(1) ("[P]ostsecondary educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics shall not . . .").

238. *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582–83 (1986) (holding that a law directed at both in-state and out-of-state actors held invalid under the extraterritoriality doctrine).

239. *See* South Dakota v. Wayfair, 138 S. Ct. 2080, 2091 (2018) (citing caselaw that illustrates various applications of the virtual *per se* test depending on legitimate local interest and burden on interstate commerce).

240. NCAA v. Miller, 10 F.3d 633, 639 (9th Cir. 1993).

241. *See id.* ("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.") (internal quotations omitted) (citing Healy v. Beer Institute, 491 U.S. 324, 336 (1989)).

242. *Infra* Subsection III.B.2.a.

extraterritoriality doctrine.[243]

a. Virtual Per Se Invalid

Again, statutes that facially discriminate against interstate commerce are virtually *per se* invalid.[244] The *Miller* court wasted no time determining that the Nevada Statute's facially discriminated against interstate commerce.[245] The Statute's language was explicitly clear—it regulated only the NCAA.[246] Nevada Revised Statute § 398.055's text singled out national collegiate athletic organizations, "a group of institutions in 40 or more states[.]"[247] Thus, the Statute did not clearly draw an in-state versus out of state line, but rather facially discriminated against interstate commerce because "[b]y its terms, it regulates only interstate organizations, i.e., national collegiate athletic associations. . ."[248]

By contrast, the California law does not only single out the NCAA.[249] The Statute is generally focused on student-athletes, colleges, and universities.[250] Entities like the NCAA are not the express object of the law.[251] The law mentions the NCAA only in four provisions.[252] The first two provisions prohibit the NCAA from retaliating against student-athletes, colleges, or universities that comply with the law.[253] The third and fourth provisions control the conduct of both the NCAA and universities.[254] The second two provisions seem to regulate student-athletes, colleges, universities, and the NCAA evenhandedly.[255] For these reasons, some legal commentators believe that Fair Pay to Play Act is constitutional.[256] They highlight how the law does not directly regulate the NCAA.[257] However, the Court

243. *Infra* Subsection III.B.2.b.

244. *Wayfair*, 138 S. Ct. at 2091.

245. *Miller*, 10 F.3d at 638.

246. *Id.*

247. NEV. REV. STAT. ANN. § 398.055 (West 2020), *invalidated by* NCAA v. Miller, 10 F.3d 633 (9th Cir. 1993).

248. *Miller*, 10 F.3d at 638 (9th Cir. 1993).

249. *Compare* CAL. EDUC. CODE § 67456 (West 2020) (targeting both in-state and out-of-state actors), *with* NEV. REV. STAT. ANN. § 398.055 (requiring Due Process procedures for only the NCAA).

250. *Compare* CAL. EDUC. CODE § 67456 (targeting both in-state and out-of-state actors), *with* NEV. REV. STAT. ANN § 398.055 (requiring Due Process procedures for only the NCAA).

251. *Compare* CAL. EDUC. CODE § 67456 (targeting both in-state and out-of-state actors), *with* NEV. REV. STAT. ANN. § 398.055 (requiring Due Process procedures for only the NCAA).

252. EDUC. § 67456(a)(2)–(3), (b), (c)(1).

253. *See* EDUC. § 67456 (targeting both in-state and out-of-state actors).

254. EDUC. § 67456(b), (c)(1).

255. *See id.* (applying provisions equally to student-athletes, colleges and universities, and athletic organizations).

256. Letter from Christopher Sagers, Distinguished Professor of Law, Cleveland State University, to Gavin Newsom, Governor of California, *supra* note 183; Letter from Leonard B. Simon, Adjunct Professor of Law, University of San Diego, to Gavin Newson, Governor of California (Sept. 18, 2019) (on file with the *University of the Pacific Law Review*).

257. Letter from Christopher Sagers, Distinguished Professor of Law, Cleveland State University, to Gavin Newsom, Governor of California, *supra* note 183; Letter from Leonard B. Simon, Adjunct Professor of Law,

has admonished the analysis does not stop here.[258]

b. Extraterritoriality

The extraterritoriality doctrine, a Dormant Commerce Clause variant, is the subject of controversy and misunderstanding.[259] The general formulation of the doctrine holds that state regulations which have the practical effect of directly regulating interstate commerce violate the Dormant Commerce Clause.[260]

The *Miller* court did not solely examine whether the Nevada Statute drew an in-state or out-of-state line and directly regulated interstate commerce.[261] The court also scrutinized the Nevada Statute's practical effect.[262] State regulations that have the practical effect of discriminating against interstate commerce are also violative, and the *Miller* court determined the Nevada Statute—in practice—discriminated against interstate commerce.[263]

The critical consideration in analyzing whether a state regulation discriminates in practical effect is determining the regulation's overall effect "on both local and interstate activity."[264] For example, in *Brown-Forman*, the Court held a New York liquor regulation was violative because it had the effect of regulating liquor outside of New York's borders.[265] The New York law provided that once distillers post their prices in New York, they could not lower their prices in other states.[266] Distillers who sold liquor in New York could not change their prices elsewhere even if another state's regulatory directive ordered them to do so, without risking forfeiting their liquor license in New York.[267] This kind of regulation had the practical effect of regulating outside of the state's borders—essentially projecting state legislation into other states, also known as an extraterritorial effect.[268]

In *Miller*, the Ninth Circuit determined the NCAA's structure gave the Nevada Statute an extraterritorial effect.[269] As stated earlier, the NCAA's structure depends on contractual agreements with colleges, universities, and other collegiate athletic

University of San Diego, to Gavin Newson, Governor of California, *supra* note 256.

258. *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986) (listing discriminatory principles for dormant commerce clause analyses); *see also* NCAA v. Miller, 10 F.3d 633, 639 (9th Cir. 1993) (holding the Nevada statute was extraterritorial).

259. Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979 (2013) (arguing that the extraterritoriality doctrine is a commonly misunderstood variant of the commerce clause).

260. *Miller*, 10 F.3d at 639.

261. *Id.*

262. *Id.*

263. *Id.*

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

265. *Id.* at 584.

266. *Id.* at 583 (1986).

267. *Id.*

268. *Id.* at 584.

269. NCAA v. Miller, 10 F.3d 633, 638 (9th Cir. 1993).

associations to enforce the NCAA's bylaws in a particular manner—i.e., uniformly.[270] The NCAA must apply its bylaws uniformly to have a level playing field for all college athletics.[271] Thus, when the Nevada Statute requires the NCAA to meet additional procedural due process requirements, Nevada forces the NCAA to enforce Nevada's legislative authority across the nation.[272] If the NCAA had to follow heightened requirements in one state, it had to apply those heightened requirements across the entire nation.[273]

The California law states, "[A]n athletic association . . . with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, shall not prevent" colleges or universities from participating in college athletics because the college or university permitted name, image, and likeness compensation for student-athletes.[274] The Nevada Statute prohibited the NCAA from "impair[ing] "the rights or privileges of membership . . . as a consequence of any rights granted by [the act]."[275] These provisions are very similar.[276] Both statutes prevent the NCAA from retaliating against schools within the states.[277]

In a similar—yet slightly distinct—vein, subdivisions (b) and (c)(1) respectively prevent both universities and the NCAA from paying prospective student-athletes and preventing students from obtaining professional representation.[278] These provisions create additional obligations for the NCAA.[279] As noted earlier, to impose NCAA bylaws uniformly across the nation, the NCAA's structure requires the uniform imposition of horizontal trade restraints through contracts with all member institutions.[280] Thus, the NCAA would have no option but to enforce California's laws uniformly across the nation to fulfil its contractual obligations.[281]

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270. *See supra* Section II.A; *see also Miller*, 10 F.3d at 639 ("[T]he integrity of the NCAA's product cannot be preserved 'except by mutual agreement.'").

271. *See Miller*, 10 F.3d at 638 ("The statute would have a profound effect on the way the NCAA enforces its rules and regulates the integrity of its product.").

272. *See id.* at 639 ("The statute would force the NCAA to regulate the integrity of its product in every state according to Nevada's procedural rules.").

273. *See id.* ("In order to avoid liability under the statute, the NCAA would be forced to adopt Nevada's procedural rules for Nevada schools. Therefore, if the NCAA wished to have the uniform enforcement procedures that it needs to accomplish its fundamental goals and to simultaneously avoid liability under the statute, it would have to apply Nevada's procedures to enforcement proceedings throughout the country.").

274. CAL. EDUC. CODE § 67456(c)(1) (West 2020).

275. NEV. REV. STAT. ANN. § 398.235(3) (West 2020), *invalidated by* NCAA v. Miller, 10 F.3d 633 (9th Cir. 1993).

276. *Compare* CAL. EDUC. CODE § 67456(a)(2) (regulating the NCAA's conduct), *with* NEV. REV. STAT. ANN. § 389.235(3) (containing similar provisions).

277. *Compare* CAL. EDUC. CODE § 67456 (a)(2) (regulating the NCAA's conduct), *with* NEV. REV. STAT. ANN. § 389.235(3) (containing similar provisions).

278. EDUC. § 67456(c)(1).

279. *Id.*

280. *See supra* Section II.C (describing the NCAA's antitrust litigation).

281. *Compare* CAL. EDUC. CODE § 67456(a)(3) (establishing an enforcement provision protecting

Some legal commentators distinguish *Miller* on the premise that the Nevada Statute affirmatively created legal obligations for the NCAA, and here, the California Statute merely disallows some NCAA conduct.[282] But this argument fails to recognize the importance of the NCAA's structure in resolving this issue.[283] Forcing the NCAA to allow conduct that is inconsistent with its bylaws in one state necessarily requires the NCAA to allow that conduct across the entire nation.[284]

However, a court may decide the bylaws violate antitrust principles.[285] If a plaintiff successfully convinces a court that the bylaws fail under the rule of reason, then the NCAA's structure would not force California's law on the other forty-nine states.[286] The NCAA would not be able to uniformly enforce its bylaws across the entire country, precluding any extraterritorial effect.[287]

Almost all state regulations have extraterritorial effects.[288] The law's authors argue that the law is not an attempt to legislate outside of California's borders, but rather an attempt to protect California's student-athletes.[289] Furthermore, prominent constitutional scholars claim that the Statute's discriminatory effects are merely incidental to the act's purported purpose.[290]

Thus, there may be an argument that the California law does not discriminate against interstate commerce nor directly regulates interstate commerce.[291] If a court were to determine this to be true, it would apply the less rigorous, and more forgiving, *Pike* balancing test.[292]

California student-athletes and schools from NCAA retaliation), *with* NEV. REV. STAT. ANN. § 398.235(3) (establishing an enforcement provision protecting Nevada student-athletes and schools from NCAA retaliation), *and* NCAA v. Miller, 10 F.3d 633, 639 (9th Cir. 1993) (using the enforcement provisions of the Nevada statute to determine that the NCAA must apply the Nevada law to NCAA enforcement proceedings).

282. Letter from Christopher Sagers, Distinguished Professor of Law, Cleveland State University, to Gavin Newsom, Governor of California, *supra* note 183; Letter from Leonard B. Simon, Adjunct Professor of Law, University of San Diego, to Gavin Newson, Governor of California, *supra* note 256.

283. *Miller*, 10 F.3d at 647.

284. *Id.*

285. *See supra* Section III.A (arguing the NCAA's amateurism bylaws violate antitrust principles and O'Bannon's logic is flawed).

286. *See, e.g.*, *Miller* 10 F.3d at 647 (holding the NCAA's uniformity gives Nevada's law extraterritorial effect).

287. *See, e.g.*, *id.* (holding the NCAA's uniformity gives Nevada's law extraterritorial effect).

288. Denning, *supra* note 259, at 998–99.

289. *See* Blinder, *supra* note 117 (describing Governor Newsom and Senator Skinner's arguments in favor of the law).

290. E-mails from Erwin Chemerinsky, Dean, University of California, Berkeley Law, with Nicolas Chapman, Editor, University of the Pacific Law Review, (Oct. 2019) (on file with the *University of the Pacific Law Review*).

291. *See, e.g.*, Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (finding regulations that purposefully favor in-state economic interests over out of state interests are virtually *per se* invalid); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996) (emphasizing purpose in determining whether state regulations are incidental or directly burdening interstate commerce). *But see* Healy v. Beer Inst., 491 U.S. 324, 336 (determining a statute that directly controls commerce occurring wholly outside the boundaries of a state exceeds the inherent limits of the enacting state's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature).

292. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018) (upholding the balancing test derived

IV. CONCLUSION

The Fair Pay to Play Act promotes an important policy objective—putting student-athletes on par with members of the public at large.[293] Thus, without the law, it is unlikely that student-athletes would be able to sign endorsement deals and profit from their own publicity.[294] Unfortunately, the law is likely unconstitutional.[295] Courts enabled the NCAA to impose horizontal trade restraints, in the form of bylaw uniformity, across the United States to promote the purposes of collegiate athletics.[296] The NCAA's structural dependence on uniform bylaws means any state law that regulates the NCAA will have the practical effect of regulating commerce outside of that state's borders.[297] The extraterritoriality doctrine would therefore stymie California's attempt to protect its student-athletes in the event of a conflict.[298] However, if courts do not uphold the NCAA's bylaws against antitrust challenges, then this problem would not exist.[299]

If a court decides that the extraterritoriality doctrine does not apply, then the law would most likely survive a *Pike* balancing test.[300] State regulatory actions receive much more deferential treatment under the *Pike* balancing test.[301]

NCAA's policy shift still has puzzled many sports commentators.[302] The NCAA may have felt pressure from changing public perceptions regarding collegiate athletics.[303] California's progressive reputation is not unwarranted, and California should continue to push the NCAA to reform its amateurism requirements.[304] If the NCAA does sue California over the law, California should attack the NCAA's bylaws through antitrust means to avoid the Dormant Commerce Clause issue.[305] This way, California would be able to protect its student-athletes and continue to push forward against the NCAA.[306]

Perhaps Kevin Ware would be in a better position financially if he was able to

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

293. Chemerinsky, *supra* note 196.

294. McCann, *supra* note 26.

295. *See supra* Subsection III.B.2 (arguing the California statute is unconstitutional).

296. O'Bannon v. NCAA, 802 F.3d 1049, 1074 (9th Cir. 2015).

297. NCAA v. Miller, 10 F.3d 633, 638–40 (9th Cir. 1993).

298. *Id.* at 639–40.

299. *See supra* Section III.A (arguing that NCAA bylaws should not withstand antitrust scrutiny).

300. *Accord* South Dakota v. Wayfair, Inc. 138 S. Ct. 2080, 2099–100 (2018) (refusing to apply the extraterritoriality doctrine and noting the ample deference states receive under the *Pike* balancing test).

301. *See* NOWAK & ROTUNDA, *supra* note 167, § 8.1(b), at 341 ("The balancing test used in dormant commerce clause cases favors the government, as indicated by the quotation from the Pike majority opinion.").

302. McCann, *supra* note 26.

303. *Id.*

304. Chemerinsky, *supra* note 196.

305. *See supra* Part III (arguing that the antitrust principles are critical to dismantling the dormant commerce clause problem).

306. *See supra* Part III (noting without the NCAA's bylaw uniformity California would be able to protect the welfare of student athletes by regulating the NCAA).

capitalize on his unfortunate fame.[307] No one would wish fame acquired in such a manner on anyone, but if a California student-athlete suffers such an experience, then the Fair Pay to Play Act provides an avenue for compensation.[308] Protecting student-athletes by providing such avenues is quite the legitimate local interest.[309]

307. *See generally* Riches, *supra* note 1.

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

309. Chemerinsky, *supra* note 196.

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