

Third-Party Payments: A Reasonable Solution to the Legal Quandary Surrounding Paying College Athletes

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Neither Professor Yasser nor Mr. Fox possessed the requisite athletic skill to take advantage of the Third-Party Payment System had it been available when they were in school, but they are both passionate about advocating for the student-athletes who are.

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I. INTRODUCTION

The National Collegiate Athletic Association (“NCAA”) is a billion-dollar industry.¹ The so-called “money” sports—men’s basketball and football—generate most of this revenue through the men’s championship basketball tournament and post-season games in football.² While the majority of these funds are dispersed back to member schools and conferences who perform well in championship events,³ the athletes—who play the vital role in generating revenue—do not receive any compensation beyond their scholarship award, room and board, books, and a cost-of-attendance stipend.⁴ For generations, the NCAA has required student-athletes to forgo opportunities to monetize their athletic prowess to participate in college sports.⁵

As college athletics evolves into big business, coaches and administrators receive large salaries that stand in stark contrast to the benefits athletes can receive. For example, in 2018, Duke’s men’s basketball coach, Mike Krzyzewski (colloquially “Coach K”), brought home \$8.98 million in salary;⁶ his best player and one of the most dominant college basketball players of the twenty-first century, Zion Williamson,⁷ received a financial aid package that capped compensation at the calculated full cost of attendance. Full

¹ See Darren Rovell, *NCAA Tops \$1 Billion in Revenue During 2016-2017 School Year*, ESPN (Mar. 7, 2018), https://www.espn.com/college-sports/story/_/id/22678988/ncaa-tops-1-billion-revenue-first [<https://perma.cc/437W-6XDY>]; Brent Schrottenboer, *College Football Playoff Business is Booming at Halfway Point, but Expansion Looms*, USA TODAY, (Jan. 9, 2020), <https://www.usatoday.com/story/sports/ncaaf/2020/01/09/college-football-playoff-financial-success-expansion-future/2838495001/>.

² See *id.*

³ See *id.*

⁴ See Len Simon, *NCAA Won Big in Case vs. Athletes*, SAN DIEGO UNION-TRIBUNE (Mar. 10, 2019), <https://www.sandiegouniontribune.com/sports/sd-sp-ncaa-lawsuit-athletes-money-analysis-20190309-story.html> [<https://perma.cc/WH3F-7JJC>].

⁵ See NAT’L COLLEGIATE ATHLETIC ASS’N, 2019–2020 NCAA DIVISION I MANUAL § 2.9 (2019), available at <http://www.ncaapublications.com/productdownloads/D120.pdf> [<https://perma.cc/3SYA-6WV8>] [hereinafter NCAA DIVISION I MANUAL].

⁶ See Abigail Hess, *The 10 Highest-Paid NCAA Basketball Coaches*, CNBC (Mar. 10, 2019), <https://www.cnbc.com/2019/03/08/the-10-highest-paid-ncaa-basketball-coaches.html> [<https://perma.cc/4DH7-RRQ>].

⁷ See Josh Planos, *Zion Williamson is the Best College Basketball Player in at Least a Decade*, FIVETHIRTYEIGHT (Dec. 12, 2018), <https://fivethirtyeight.com/features/zion-williamson-is-the-best-college-basketball-player-in-at-least-a-decade/> [<https://perma.cc/8Q4P-6E24>].

cost of attendance at Duke is currently assessed at \$78,828.⁸ After ending his college hoops career and entering the NBA Draft, Zion was drafted first overall,⁹ and he subsequently signed a shoe deal with Jordan brand—a subsidiary of Nike—worth \$75 million over five years.¹⁰

In September 2019, Tim Tebow, a former quarterback for the Florida Gators and one of the most famous college athletes of recent memory,¹¹ spoke on *First Take*—a morning sports talk show aired by ESPN.¹² On air, the former Gator great passionately argued that college athletes should not receive compensation for participating in sports.¹³ The crux of Tebow's argument was that athletes should participate for the love of the game and that if athletes want to be paid, they should be paid in professional leagues and not as collegiate athletes.¹⁴ The same day, Dez Bryant, a decorated former receiver for the Oklahoma State Cowboys¹⁵ and the Dallas Cowboys,¹⁶ responded to Tebow on Twitter.¹⁷ Bryant argued that most college athletes never receive the opportunities Tebow did as a Heisman Trophy winner,¹⁸

⁸ See *Cost*, DUKE KARSH OFFICE UNDERGRADUATE FIN. SUPPORT, <https://financialaid.duke.edu/undergraduate-applicants/cost> [https://perma.cc/RH9H-ATER] (last visited Oct. 30, 2020).

⁹ See Brian Mahoney, *Pelicans Select Zion Williamson with No. 1 Pick in Draft*, NBA (June 20, 2019), <https://www.nba.com/article/2019/06/20/pelicans-take-zion-williamson-no-1-pick-draft> [https://perma.cc/CP9J-ALRK].

¹⁰ See Darren Rovell (@darrenrovell), TWITTER (July 24, 2019, 1:51 PM), <https://twitter.com/darrenrovell/status/1154131926988574721> [https://perma.cc/LS76-K9GK].

¹¹ See generally Fred Goodall et al., *Tebow, Teammates Reflect on 2008 Loss to Ole Miss, Promise*, USA TODAY (Oct. 2, 2015), <https://www.usatoday.com/story/sports/ncaaf/2015/10/02/tebow-teammates-reflect-on-2008-loss-to-ole-miss-promise/73192500/> [https://perma.cc/2593-KEAK].

¹² See *First Take* (@FirstTake), TWITTER (Sept. 13, 2019, 8:51 AM), <https://twitter.com/FirstTake/status/1172538239095332864/video/1> [https://perma.cc/7QPM-G9KS].

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See generally Anthony Slater, *Dez Bryant Reflects on his Oklahoma State Career and the Lie that Eventually Ended It*, OKLAHOMAN (Apr. 22, 2013), <https://oklahoman.com/article/3795965/dez-bryant-reflects-on-his-oklahoma-state-career-and-the-lie-that-eventually-ended-it> [https://perma.cc/52EV-W5EV].

¹⁶ See *id.*

¹⁷ Dez Bryant (@DezBryant), TWITTER (Sept. 13, 2019, 3:43 PM), <https://twitter.com/DezBryant/status/1172642050837221381> [https://perma.cc/G2YT-KQQW].

¹⁸ See *Tim Tebow*, HEISMAN TROPHY, <https://www.heisman.com/heisman-winners/tim-tebow/> [https://perma.cc/5VYR-ZWHA] (last visited Jan. 22, 2020).

first round draft pick,¹⁹ and NFL quarterback.²⁰ Bryant also indicated that many college athletes come from underprivileged backgrounds and that compensation could greatly help their situations.²¹ Finally, Bryant noted the vast majority of college athletes never play professionally and thus, would not be eligible for payment according to Tebow.²²

Proposed compensation schemes vary, but they can nearly all be placed on a spectrum. On one end of the spectrum lies the traditional amateur model used in college sports, in which there is no compensation beyond financial aid. On the other end of the spectrum lies “pay-to-play,” where the NCAA member schools directly pay athletes. Allowing athletes to “cash in” on their Name, Image, and Likeness (“NIL”) and be paid by third parties falls somewhere in the middle of these two extremes of the spectrum.

Even coaches have waded into the morass and chimed in on the issue of compensation. Some, like Washington State football coach Mike Leach, argue that compensation for college athletes would ruin college sports.²³ Others, like Duke’s Coach K, support allowing athletes to capitalize on their NIL while in school.²⁴ Mike Gundy, head football coach of the Oklahoma State Cowboys, maintains a more pragmatic approach.²⁵ He approves of NIL payments in theory, but advocates for a uniform implementation scheme so a certain parity could be maintained in recruiting athletes.²⁶

Today, because public opinion has shifted to support some sort of payment scheme for college athletes,²⁷ the NCAA has been forced to respond to

¹⁹ See Aaron Young, *Denver Broncos: Grading Tim Tebow and 11 Other First Round Draft Picks 2000-2010*, BLEACHER REPORT (Apr. 27, 2011), <https://bleacherreport.com/articles/677083-denver-broncos-grading-their-first-round-draft-picks-2000-2010> [https://perma.cc/8AFU-3Z86].

²⁰ See *id.*

²¹ See Bryant, *supra* note 17.

²² See *id.*

²³ See Brenna Greene (@BrennaGreene_), TWITTER (Sept. 16, 2019, 3:02 PM), https://twitter.com/BrennaGreene_/status/1173718746222907392 [https://perma.cc/Z4QX-U7EY].

²⁴ See Michael Shapiro, *Mike Krzyzewski Supports Fair Pay to Play Act: ‘We Need to Stay Current,’* SPORTS ILLUSTRATED (Oct. 8, 2019), <https://www.si.com/college/2019/10/08/mike-krzyzewski-california-fair-pay-to-play-act> [https://perma.cc/X5L7-2ATK].

²⁵ See Scott Wright, *OSU Football Journal: Mike Gundy Approves of California Law, but Hopes for Uniformity*, OKLAHOMAN (Oct. 1, 2019), <https://oklahoman.com/article/5642751/osu-football-journal-mike-gundy-approves-of-california-law-but-hopes-for-uniformity> [https://perma.cc/RVX6-DFBL].

²⁶ See *id.*

²⁷ See Rick Maese, *Should College Athletes Be Paid? Some Lawmakers, and a Presidential Candidate, Say Yes*, WASHINGTON POST (May 22, 2019), <https://www.washingtonpost.com/sports/college-athletes-should-be-paid-some-lawmakers-and-a-presidential-candidate-say-yes/2019/05/22/>

calls to pay athletes.²⁸ While traditionally the NCAA has been diametrically opposed to any movement toward compensation, as things stand now, the NCAA appears willing to consider some sort of NIL scheme so long as the payment system is “consistent with the collegiate model.”²⁹ To get to this point, athletes have used the legal system to challenge aspects of “amateurism” and have achieved varying degrees of success.³⁰ However, courts have been hesitant to upend a college athletic system that has become a unique staple of American sport.³¹ Part of the problem could be that athletes have typically requested “pay-to-play” in which member schools directly pay athletes for their participation.³² For reasons discussed below, “pay-to-play” is not acceptable to the courts, nor is it a reasonable solution to the legal quandary surrounding compensating college athletes.³³

In 1906, NCAA member schools at the time adopted the “Principle of Amateurism” as a core tenet of the NCAA system.³⁴ This principle forbids athletes from receiving any compensation or benefit for their NIL, and it also forbids athletes from receiving any direct payment or benefit for their athletic prowess.³⁵ The NCAA justifies the rule in a twofold manner: first, it argues that amateurism prevents college athletes from exploitation,³⁶ and second, it argues that amateurism creates a clear demarcation between college and professional sports.³⁷

www.washingtonpost.com/sports/2019/05/22/should-college-athletes-be-paid-some-lawmakers-presidential-candidate-say-yes/ [https://perma.cc/QK8T-TMKZ].

²⁸ See *id.*

²⁹ See *Board of Governors Starts Process to Enhance Name, Image & Likeness Opportunities*, NAT’L COLLEGIATE ATHLETIC ASS’N (Oct. 29, 2019), <http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities> [https://perma.cc/TYX3-ATPG] [hereinafter *Board of Governors*].

³⁰ See, e.g., *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049 (9th Cir. 2015); *In re Nat’l Collegiate Athletic Ass’n, Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013); *Marshall v. ESPN Inc.*, 111 F.Supp. 3d 815 (M.D. Tenn. 2015).

³¹ See *O’Bannon*, 802 F.3d at 1053, 1079.

³² See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 971–73 (N.D. Cal. 2014).

³³ See *O’Bannon*, 802 F.3d at 1053, 1079; see also *infra* Part III.

³⁴ See NCAA DIVISION I MANUAL, *supra* note 5, at § 2.9.

³⁵ See *id.*

³⁶ See *NCAA Opposition to Petition for Rehearing en banc at *3, O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) (No. 14-16601), LEXIS 63 [hereinafter *NCAA O’Bannon Brief*].

³⁷ See *id.*

Considering the wide range of ongoing litigation, state and congressional action (or inaction), and a general jockeying for favorable position in the sphere of public perception, there is little question that the issue of paying college athletes presents a quagmire lacking an apparent answer. Athletes are seeking “pay-to-play,” but the courts are unwilling to upend the current system to such an extent.³⁸ Meanwhile, some states are implementing payment systems while other states are not, which will potentially create an uneven playing field when schools recruit athletes.³⁹

Additionally, professional athletes like Los Angeles Lakers star LeBron James (who bypassed the NCAA by going straight to the NBA)⁴⁰ and San Francisco 49ers cornerback Richard Sherman (who turned professional after playing college football at Stanford)⁴¹ use their platforms to speak out for compensating athletes with just as much passion as opponents argue that paying athletes will destroy college sports.⁴² To resolve this pervasive conflict, the Third-Party Payment system could fulfill NCAA, member school, and student-athlete needs by offering a viable legal compromise that preserves the college athletics model and offers student-athletes reasonable compensation for their valuable talents.

The first part of this Article analyzes the historical landscape behind the current push for athletic compensation. Athletes have challenged aspects of the amateur system since the 1940s to varying degrees of success.⁴³ Today, the bulk of litigation involves antitrust disputes as to whether the NCAA system violates Section I of the Sherman Act.⁴⁴

³⁸ See, e.g., *O'Bannon*, 802 F.3d at 1049; *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013); *Marshall v. ESPN Inc.*, 111 F. Supp. 3d 815 (M.D. Tenn. 2015).

³⁹ See *Wright*, *supra* note 25.

⁴⁰ See Marc Stein, *Cleveland is Officially Jamestown Now*, ESPN (June 27, 2003), <https://www.espn.com/nbadraft/d03/story?id=1573511> [<https://perma.cc/FV3E-T57Q>].

⁴¹ Zac Al-Khateeb, *Richard Sherman at Stanford: Revisiting the 49er's College Football, Academic Careers*, SPORTING NEWS (Feb. 2, 2020), <https://www.sportingnews.com/us/nfl/news/richard-sherman-college-football-academic-careers/1xc5bxn4n0rv4114dnjwwzin1a> [<https://perma.cc/42M5-VAH6>].

⁴² See Taylor Branch, *The Shame of College Sports*, ATLANTIC, Oct. 2011, <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/S7LE-H7EK>].

⁴³ See, e.g., *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015); *O'Brien*, *infra* note 63; *Kupec*, *infra* note 71.

⁴⁴ See 15 U.S.C. § 1; see also *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85 (1984).

The second part of this Article discusses “pay-to-play.” For reasons ranging from potential Title IX⁴⁵ violations to general public relations nightmares, “pay-to-play” is not a viable solution to the current standoff.⁴⁶ This part analyzes the issues plaguing the “pay-to-play” model in turn.⁴⁷ Additionally, this section argues that when confronted with an antitrust challenge to the current system, the legal system will not recognize “pay-to-play” as a less restrictive alternative to the current system when applying the antitrust “rule of reason.”⁴⁸ Furthermore, the NCAA and member schools will not implement “pay-to-play” on their own. In some ways, the NCAA is correct in arguing that “pay-to-play” could kill the goose that laid the golden egg.⁴⁹

Finally, the third part of this Article introduces and analyzes the Third-Party Payment system.⁵⁰ In contrast to “pay-to-play,” the Third-Party Payment system is a reasonable solution to the legal quandary sur-

⁴⁵ See 20 U.S.C. §§ 1681–1688.

⁴⁶ While “pay-to-play” does not implicate equal pay laws directly, one area that may offer a comparison for universities that pay females less than male athletes is the current struggle for the U.S. Women’s Soccer Team to achieve equal pay. In a legal filing, the U.S. Soccer Federation asserted that female players have less skill and responsibility than their male counterparts. The public outcry has been enormous and the head of the Federation was forced to resign. See Lauren M. Johnson, *US Soccer Claims It Won’t Pay Women Equally Because Being a Male Player Requires More Skill*, CNN (Mar. 12, 2020, 5:52 AM), <https://www.cnn.com/2020/03/11/us/us-soccer-federation-court-document-trnd/index.html> [<https://perma.cc/2MEZ-HFLP>].

⁴⁷ See, e.g., Jane McManus, *Pressure to Pay Student-Athletes Carries Question of Title IX*, ESPN (Apr. 19, 2016), <http://www.espn.com/espnw/culture/feature/article/15201865/pressure-pay-student-athletes-carries-question-title-ix> [<https://perma.cc/A7YA-URXT>]; Brian Burnsed, *Athletics Departments That Make More Than They Spend Still a Minority*, Nat’l Collegiate Athletic Ass’n (Sept. 18, 2015), <http://www.ncaa.org/about/resources/media-center/news/athletics-departments-make-more-they-spend-still-minority> [<https://perma.cc/ABD9-XWPF>]; Michelle Brutlag Hosick, *NCAA Working Group to Examine Name, Image and Likeness*, NAT’L COLLEGIATE ATHLETIC ASS’N (May 14, 2019), <http://www.ncaa.org/about/resources/media-center/news/ncaa-working-group-examine-name-image-and-likeness> [<https://perma.cc/266A-6BHD>].

⁴⁸ See David A. Grenardo, *The Blue Devil’s in the Details: How a Free Market Approach to Compensating College Athletes Would Work*, 46 PEPP. L. REV. 203, 214 (2019).

⁴⁹ See Hosick, *supra* note 47.

⁵⁰ See Len Simon, *NCAA Should Allow College Athletes to Cash in on Endorsements*, S.F. CHRON. (Dec. 24, 2018), <https://www.sfchronicle.com/opinion/openforum/article/NCAA-should-allow-college-athletes-to-cash-in-on-13489721.php> [<https://perma.cc/4F86-29MU>].

rounding paying college athletes. After discussing how the Third-Party Payment system can address each issue that plagues the “pay-to-play” system, we conclude that the Third-Party Payment system can be implemented in a variety of ways. In particular, it could be implemented through litigation—either through a court order or a settlement agreement. Additionally, Congress and state legislatures can implement it within their jurisdictions. However, the easiest and best way to implement the Third-Party Payment system is through an amendment to the NCAA Division I Manual.

II. AMATEURISM IS A CORE TENET OF THE NCAA

The NCAA was founded in 1905 when sixty-two member schools sought to reform college athletics, and in part, to address the issue of schools hiring professional athletes to play on college teams.⁵¹ A year later, in 1906, the member schools adopted the “Principle of Amateurism” as a core tenet of the NCAA.⁵² To satisfy this core tenet, athletes cannot be paid for their athletic prowess.⁵³ In justifying the need for this tenet, the NCAA states that the “‘basic purpose’ of [the principle of amateurism] ‘is to maintain inter-collegiate athletics as an integral part of the educational program.’”⁵⁴ Further, the NCAA offers a distinct sports product to consumers separate from professional leagues and argues that the amateurism rules create a clear line of demarcation from professional sports.⁵⁵

Thus, the NCAA presents two primary arguments for maintaining amateurism. First, it argues that allowing athletes to be paid would upset the balance between member schools.⁵⁶ Ideally, sports leagues enforce rules that keep teams from becoming too good and dominating competition.⁵⁷ The NCAA argues that amateurism rules fall into this category. The NCAA’s second primary argument is that college sports in general are distinct from professional sports and that the demarcation between the two promotes consumer choice.⁵⁸ Under this theory, the NCAA contends that amateurism rules are a necessary requirement for a sports “product” that is distinguishable

⁵¹ See NCAA O’Bannon Brief, *supra* note 36, at *2.

⁵² See *id.*

⁵³ See *id.*

⁵⁴ *Id.* at *3.

⁵⁵ See *id.*

⁵⁶ See NCAA O’Bannon Brief, *supra* note 36, at *2.

⁵⁷ See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 101–03 (1984).

⁵⁸ See *id.*

ble from professional sports.⁵⁹ The thinking goes that college athletes—who are playing “for the love of the game” and nothing more—are more passionate than their professional counterparts.⁶⁰ Athletes have challenged the NCAA on both arguments in court.⁶¹

A. *Athletes Have Historically Challenged Aspects of the Amateurism Model in Court*

Athletes have not been reticent to legally challenge the restrictive amateur rules and the expansive control member schools and the NCAA maintain over student-athletes. In the 1940s, legendary quarterback Davey O’Brien⁶² challenged Pabst Blue Ribbon in court for its use of his photograph without his consent.⁶³ The Fifth Circuit framed O’Brien’s challenge with a biblical metaphor and began its opinion, “[p]laintiff, in physique as in prowess as a hurler, a modern David, is a famous football player.”⁶⁴ As a famous football player, O’Brien understood his platform and was a member of the Allied Youth of America—an organization dedicated to eradicating drinking among young people.⁶⁵ O’Brien received opportunities to endorse alcohol products after turning professional, which he steadfastly refused.⁶⁶ However, O’Brien also allowed the Texas Christian University publicity department to take, use, and distribute his photos while he played for the Horned Frogs.⁶⁷ O’Brien ultimately lost his case because although he did not consent, Pabst Blue Ribbon paid his school, Texas Christian University, to use the photograph.⁶⁸ The court distinguished O’Brien’s alleged injury, that the image advertising beer caused him damages, from a case in which O’Brien sued for the value of his picture in the advertisement.⁶⁹ While this

⁵⁹ See NCAA O’ Bannon Brief, *supra* note 36, at *2.

⁶⁰ See *id.*

⁶¹ See, e.g., O’ Bannon v. Nat’l Collegiate Athletic Ass’n, 802 F.3d 1049 (9th Cir. 2015); *In re Nat’l Collegiate Athletic Ass’n Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013); Marshall v. ESPN Inc., 111 F. Supp. 3d. 815 (M.D. Tenn. 2015).

⁶² Today, the award for best collegiate quarterback is named after O’Brien.

⁶³ See O’Brien v. Pabst Sales Co., 124 F.2d 167, 168 (5th Cir. 1941).

⁶⁴ *Id.*

⁶⁵ See *id.* at 168-69.

⁶⁶ See *id.* at 169.

⁶⁷ See *id.*

⁶⁸ See *id.* at 168; see also Sean Hanlon & Ray Yasser, “J.J. Morrison” and his Right of Publicity Lawsuit Against the NCAA, 15 VILL. SPORTS & ENT. L.J. 241, 260 (2008).

⁶⁹ See O’Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir. 1941).

case did not involve antitrust in any sense, and was instead an early “right of publicity” case, it is significant that the court determined that the NCAA member school could provide the necessary consent to use an athlete’s NIL.

In the 1970s, University of North Carolina quarterback Chris Kupec⁷⁰ sued the Atlantic Coast Conference (“ACC”), a collective of NCAA member schools, partly on an antitrust theory.⁷¹ Kupec alleged in his complaint that “[t]he actions of the member institutions of the Atlantic Coast Conference in combining to set maximum compensation to be received by student athletes . . . have unreasonably restrained . . . commerce . . . in violation of the Sherman Act.”⁷² While Kupec lost his case, and the court never addressed his antitrust theory, antitrust has become the playing field for current litigation battles between athletes and the NCAA.

After the NCAA gave the Southern Methodist University football team the “death penalty” in 1987 by ending the program for widespread and systematic violations of NCAA rules,⁷³ SMU athletes and cheerleaders sued the NCAA on an antitrust theory, arguing that by ending the program, the NCAA unlawfully restricted the benefits the athletes could receive.⁷⁴ Ultimately, this action was dismissed because the court determined that several plaintiffs lacked standing and the plaintiffs who had standing failed to “state a claim upon which relief could be granted.”⁷⁵

These early antitrust cases and arguments are important because in 1988, the Supreme Court slammed the door on challenging the NCAA under constitutional law theories when it determined that the NCAA was not a “state actor” in *NCAA v. Tarkanian*.⁷⁶ But, when one door shuts, another door opens, and athletes have found varying levels of success challenging the NCAA under antitrust theories.

In the early 2000s, the NCAA determined that skier, model, and celebrity Jeremy Bloom⁷⁷ was ineligible to play college football at the Univer-

⁷⁰ Kupec played at the University of North Carolina from 1972 until 1974.

⁷¹ For more on the complaint, see RAY YASSER ET AL., *SPORTS LAW: CASES AND MATERIALS* 253 (8th ed. 2015).

⁷² *Id.*

⁷³ See Eric Dodds, *The ‘Death Penalty’ and How the College Sports Conversation has Changed*, TIME (Feb. 25, 2015), <https://time.com/3720498/ncaa-smu-death-penalty/> [<https://perma.cc/3YPV-TXL6>].

⁷⁴ See *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338 (5th Cir. 1988).

⁷⁵ YASSER ET AL., *supra* note 71, at 240.

⁷⁶ *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179 (1988).

⁷⁷ See ASSOCIATED PRESS, *No Football for Bloom While Taking Ski Endorsements*, ESPN (Aug. 24, 2004), <https://www.espn.com/college-football/news/story?id=1867015> [<https://perma.cc/U6XH-45V2>].

sity of Colorado because he received compensation and benefits for his skiing ability.⁷⁸ Bloom filed suit seeking a permanent injunction on an antitrust theory.⁷⁹ The court determined that the amateur rules did not violate antitrust law and subsequently refused to permit an injunction.⁸⁰ Interestingly, in this case, the NCAA saw the writing on the wall and amended the Division I Manual so that athletes who received compensation and benefits for one sport could still maintain amateur status in other sports.⁸¹ Former Oklahoma State University quarterback Brandon Weeden is an example of an athlete who benefited from this rule change, as he was able to pursue a collegiate football career after pitching in the New York Yankees organization.⁸²

i. Courts Recognize Problems with the Current Amateur System but Are Unwilling to Upend a System That Has Become a Stalwart of American Sport.

A discussion of recent antitrust cases requires an understanding of the antitrust “rule of reason.” In deciding antitrust claims, courts initially determine whether a defendant’s conduct violates the Sherman Act.⁸³ This 1890 Act makes it unlawful for entities to unreasonably restrain trade within a market.⁸⁴ The first step of this analysis is to determine the unlawful conduct, and the subsequent step is to determine whether the violation is a per se violation or is to be analyzed under the rule of reason.⁸⁵

Typically, per se violations are egregious restraints such as price fixing, group boycotts, collusive geographic sales agreements, etc.⁸⁶ If an alleged violation does not meet the per se standard, then the rule of reason is ap-

⁷⁸ See *id.*; Bloom v. Nat’l Collegiate Athletic Ass’n, 93 P.3d 621 (Colo. App. 2004).

⁷⁹ See *id.* at 622.

⁸⁰ See *id.* at 625–26.

⁸¹ See Tully Corcoran, *Jeremy Bloom and the Shifting Sands of the Rules*, SPORTS ILLUSTRATED (Oct. 31, 2019), <https://www.si.com/college/colorado/football/jeremy-bloom-ncaa-rules> [https://perma.cc/MP5Q-B7VT].

⁸² See John Henderson, *QB Brandon Weeden Trades Minor-League Baseball for Oklahoma State Football*, DENVER POST (Aug. 8, 2010), <https://www.denverpost.com/2010/08/08/qb-brandon-weeden-trades-minor-league-baseball-for-oklahoma-state-football/> [https://perma.cc/PFY9-BTE2].

⁸³ Sherman Antitrust Act of 1890, 15 U.S.C §1 (2018).

⁸⁴ See *id.*

⁸⁵ See Grenardo, *supra* note 48, at 214.

⁸⁶ See *id.*

plied.⁸⁷ The rule of reason test first requires the plaintiff to show that the defendant's conduct restricts competition and in doing so hurts consumers.⁸⁸ If a plaintiff meets this burden, then the defendant has the opportunity to show that the anticompetitive behavior has a procompetitive justification.⁸⁹ Once a defendant meets this standard, the burden shifts back to the plaintiff to show that there is a less restrictive alternative that will serve the procompetitive justification.⁹⁰

There is a distinct paradox unique to sports antitrust claims. To enhance parity among member teams in sport, it is necessary to restrict competition. Courts keep this core principle in mind while analyzing sports leagues for antitrust violations.⁹¹ This is because sports competition requires an even playing field to be most effective, and parity has been achieved through a variety of anticompetitive means in professional leagues including salary caps⁹² and maximum levels of compensation.⁹³ At the amateur level, NCAA member schools have a set number of scholarships available to grant to student-athletes which keeps certain powerhouse schools from cornering the market on talent.⁹⁴

Due to this paradox, even though many antitrust claims in the sports setting appear to be per se violations of the Sherman Act, courts instead apply the rule of reason.⁹⁵ Because of this quirk in sports law, a viable solution to the legal quandary surrounding paying college athletes should be a system that satisfies the rule of reason.

O'Bannon v. National Collegiate Athletic Association is, thus far, the most significant antitrust case regarding compensating college athletes.⁹⁶ The

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See Grenardo, *supra* note 48, at 214.

⁹¹ See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 101–03 (1984).

⁹² See generally Tyler Brooke, *How Does the Salary Cap Work in the NFL?*, BLEACHER REPORT (June 10, 2013), <https://bleacherreport.com/articles/1665623-how-does-the-salary-cap-work-in-the-nfl> [<https://perma.cc/JFT3-9JYP>].

⁹³ See generally Morten Jensen, *Mission Impossible: Fixing the NBA Max Contract System*, FORBES (July 10, 2019), <https://www.forbes.com/sites/mortenjensen/2019/07/10/mission-impossible-fixing-the-nba-max-contract-system/#32828633193b> [<https://perma.cc/V643-2FDG>].

⁹⁴ See generally Peter Keating, *The Silent Enemy of Men's Sports*, ESPN (May 22, 2012), https://www.espn.com/espnw/title-ix/story/_/id/7959799/the-silent-enemy-men-sports [<https://perma.cc/KCB9-JRGK>].

⁹⁵ See *Bd. of Regents*, 468 U.S. at 101–03.

⁹⁶ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015).

crux of this massive class action involved the NCAA's agreement with EA Sports to produce lucrative sports simulation video games, and the NCAA's subsequent decision to pocket the proceeds instead of compensating the athletes for the use of their NIL.⁹⁷ Ed O'Bannon, an All-American basketball player at the University of California – Los Angeles,⁹⁸ sued the NCAA on behalf of all former college athletes who appeared in the EA Sports games.⁹⁹ The district court found that the NCAA's amateurism rules violated Section I of the Sherman Act. The court issued an injunction to the NCAA requiring it to cease barring schools from 1) offering full cost-of-attendance stipends and 2) providing deferred payments to student-athletes of up to five thousand dollars a year for each year the athlete participated in an NCAA sport.¹⁰⁰

On appeal, the Ninth Circuit applied the antitrust rule of reason and affirmed in part and reversed in part.¹⁰¹ While the court determined that the NCAA violated Section I of the Sherman Act, it was unwilling to approve "pay-to-play" as a less restrictive alternative.¹⁰² In essence, the athletes carried their burden at step one of the rule of reason analysis (showing the NCAA's conduct restricts competition and in doing so hurts consumers), the NCAA met its burden at step two (showing that their anticompetitive behavior has a procompetitive justification), and the athletes failed at step three (failing to offer a less restrictive alternative that would serve the procompetitive justification).¹⁰³ Instead of implementing "pay-to-play," the Ninth Circuit affirmed the district court ruling prohibiting the NCAA from barring schools from offering full cost-of-attendance stipends.¹⁰⁴ Accordingly, the court reversed the lower court's deferred payment order.¹⁰⁵ To date, EA Sports has not produced any subsequent NCAA video games in light of the NCAA's refusal to allow EA to negotiate with the athletes directly.¹⁰⁶

⁹⁷ *See id.*

⁹⁸ *See id.* at 1055.

⁹⁹ *See id.*

¹⁰⁰ *See id.* at 1061.

¹⁰¹ *See O'Bannon*, 802 F.3d at 1053.

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.* at 1079.

¹⁰⁵ *See id.*

¹⁰⁶ *See* Kevin Webb, *Electronic Arts Wants to Make College Sports Games Again, But the Biggest Obstacle is Still the NCAA*, BUSINESS INSIDER (Oct. 22, 2019), <https://www.businessinsider.com/electronic-arts-ea-college-sports-ncaa-football-basketball-2019-10> [<https://perma.cc/56P6-KQAX>].

In March 2019, the next potential landscape-shifting case, *Alston v. NCAA*, was decided at the district level and affirmed at the appellate court level.¹⁰⁷ Although the Supreme Court has granted certiorari in this case, as it stands, there will not be a huge shift towards “pay-to-play,” as the lower courts again proved hesitant to upend the current system.¹⁰⁸ In his synopsis of the case, Len Simon¹⁰⁹ noted that, if the case were a football game, the NCAA would have won 55-3.¹¹⁰ Once again, the lower courts recognized that the NCAA violated antitrust laws, but only allowed for broadening the definition of “education-related” benefits.¹¹¹ Presumably, this means that schools could provide benefits ranging from lab equipment to scholarships for graduate school without violating NCAA rules.¹¹² While broadening educational benefits would be a small step forward for athletes, this remains a far cry from “pay-to-play.”

Much like *O’Bannon*, the *Alston* decision thus far signals that “pay-to-play” is not a less restrictive alternative palatable to the court.¹¹³ Because “pay-to-play” fails to pass muster, the NCAA is a big winner in the current antitrust litigation battles.¹¹⁴ Nevertheless, the fact that courts are willing to recognize that the amateur system violates antitrust law means that there is a possibility that a proposal could ultimately pass the antitrust rule of reason as long as it presents a less restrictive alternative to the NCAA’s procompetitive justification.

III. THE “PAY-TO-PLAY” ALTERNATIVE IS NOT A VIABLE SOLUTION TO THE CURRENT LEGAL QUANDARY

As discussed above, courts thus far have been unwilling to impose “pay-to-play” upon the NCAA as a less restrictive alternative under the rule

¹⁰⁷ See *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Antitrust Litigation*, 958 F.3d 1239 (9th Cir. 2019); see also Simon, *supra* note 4.

¹⁰⁸ See *In re Nat’l Collegiate Athletic Ass’n*, 958 F.3d at 1271.

¹⁰⁹ Len Simon, of Counsel with Robbins Geller Rudman & Dowd in San Diego, is a lawyer and law professor. He has handled sports-related litigation, antitrust cases, and taught Sports and the Law at the University of San Diego for more than a decade. See *Leonard B. Simon*, ROBBINS GELLER RUDMAN & DOWD LLP, <https://www.rgrdlaw.com/attorneys-Leonard-B-Simon.html> [https://perma.cc/D6EU-HU7E] (last visited Jan. 6, 2021).

¹¹⁰ See Simon, *supra* note 4.

¹¹¹ See *In re Nat’l Collegiate Athletic Ass’n*, 958 F.3d at 1243–44.

¹¹² See Simon, *supra* note 4.

¹¹³ See *id.*

¹¹⁴ See *id.*

of reason analysis.¹¹⁵ In particular, courts consider requiring member schools to directly compensate athletes for their participation in college athletics to be too drastic a departure from the current system.¹¹⁶ Furthermore, if colleges are forced to directly pay student-athletes, the clear demarcation between college and professional sports would be obliterated.¹¹⁷ Indeed, part of the hesitance in imposing “pay-to-play” could be that amateur sports in general present a procompetitive alternative to professional sports that actually increases consumer choice by offering a collegiate option and professional option.¹¹⁸ A reasonable solution to the legal quandary surrounding paying athletes must be a proposal that allows college sports to be distinct from professional sports.¹¹⁹

A. Even if “Pay-to-Play” Were Imposed, There Are Serious Issues That Will Arise When It Is Implemented.

“Pay-to-play” will implicate concerns regarding Title IX, funding for non-revenue sports, the payment model itself, and “steering”—the practice of paying athletes to entice them to a certain school. Regarding Title IX, schools will likely end up paying male athletes more than their female counterparts. This could lead to violations of federal law and expose schools to litigation. “Pay-to-play” could also create serious issues for athletic program funding across American universities because the vast majority of college programs do not turn a profit that could be used to pay student-athletes.¹²⁰ Instead, the standard athletic department uses revenue generated by lucrative sports such as football and men’s basketball to fund the plethora of other sports teams that the university sponsors.¹²¹

In addition to the aforementioned issues, universities directly paying athletes for their participation on the playing field increases tension regarding the line between professional and college sports, and it also opens the

¹¹⁵ See, e.g., *O’ Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049 (9th Cir. 2015); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013); *Marshall v. ESPN Inc.*, 111 F. Supp. 3d. 815 (M.D. Tenn. 2015).

¹¹⁶ See NCAA O’ Bannon Brief, *supra* note 36, at *1-2.

¹¹⁷ See *id.*

¹¹⁸ See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 101–03 (1984).

¹¹⁹ See generally *id.*

¹²⁰ See *Burnsed*, *supra* note 47.

¹²¹ See *id.*

door for the steering of talented athletes to certain schools by wealthy benefactors.¹²²

i. “Pay-to-Play” Likely Violates Current Title IX Regulations

Title IX requires that universities provide financial assistance to men and women on an equal basis.¹²³ Should “pay-to-play” take effect among NCAA member schools, there would be serious issues regarding what athletes and which programs receive compensation for participation.¹²⁴ Because most revenue generated by the NCAA stems from the men’s championship basketball tournament, men’s basketball players would be able to receive compensation from their schools for their participation in that sport.¹²⁵ However, women’s basketball is not a “money” sport.¹²⁶ Should men’s basketball players receive compensation, while their female counterparts do not, member schools would potentially open themselves up to Title IX litigation and a public relations disaster.¹²⁷

Title IX ensures equal educational opportunities for men and women.¹²⁸ Because college athletics is considered part of the educational process, any attempt to pay men more than women would trigger Title IX protections.¹²⁹ Ironically, the NCAA’s insistence that college athletics is a part of the educational process and remains distinct from professional sports actually increases the likelihood that “pay-to-play” would trigger Title IX scrutiny.¹³⁰ While it is true that athletes in “Olympic” sports are uniquely situated among their peers in “Olympic” sports, courts have not drawn this distinction when interpreting Title IX.¹³¹ Instead, according to Mary

¹²² See Marc Tracy, *NCAA Coaches, Adidas Executive Face Charges; Pitino’s Program Implicated*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/sports/ncaa-adidas-bribery.html> [<https://perma.cc/7NEB-TFJL>].

¹²³ See 20 U.S.C. §§1681–1688.

¹²⁴ See McManus, *supra* note 47.

¹²⁵ See Rovell, *supra* note 1.

¹²⁶ See generally *id.*

¹²⁷ See McManus, *supra* note 47.

¹²⁸ See 20 U.S.C. §§ 1681–1688.

¹²⁹ See NCAA O’Bannon Brief, *supra* note 36, at *2; see also NCAA DIVISION I MANUAL art. 1.3.1 (“The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program. . . .”).

¹³⁰ See *id.*

¹³¹ See Mechelle Voepel, *Title IX a Pay-for-Play Roadblock*, ESPN (July 15, 2011), https://www.espn.com/college-sports/story/_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics [<https://perma.cc/K6K2-VNQS>].

Gambardella,¹³² “[w]hat the court would say is, it’s not an equally meaningful opportunity if the experience is richer, for lack of a better word, in some sports.”¹³³

Because Title IX arguments cut against “pay-to-play,” some analysts argue that Title IX is simply a red herring that the NCAA uses to continue fighting compensation for athletes.¹³⁴ In making this argument, advocates for “pay-to-play” argue that when confronted with an issue of pay, courts should read Title IX as “coextensive with the Equal Pay Act of 1963 and the Civil Rights Act of 1964.”¹³⁵ When taken together, courts have upheld greater pay for coaches for men’s teams when that coach’s work involves greater “skill, effort, or responsibility.”¹³⁶ For example, in *Stanley v. University of Southern California*, the Ninth Circuit “noted that it may be permissible for the University of Southern California to offer higher pay to its men’s basketball coach because the men’s team generated far greater annual revenues.”¹³⁷ Further support for this argument is found in looking at the current pay gap between men’s and women’s basketball coaches.¹³⁸ In analogizing coaching salaries to college athletes, the argument concludes that players should likewise be able to receive unequal compensation in accordance with revenue.¹³⁹

This argument is fatally flawed. As previously discussed, Title IX is triggered when unequal educational opportunities are offered for men and women.¹⁴⁰ While the issue of paying coaches finds its source in employment law and the Equal Pay Act, “pay-to-play” would trigger Title IX because student-athletes would receive compensation as part of their educational process, and there would almost certainly be a disparate impact felt by fe-

¹³² Mary Gambardella is an attorney specializing in employment litigation. In the context of Title IX, Ms. Gambardella represented Quinnipiac University in a suit brought by the women’s volleyball team. *See id.*

¹³³ *Id.*

¹³⁴ *See* Marc Edelman, *When it Comes to Paying College Athletes, Title IX is Just a Red Herring*, FORBES (Feb. 4, 2014), <https://www.forbes.com/sites/marcedelman/2014/02/04/when-it-comes-to-paying-college-athletes-is-title-ix-more-of-a-red-herring-than-a-pink-elephant/#101d7f6c1bde> [<https://perma.cc/D5RK-BHDZ>].

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313 (9th Cir. 1994); *see also* Edelman, *supra* note 134.

¹³⁸ *See* James K. Gentry & Raquel Meyer Alexander, *Pay for Women’s Basketball Coaches Lags Far Behind That of Men’s Coaches*, N.Y. TIMES (Apr. 2, 2012), <https://www.nytimes.com/2012/04/03/sports/ncaabasketball/pay-for-womens-basketball-coaches-lags-far-behind-mens-coaches.html> [<https://perma.cc/SJ5B-8NHS>].

¹³⁹ *See* Edelman, *supra* note 134.

¹⁴⁰ *See* 20 U.S.C. §§1681–1688.

male athletes who would undoubtedly receive less compensation than their male counterparts in “money” sports. Because the NCAA has determined that college sports programs are part of the educational experience for student-athletes, unequal compensation among male and female athletes would trigger Title IX regardless of whether or not schools can make business decisions about how to compensate coaches.

Additionally, even if “pay-to-play” was found not to trigger Title IX protections, universities that paid female athletes less than male athletes would be skewered by public perception.¹⁴¹ Given the recent publicity surrounding the fight of the U.S. Women’s National Soccer Team (“USWNT”) to achieve equal pay,¹⁴² it is a near certainty that advocates would rally around female college athletes on social media, through demonstrations and other public displays of support. A college corollary to the USWNT could occur at the University of Connecticut (“UConn”) should “pay-to-play” be implemented. Much like the USWNT faring better internationally than the men’s U.S. National Team, UConn’s women’s basketball program is perhaps the most dominant sports program in American sports history¹⁴³—and the women’s program is certainly more successful than the men’s program.¹⁴⁴ Should the UConn women be paid less than UConn men, the public outcry would be enormous.

Because “pay-to-play” likely implicates Title IX scrutiny, “pay-to-play” is not a reasonable solution to the legal quandary surrounding paying college athletes. Instead, a reasonable solution is one that can either pass Title IX muster or bypass it altogether.

ii. Non-Revenue Generating College Sports Programs Would Be Detrimentially Affected if “Pay-to-Play” Were Implemented

While it is true that the NCAA makes over \$1 billion in revenues from major sports, it is important to note that revenue is not profit.¹⁴⁵ Instead,

¹⁴¹ See Johnson, *supra* note 46.

¹⁴² See David Close & Wayne Sterling, *U.S. Women’s National Team Granted Class Action Status in Equal-Pay Lawsuit*, CNN (Nov. 8, 2019), <https://www.cnn.com/2019/11/08/sport/uswnt-soccer-equal-pay-lawsuit-class-action/index.html> [<https://perma.cc/53ZD-C97P>]; see also Johnson, *supra* note 46.

¹⁴³ See Jan Diehm, *111 Wins and Counting: The Numbers Behind UConn Women’s Basketball, One of the World’s Most Dominant Teams*, GUARDIAN (Jan. 30, 2020), <https://www.theguardian.com/sport/ng-interactive/2017/mar/29/uconn-womens-basketball-ncaa-most-dominant-team-in-sports-interactive> [<https://perma.cc/XNL8-VSVG>].

¹⁴⁴ See *id.*

¹⁴⁵ See Rovell, *supra* note 1.

the vast majority of these funds are distributed back to the member schools to fund their athletic programs.¹⁴⁶ It is critical that the monies go to fund member school programs because most collegiate athletic programs operate at a deficit.¹⁴⁷ Schools use revenues generated by football and men's basketball to subsequently fund the other sports programs that do not generate revenue.¹⁴⁸

If “pay-to-play” were implemented, most of the money generated by “money” sports would presumably go to paying the athletes competing in those sports instead of funding other sports programs.¹⁴⁹ This presents serious concerns regarding the future of these “Olympic”—or non-revenue generating—sports. Should schools determine that maintaining a competitive football and/or men's basketball team is worth more than funding a wrestling or volleyball program, these “Olympic” programs would face the possibility of being cut from the athletic program. Not only would eliminating sports have a deleterious effect on the athletes who are impliedly being told that their craft, and educational experience, is worth less than a football player or basketball player, but also cutting programs could implicate Title IX as discussed above. This issue could also affect schools that choose not to cut programs because they will have to find new programs to compete against. Because “pay-to-play” would likely result in diminished athletic programs, it is not a reasonable solution to the legal quandary surrounding paying athletes.

iii. A “Pay-to-Play” Scheme Would Obliterate the Line Between Professional and College Sports

The NCAA is willing to discuss potential compensation schemes for college athletes, but it asserts that any scheme must “maintain the clear demarcation between professional and college sports. . . .”¹⁵⁰ “Pay-to-play” does not provide for this required boundary between professional leagues and college teams because “pay-to-play” would require that member schools directly pay athletes for participating in college sports.

One hypothetical “pay-to-play” proposal even goes so far as to create a salary cap for member schools and discuss standard college player contracts.¹⁵¹ Standard contracts and salary caps are hallmarks of professional

¹⁴⁶ See Burnsed, *supra* note 47.

¹⁴⁷ See Simon, *supra* note 50.

¹⁴⁸ See Burnsed, *supra* note 47.

¹⁴⁹ See Simon, *supra* note 50.

¹⁵⁰ Hosick, *supra* note 47.

¹⁵¹ See Grenardo, *supra* note 48.

sports leagues in America.¹⁵² Furthermore, because the athlete is paid directly by the school for playing college sports, the payment is tied directly to athletic prowess—which is exactly the same as professional sports.¹⁵³

This is a serious problem for “pay-to-play” schemes because the NCAA refuses to consider them valid proposals,¹⁵⁴ and because courts have long recognized that college sports are a “product” distinctly different from professional leagues.¹⁵⁵ Furthermore, thus far, courts have been unwilling to recognize “pay-to-play” as a less restrictive alternative to the current system.¹⁵⁶ Because the NCAA is unwilling on its own to consider “pay-to-play” and the courts seemingly find the demarcation argument sympathetic, “pay-to-play” is likely not a solution to the legal quandary surrounding paying college athletes. Instead, a reasonable solution is one that maintains the demarcation between professionals and amateurs.

iv. Steering Would be Nearly Impossible to Regulate Under the “Pay-to-Play” System

Steering—or the use of money to entice recruits to attend specific schools—is a major problem facing the NCAA today.¹⁵⁷ In September 2017, Adidas executives; major basketball programs including Louisville, Arizona, Auburn, and Oklahoma State; and middle men were caught up in a massive fraud investigation led by U.S. attorneys.¹⁵⁸ This investigation found that Adidas sponsored youth basketball teams and paid coaches and middle men to nurture relationships with young, promising players.¹⁵⁹ Once those players reached the age that they were able to be recruited by college programs, Adidas used the middle men to pay the recruited players and entice them to attend schools sponsored by Adidas.¹⁶⁰

Obviously, this practice affects competitive balance, as players might well attend the school that provides them with the best deal—even if that deal is not entirely legal. Under a “pay-to-play” scheme, there would be nothing stopping wealthy philanthropists or donors like George Kaiser or

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ See Hosick, *supra* note 47.

¹⁵⁵ See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 101–03 (1984).

¹⁵⁶ See Simon, *supra* note 50.

¹⁵⁷ See Tracy, *supra* note 122.

¹⁵⁸ See *id.*

¹⁵⁹ See RAY YASSER ET AL., *SPORTS LAW: CASES AND MATERIALS* 652–53 (9th ed. 2020).

¹⁶⁰ See *id.*

Michael Case from paying the best quarterback prospect available to attend the University of Tulsa or well-connected alumni like Jerry Jones from paying the best point guard to attend the University of Arkansas.¹⁶¹ Wealthy donors could have an outsized influence on competitive balance of major college sports.¹⁶² Additionally, if an athlete is strictly getting paid to play a sport at a specific school, the demarcation between amateur and professional sports would be eroded because the athlete is attending a specific school for the sole purpose of the athlete's athletic prowess.

In light of all of these issues, "pay-to-play" is not a viable solution to the legal quandary surrounding paying college athletes. "Pay-to-play" would trigger scrutiny under Title IX should male and female athletes be compensated unequally, and stories of unequal treatment could create public outcry against certain institutions.¹⁶³ This payment scheme would also put "Olympic" sports programs in jeopardy because schools would not be able to use football and men's basketball revenue to fund non-revenue generating sports.¹⁶⁴ On top of these issues, "pay-to-play" would also obliterate the line between college and professional sports because universities would pay college athletes directly for their participation on the field.¹⁶⁵ In spite of "pay-to-play's" inadequacies in rectifying the legal quandary surrounding paying college athletes, there is a reasonable solution available: third-party payments.

IV. THE THIRD-PARTY PAYMENT SYSTEM IS A REASONABLE SOLUTION TO THE LEGAL QUANDARY SURROUNDING PAYING COLLEGE ATHLETES

The Third-Party Payment system would allow student-athletes to capitalize on their own names and likenesses. Third-Party Payment would allow athletes to use their own fame to garner endorsements, sponsor products, and negotiate deals, thus providing a reasonable compromise between colleges players and the NCAA.¹⁶⁶ In today's social media landscape, top col-

¹⁶¹ These men all have the means to participate in steering should they choose to do so.

¹⁶² See YASSER, ET AL., *supra* note 159.

¹⁶³ See McManus, *supra* note 47.

¹⁶⁴ See Burnsed, *supra* note 47.

¹⁶⁵ See Simon, *supra* note 50.

¹⁶⁶ See *id.*

lege athletes are famous before they arrive on campus,¹⁶⁷ and they gain more notoriety based upon their exploits on the field or court. For example, Zion Williamson had over 2.7 million followers on Instagram while at Duke, and his domination of college hoops made him a household name.¹⁶⁸ As the 2019 NCAA basketball tournament ramped up, his picture was plastered on TV promos advertising the tournament.¹⁶⁹ However, he was forced to relinquish his intellectual property rights in order to compete under the current system.¹⁷⁰

The Third-Party Payment system would allow athletes like Mr. Williamson to negotiate with third parties for the right to use his NIL in advertising, endorsements, etc. This is a right enjoyed by all Americans—except for NCAA athletes. Critically, “pay-to-play” does not even concern itself with this issue. While “pay-to-play” would allow athletes to receive compensation for their performance on the court, but no more, Third-Party Payments would allow athletes to have the opportunity to capitalize on their own intellectual property distinct from the playing field.

Ultimately, it is fundamentally unfair that athletes like Mr. Williamson cannot take advantage of their own intellectual property rights while the NCAA rakes in millions of dollars by utilizing their NIL.¹⁷¹ The Third-Party Payment System would help address this issue by offering a reasonable solution to the legal quandary surrounding paying college athletes.

A. *The Third-Party Payment System Offers a Reasonable Solution to the Issues Surrounding “Pay-to-Play.”*

As discussed above, “pay-to-play” could create serious issues for member schools relating to Title IX; the payment system itself; funding “Olympic” sports; and steering. However, the Third-Party Payment system does not have the same legal shortcomings.

¹⁶⁷ See generally Matthew Foley, *Can Mac McClung Do More Than Dunk?*, BLEACHER REPORT (Mar. 6, 2020), <https://bleacherreport.com/articles/2879229-can-mac-mcclung-do-more-than-dunk> [https://perma.cc/4YQS-RZ7S].

¹⁶⁸ See Mina Kimes, *The Education of Zion Williamson*, ESPN (May 8, 2019), https://www.espn.com/mens-college-basketball/story/_/id/26406892/the-education-zion-williamson [https://perma.cc/D6ES-8NRF].

¹⁶⁹ See *id.*

¹⁷⁰ See NCAA DIVISION I MANUAL, *supra* note 5 § 2.9.

¹⁷¹ See Rovell, *supra* note 1.

i. Third-Party Payments Would Not Trigger Title IX Scrutiny

Title IX prohibits discrimination on the basis of sex in educational settings.¹⁷² “Pay-to-play” would trigger Title IX scrutiny because the NCAA justifies the current model as part of a student athlete’s educational experience.¹⁷³ Additionally, if the member schools were required to pay college athletes directly, Title IX would be directly implicated because member schools would likely offer heftier financial aid packages to athletes in “money” sports than those offered to athletes in “Olympic” sports. Schools could violate Title IX by not balancing financial aid between male and female athletes.¹⁷⁴

The Third-Party Payment system avoids this issue entirely. Under the Third-Party Payment system, the member schools would not pay athletes beyond what the NCAA and the courts have determined they can currently give athletes. Instead, athletes could capitalize on their NIL with third parties. These third parties would not trigger Title IX scrutiny because they are not educational institutions.¹⁷⁵ While the NCAA’s Title IX concerns regarding “pay-to-play” are legitimate and not a “red herring,” the issue is moot regarding Third-Party Payments.¹⁷⁶

ii. The Third-Party Payment System Would Not Affect How Universities Fund “Olympic” Sports

University athletic programs fund the majority of their athletic programs with the revenue generated by men’s basketball and football.¹⁷⁷ Because of this, should schools have to reinvest that money into paying basketball and football players, at best, the other athletic programs could face funding shortages, and, at worst, they could risk being cut from the athletic department.¹⁷⁸

The Third-Party Payment system addresses this issue because it does not require member schools to pay student-athletes directly. This has two benefits for athletes in “Olympic” sports that do not generate a profit for

¹⁷² See 20 U.S.C. §§ 1681–1688.

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See McManus, *supra* note 47.

¹⁷⁶ See Edelman, *supra* note 134.

¹⁷⁷ See Burnsed, *supra* note 47.

¹⁷⁸ See Phil Mushnick, *Colleges Cutting Sports for ‘Revenue’ Doesn’t Add Up at All*, N.Y. POST (Dec. 28, 2013), <https://nypost.com/2013/12/28/colleges-cutting-sports-for-revenue-doesnt-add-up-at-all> [<https://perma.cc/3F8K-S3CR>].

the member schools. First, the Third-Party Payment system lets these athletes capitalize on their NIL the same way “money” sport athletes would.¹⁷⁹ Under a “pay-to-play” system, “Olympic” sport athletes would almost certainly not receive any additional compensation from their member school.¹⁸⁰ However, in a Third-Party Payment system, “Olympic” athletes could capitalize on their NIL in niche markets.

For example, while Oklahoma State University has a competitive football program, its Cowboy wrestling program is one of the most successful athletic programs in the country.¹⁸¹ OSU running back Chuba Hubbard¹⁸² would have a national market on which he could capitalize as a potential Heisman Trophy finalist; wrestler Daton Fix¹⁸³ could also capitalize on his NIL in wrestling-centric markets. Particularly in and around the OSU campus in Stillwater, Fix would have opportunities to monetize his local fame. Furthermore, for wrestling fans, his appeal would be even more widespread as he attempts to make the 2020 U.S. Olympic Team.

The second major benefit the Third-Party Payment system would have for “Olympic” athletes is that “Olympic” sports would not face additional funding shortages because universities would not have to change how they fund their athletic programs.¹⁸⁴ The Third-Party Payment system does not implicate the current way that sports programs are funded because it does not require member schools to pay athletes directly and instead moves the potential compensation to third parties.

¹⁷⁹ See Simon, *supra* note 50.

¹⁸⁰ See *id.*

¹⁸¹ Cowboy wrestling is arguably the most successful wrestling program in America. By any measure, it is one of the most dominant sports programs in the country. See *Dynasty Defined: Cowboy Wrestling Tradition*, OKLA. ST., <https://okstate.com/news/2017/3/12/dynasty-defined-cowboy-wrestling-tradition.aspx> [<https://perma.cc/7DEB-UCDQ>] (accessed Jan. 29, 2020).

¹⁸² Hubbard is a celebrated OSU running back who led the country in rushing yards in 2019. See *2019 College Football Rushing Stats*, SPORTS REFERENCE, <https://www.sports-reference.com/cfb/years/2019-rushing.html> [<https://perma.cc/ZNP8-9H7M>] (last visited Jan. 6, 2021).

¹⁸³ Fix is one of the most-decorated amateur wrestlers to come out of Oklahoma, and he currently wrestles 133 pounds for OSU. In addition to his time with the OSU Cowboys, Fix also wrestles on the U.S. National Team. See *2020-21 Wrestling Roster*, OKLA. ST. UNIV., <https://okstate.com/sports/wrestling/roster/daton-fix/9368> [<https://perma.cc/PFJ8-U3BY>] (last visited Jan. 6, 2021).

¹⁸⁴ See Burnsed, *supra* note 47.

iii. The Third-Party Payment System Maintains a Clear Demarcation Between Collegiate and Professional Sports

A reasonable solution to the legal quandary surrounding college players must maintain a clear line of demarcation between college and professional sports.¹⁸⁵ While “pay-to-play” would certainly blur the line between professionals and student-athletes, under the Third-Party Payment system there would still be a clear boundary between the two.

As discussed above, “pay-to-play” requires member schools to directly pay student-athletes, which means that compensation is directly tied to athletic performance. Some advocates have gone so far as to propose salary caps, contract negotiations, and other hallmarks of professional sports for college athletics.¹⁸⁶ At the least, these proposals would blur the demarcation line between professional and collegiate sports. At the extreme, it would obliterate the line altogether. However, the demarcation is not a bad thing, and maintaining a distinction should be a goal for student-athletes, universities, and the NCAA.¹⁸⁷

The Third-Party Payment system maintains a clear demarcation because payments are tied to NIL intellectual property rights and are not associated directly with play on the field. At the professional level, athletes are able to capitalize on their NIL and they receive salaries from their teams.¹⁸⁸ Under the Third-Party Payment system, the distinction between professional athletes and college athletes is that college athletes would not receive salaries from their member schools like professional athletes do from their teams. Because courts have been sympathetic to the NCAA’s demarcation argument, it is important that a reasonable solution maintains the line between professionals and amateurs.¹⁸⁹ The Third-Party Payment system does so by allowing athletes to capitalize on their NIL while not requiring member schools to directly pay athletes for athletic prowess.

¹⁸⁵ See NCAA O’Bannon Brief, *supra* note 36, at *2–4.

¹⁸⁶ See Grenardo, *supra* note 48.

¹⁸⁷ See Nat’l Collegiate Athletic Ass’n v. Bd. of Regents, 468 U.S. 85, 101–03 (1984).

¹⁸⁸ See, e.g., Brooke, *supra* note 92; Jensen, *supra* note 93.

¹⁸⁹ See, e.g., O’Bannon v. Nat’l Collegiate Athletic Ass’n, 802 F.3d 1049, 1053 (9th Cir. 2015).

iv. Steering Can Be Regulated When It Is Done in the Open and Not on a “Black Market”

Steering is a major issue regarding college athletics today, and both “pay-to-play” and the Third-Party Payment system would increase the opportunities for athletes to be enticed into attending specific schools for compensation. However, the Third-Party Payment system offers more reasonable opportunities for regulating the practice.

While steering has become a hot-button issue in college sports, at its core it is not significantly different from typical recruiting. All schools seek to entice athletes to attend their school through better benefits, coaches, facilities, etc.¹⁹⁰ Steering adds in an element of compensation to the recruitment process.¹⁹¹ Taken to the extreme, steering could seriously undermine the competitive balance within NCAA member schools, and today it happens on a “black market.”¹⁹² However, with Third-Party Payments it could be regulated more easily in the open. Critically, the Third-Party Payment system requires some tie between NIL and the third-party, which would keep boosters from simply paying an athlete to play.

Under “pay-to-play,” a wealthy booster could simply make a large donation to the football program to be used to pay athletes. This would allow the wealthiest schools to recruit the best athletes. However, under the Third-Party Payment system, the money an athlete receives would be tied to an athlete’s NIL. Because many major boosters could meet this requirement, the Third-Party Payment system would not eliminate the problem. However, by requiring at the outset that third parties tie their compensation to athletes to their NIL usage, the NCAA could then regulate bad behavior.

Additionally, some steering could actually increase competitive balance by allowing small schools who struggle in recruiting, like the University of Tulsa, to entice athletes who otherwise would not be interested in playing at TU to attend TU.¹⁹³ Bringing steering into the open and then regulating bad behavior would allow the NCAA to cut down on illicit “black market”

¹⁹⁰ See Jessica S. Lee, *LSU’s Football Team has a New \$28 Million Locker Room – Complete with Sleep Pods, a Pool, and a Mini Theater*, BUSINESS INSIDER (Aug. 30, 2019), <https://www.businessinsider.com/louisiana-state-university-football-locker-room-athletic-facility-2019-8> [https://perma.cc/P5WP-9Y5Q].

¹⁹¹ See *supra* Section III.A.iv.

¹⁹² Mark Schlabach, *3 Convicted in NCAA Pay-for-Play Trial File Appeal*, ESPN (Aug. 13, 2019), https://www.espn.com/mens-college-basketball/story/_/id/27382222/3-convicted-ncaa-pay-play-trial-file-appeal [https://perma.cc/8J9T-PD7H].

¹⁹³ For the 2020 football recruiting class, TU ranks 116 out of 130 teams, and it is tenth in its conference. See *Tulsa 2020 Football Commits*, 247SPORTS, <https://>

fiascos and increase competitive balance.¹⁹⁴ While issues would still arise, it is clear that the Third-Party Payment system can respond to them more easily than the “pay-to-play” model.

A reasonable solution to the legal quandary surrounding paying college athletes must be able to address the issue of steering. The Third-Party Payment system does this by putting an obligation on boosters to use an athlete’s NIL and by allowing for the regulation of bad behavior.

The Third-Party Payment system is a reasonable solution to the legal quandary surrounding paying college athletes for all of the reasons that “pay-to-play” is not a reasonable solution. Unlike “pay-to-play,” the Third-Party Payment system would not implicate Title IX scrutiny because it would bypass the legislation entirely.¹⁹⁵ Third parties who negotiate with college athletes to use an athlete’s NIL would not affect the educational experience the NCAA provides to athletes.¹⁹⁶ Additionally, because payments are made by third-parties and not by educational institutions, member schools would likely be free of litigation and the public outcry regarding unequal payments to male and female athletes.¹⁹⁷

Furthermore, under the Third-Party Payment system, “Olympic” sports would not face extermination by athletic departments that need funds to pay athletes because the athletic department would not be responsible for paying athletes. This would allow member schools to continue funding “Olympic” sports in the way they are currently—with revenue from football and men’s basketball.¹⁹⁸

Finally, the Third-Party Payment system maintains the boundary between college and professional sports because third-party payments only allow college athletes to capitalize on their NIL—college athletes are not paid directly for athletic participation. Further, the issue of steering can be partially solved by requiring third parties to negotiate for use of NIL instead of simply paying an athlete to attend a school. By negotiating in the open, bad behavior could be regulated. For all of these reasons, the Third-Party Pay-

247sports.com/college/tulsa/Season/2020-Football/Commits/ [https://perma.cc/4GQ5-F7P6] (last visited Nov. 3, 2020).

¹⁹⁴ See Will Hobson, *Inside the Basketball Black Market that put Adidas in the FBI’s Crosshairs*, WASHINGTON POST (Oct. 1, 2018), https://www.washingtonpost.com/sports/inside-the-basketball-black-market-that-put-adidas-in-the-fbis-crosshairs/2018/10/01/2a73ba76-c1ad-11e8-97a5-ab1e46bb3bc7_story.html [https://perma.cc/U3JR-B97U].

¹⁹⁵ See generally 20 U.S.C. §§ 1681–1688.

¹⁹⁶ See *id.*

¹⁹⁷ See *id.*

¹⁹⁸ See Rovell, *supra* note 1; Burnsed, *supra* note 47.

ment system is a reasonable solution to the legal quandary surrounding paying college athletes, and it can be implemented in variety of ways.

B. The Third-Party Payment System Offers a Reasonable Solution to the Legal Quandary Surrounding Paying College Athletes and Can Be Implemented Through NCAA Amendment, Litigation, or by State and Congressional Statute

On October 29, 2019, the NCAA Board of Governors voted unanimously to start the process of modernizing amateurism rules, opening the door to third-party payments.¹⁹⁹ It remains unclear whether the NCAA will truly embrace third-party payments or pivot towards some other restrictive scheme that would curtail the rights of athletes to capitalize on their NIL.²⁰⁰ However, as discussed above, the Third-Party Payment system is a reasonable solution to the legal quandary surrounding college athletes. Because of this, the NCAA should amend its bylaws to allow for third-party payments.²⁰¹ Even if the NCAA refuses, the Third-Party Payment system can take effect through a settlement or judgment at the end of litigation or by state or congressional statute.

i. The NCAA Can Amend Its Bylaws to Allow for NIL Payments

An NCAA bylaw amendment is likely the easiest way to implement the Third-Party Payment system. Presently, the Division I Manual explicitly denies student athletes the right to receive compensation for NIL usage.²⁰² However, even before the Board of Governors decision to begin the process towards modernization, Condoleezza Rice—at the time the chair of the Commission on College Basketball—left third-party payments available as an avenue to explore after the court battles had ended.²⁰³ If the NCAA is

¹⁹⁹ See *Board of Governors*, *supra* note 29.

²⁰⁰ See *id.*

²⁰¹ See Marc Edelman, *NCAA Can't Figure Out How to Grant Student-Athletes Endorsement Rights, But it's Simple – Really*, FORBES (May 10, 2018), <https://www.forbes.com/sites/marcedelman/2018/05/10/the-ncaa-cant-figure-out-how-to-grant-student-athlete-endorsement-rights-so-i-will-help-them/#38fb2a8d2c01> [https://perma.cc/L5WW-YXYF].

²⁰² See NCAA DIVISION I MANUAL, *supra* note 5 § 2.9.

²⁰³ See Press Release, Condoleezza Rice, Commission on College Basketball Chair, Nat'l Collegiate Athletic Ass'n, Independent Commission on College Basketball Presents Formal Recommendations (Apr. 25, 2018), https://www.ncaa.org/sites/default/files/2018CCBRRemarksFinal_webv2.pdf [https://perma.cc/LA8R-WB WJ].

truly serious about modernizing the amateurism rules, the Third-Party Payment system can be legitimized through amendment. One potential amendment has been proposed by Professor Marc Edelman of Baruch College's Zicklin School of Business:

"12.01.5 Permissible Student-Athlete Licensing Rights. A payment administered by a non-educational institution is not considered to be pay or the promise of pay for athletics skill, provided the student-athlete does not use the trademarks of the NCAA or any NCAA member college in any manner that may be construed as an endorsement, unless such manner is otherwise protected by principles of the First Amendment or fair use."²⁰⁴

By adding this, or similar, language, the Third-Party Payment system would be officially recognized by the NCAA and athletes could receive compensation for the use of their NIL.

ii. The Third-Party Payment System Can Also Be Implemented Through Litigation

Presently, the NCAA will continue defending antitrust litigation regarding the current amateur model—particularly against athletes who propose “pay-to-play.” The Third-Party Payment system may well be a solution that satisfies the rule of reason test.²⁰⁵ Should the litigants present the court with Third-Party Payments as a less restrictive alternative to the current amateur system, it could mean the end of the road for those seeking to implement “pay-to-play” in college sports.²⁰⁶

The Third-Party Payment system also appears to be a reasonable compromise in negotiations between litigants because the NCAA is finally starting to come to terms with allowing athletes to receive some sort of compensation for participating in college sports.²⁰⁷ As it addresses the issues regarding paying college athletes, the Third-Party Payment system is likely a much more palatable solution for the NCAA because it maintains the clear line of demarcation between college and professional sports. Whether as a judgment or as a settlement agreement, the Third-Party Payment system can be implemented through litigation.

²⁰⁴ Edelman, *supra* note 204.

²⁰⁵ See Grenardo, *supra* note 48, at 214.

²⁰⁶ See *id.*

²⁰⁷ See *Board of Governors*, *supra* note 29.

iii. Third-Party Payments Can Be Implemented Through State or Congressional Statute

It appears that state legislatures could have been the catalyst for the NCAA's current push towards modernization and evaluation of the amateur system.²⁰⁸ This is because several states, including Florida,²⁰⁹ South Carolina,²¹⁰ New Jersey,²¹¹ and California²¹² have passed, or are debating the passage of, bills which would allow athletes within that state to capitalize on their NIL.²¹³ Multiple NIL bills have also been introduced in Congress, though there has been little movement on Capitol Hill regarding the legislation.²¹⁴

While a federal statute would allow for a more uniform application of an NIL payment scheme across the country, Congress is notoriously slow, and it does not appear that a bill will be passed anytime soon. By contrast, states are acting quickly. Upon California's passage of the Fair Pay to Play Bill,²¹⁵ other states soon followed and began the process of enacting their

²⁰⁸ See Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12> [https://perma.cc/A92X-27SP].

²⁰⁹ See Charlotte Carroll, *Florida Rep Proposes Bill Compensating College Athletes for Names, Likeness*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://www.si.com/college/2019/10/01/florida-state-representative-proposed-legislation-pay-student-athletes> [https://perma.cc/NH6T-ZS8E].

²¹⁰ See Dan Murphy, *S. Carolina to Consider Fair Pay to Play-Type Bill*, ESPN (Sept. 13, 2019), https://www.espn.com/college-football/story/_/id/27607396/s-carolina-consider-fair-pay-play-type-bill [https://perma.cc/5XVU-RDLN].

²¹¹ Justin A. Casey, *The Landscape for College Athletes' Commercial Rights is Changing*, FOLEY & LARDNER (Nov. 23, 2020), <https://www.foley.com/en/insights/publications/2020/11/landscape-college-athletes-commercial-rights>.

²¹² See McCann, *supra* note 212.

²¹³ See *id.* In addition, the name of the California bill refers to "pay-to-play." However, the bill is actually legislation that allows athletes to receive compensation for the use of their NIL and is more closely related to third-party payments as defined in this Article.

²¹⁴ See Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019). See also Dan Murphy, *Bipartisan Federal NIL Bill Introduced for College Sports*, ESPN (Sept. 24, 2020), https://www.espn.com/college-sports/story/_/id/29961059/bipartisan-federal-nil-bill-introduced-college-sports. See also Ross Dellenger, *In Significant Step Around NCAA Athlete Rights, New Name, Image, Likeness Bill to Be Introduced in Congress*, Sports Illustrated (Dec. 10, 2020), <https://www.si.com/college/2020/12/10/ncaa-name-image-likeness-bill-congress>.

²¹⁵ See Andre Earls, *Despite Early Efforts, Student Athlete Equity Act Stalls*, MEDILL NEWS SERVICE (July 2, 2019), <https://dc.medill.northwestern.edu/blog/2019/07/02/>

own legislation.²¹⁶ Coach Mike Gundy's fear of an uneven playing field in recruiting is most clearly seen here.²¹⁷ Because states are enacting their own laws, there is a lack of uniformity among the different state statutes. For example, California's law takes effect in 2023, while Florida's takes effect in 2020, and currently, Oklahoma does not have an NIL statute.²¹⁸ This means that when recruiting, Oklahoma universities are at a disadvantage because they do not allow athletes to capitalize on NIL like California and Florida soon will. Further, in the years between Florida's enactment of its law and California's enactment of its law, California universities would be disadvantaged because Florida universities could offer the ability to capitalize on NIL sooner than California. Because of the lack of uniformity among the states, should the Third-Party Payment system be implemented by statute, a federal statute would likely be the best option in order to promote clarity for all student-athletes and member schools.

However, these state statutes pushed the NCAA to evaluate its options, putting significant pressure on the NCAA to allow for NIL payments. Even lacking uniformity across states, the statutes have forced the NCAA into recognizing the need for third-party payments.²¹⁹ Ultimately, the best, and perhaps most efficient, avenue for implementation is by NCAA amendment.²²⁰

despite-early-efforts-student-athlete-equity-act-stalls/#sthash.ONuhNNu7.dpbs [https://perma.cc/Y7SW-MR5E].

²¹⁶ See Matt Norlander, *Fair Pay to Play Act: States Bucking NCAA to Let Athletes be Paid for Name, Image, Likeness*, CBS SPORTS (Oct. 3, 2019), <https://www.cbssports.com/college-football/news/fair-pay-to-play-act-states-bucking-ncaa-to-let-athletes-be-paid-for-name-image-likeness/> [https://perma.cc/QNC5-F5CW].

²¹⁷ See Wright, *supra* note 25.

²¹⁸ See Norlander, *supra* note 219.

²¹⁹ See *Board of Governors*, *supra* note 29.

²²⁰ In addition to potential Congressional action, there has been some movement towards the Executive Branch taking action, though it is unclear if that would result in an Executive Order or what the action would look like. See Brian Murphy & Francesca Chambers, *California Changed Its Rules on College Athlete Pay. Now White House Looking into It*, NEWS & OBSERVER (Nov. 11, 2019), <https://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article237131309.html>.

V. CONCLUSION

Over the course of its existence, the NCAA has developed into an organization that oversees lucrative athletic programs.²²¹ Major college sports are a billion dollar industry, and it seems that the only people who are unable to take advantage of the financial opportunities afforded by college athletics are the very athletes who play the vital role in generating revenue.²²² On one hand, athletes argue that they should be entitled to a seat at the table and a share of the pot. On the other hand, the NCAA maintains that college sports are integral to the educational experience and that amateurism provides a clear demarcation between professional and college sports.²²³

Over the course of lengthy antitrust legal battles, the courts have appeared sympathetic to both parties.²²⁴ Courts have tended to recognize that the current amateur model violates antitrust law, but they have not found “pay-to-play” to be a viable, less-restrictive alternative to the current system.²²⁵

The Third-Party Payment system can solve this legal quandary by offering a reasonable compromise to both parties. For athletes, they get the right to financially capitalize on their NIL with third parties.²²⁶ For the NCAA, it does not have to pay athletes directly, thus avoiding Title IX concerns, and it can maintain the clear boundary line between professional and college sports.²²⁷

While the NCAA has been slow to evolve towards allowing any sort of compensation, recently it has deemed it necessary to begin the process of modernization and evaluating the amateur system.²²⁸ In part due to influential states passing laws in direct contradiction to the NCAA rules, the NCAA may finally be facing the music about the need for change. The easiest way to implement the Third-Party Payment system is through an amendment to the NCAA Manual.²²⁹

²²¹ Rovell, *supra* note 1.

²²² *See id.*

²²³ *See* Brief for the Nat'l Collegiate Athletic Ass'n at 11-12, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015) (No. 14-16601).

²²⁴ *See O'Bannon*, 802 F.3d at 1053.

²²⁵ *See id.*

²²⁶ *See* Simon, *supra* note 50.

²²⁷ *See id.*

²²⁸ *See Board of Governors*, *supra* note 29.

²²⁹ *See* Edelman, *supra* note 204.

Ultimately, allowing college athletes to capitalize on their NIL with third parties would afford athletes and the NCAA a reasonable solution to the legal quandary surrounding paying college athletes by eliminating Title IX concerns, maintaining a clear demarcation between college and professional sports, maintaining the status quo regarding funding “Olympic” sports, and allowing for the regulation of steering to maintain competitive balance. The Third-Party Payment system is a feasible answer to the issue of paying college athletes.

