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NOTES

CALIFORNIA'S FAIR PAY TO PLAY ACT AND ITS FIGHT AGAINST THE COMMERCE CLAUSE

Paul McDonnell

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Paul McDonnell[*]

California Senate Bill 206, more aptly referred to as the Fair Pay to Play Act, has sent shockwaves through the intercollegiate athletic community. Under current National Collegiate Athletic Association (NCAA) rules and regulations, student athletes are significantly restricted with respect to where financial aid comes from and what they can do with the financial aid that they do receive.[1] According to the *NCAA Division I Manual*, "Any student who receives financial aid other than that administered by the student-athlete's institution shall not be eligible for intercollegiate athletics competition."[2] Section 2.13 defines the types of financial aid a student athlete may receive to be eligible to participate in intercollegiate athletics:

> A student-athlete may receive athletically related financial aid administered by the institution without violating the principle of amateurism, provided the amount does not exceed the cost of education authorized by the Association; however, such aid as defined by the Association shall not exceed the cost of attendance as published by each institution. Any other financial assistance, except that received from one upon whom the student-athlete is naturally or legally dependent, shall be prohibited unless specifically authorized by the Association.[3]

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[1] *See generally* ACAD. AND MEMBERSHIP AFFS. STAFF, NAT'L COLLEGIATE ATHLETIC ASS'N, 2019–20 NCAA DIVISION I MANUAL, art. 15 (2020) [hereinafter NCAA MANUAL].

[2] *Id.* art. 15.01.3.

[3] *Id.* art. 2.13.

Vol. 39, No. 1 (2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.205 ● http://jlc.law.pitt.edu

The Fair Pay to Play Act is the first of its kind and will allow student athletes to obtain financial aid from sources other than the institution they attend and those upon whom they are naturally or legally dependent.[4] The Fair Pay to Play Act will allow them to earn compensation from their name, image, and likeness, hire agents, and be paid compensation for endorsements.[5]

There are many reasons why people believe that student athletes should be paid compensation beyond the costs of attending the colleges or universities where they play. One reason is that students need the money.[6] Scholarships do not provide recipients with spending money[7] for student athletes to use for leisure activities, like going to the movies. Another reason why student athletes should be compensated is based on the economic value they bring to their colleges and universities. One article looked at the 2014–2015 Duke University Men's Basketball team to demonstrate the value the student athletes bring to the University.[8] That year, in which the team won the NCAA Division I Men's Basketball Championship, the team generated $33.7 million in revenue.[9] Duke cannot pay its players more than the cost of attendance, as dictated by NCAA regulations, limiting the "pay" of each player to $67,654.[10] Combining the pay of all players shows that Duke only paid its players 2.4% of the revenue that they were responsible for generating.[11] In contrast, professional basketball players in the NBA are guaranteed a 50% share of their teams' respective revenues, per a collective bargaining agreement.[12] If Duke were forced to follow an NBA-type compensation structure, then each player would have received $1.4 million (given an even per player split).[13] This example shows that student athletes are generating massive revenues for colleges and universities without

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[4] Jack Kelly, *Newly Passed California Fair Pay To Play Act Will Allow Student Athletes To Receive Compensation*, FORBES (Oct. 1, 2019, 12:36 PM), https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-receive-compensation.

[5] *Id.*

[6] *See* Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW. J. 25, 28, 46 (1996).

[7] NCAA MANUAL, *supra* note 1, at art. 2.13.

[8] *See* David J. Berri, *Paying NCAA Athletes*, 26 MARQ. SPORTS L. REV. 479 (2016).

[9] *Id.* at 486.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

receiving a reasonable share of the money. Support for paying student athletes is widespread, as public figures from Bernie Sanders to Lebron James believe compensating student athletes is long overdue.[14]

There is also strong opposition to paying student athletes compensation beyond the cost of attendance. Academic work over the years has highlighted many of the difficulties of implementing such a system.[15] One proposed method of payment is a monthly stipend paid to an equal number of male and female Division I student-athletes in revenue producing sports.[16] However, issues arise with respect to: (1) antitrust law (a stipend may be viewed as price fixing that violates the Sherman Act),[17] (2) workers' compensation (a stipend would make student athletes "employees" under most state workers' compensation laws),[18] (3) labor law (status as wage earning employees would give student athletes the right to unionize and bargain collectively under the National Labor Relations Act),[19] (4) Title IX issues (universities may attempt to distinguish scholarships from stipends to avoid the equal opportunity requirement of Title IX),[20] and (5) taxation issues (a stipend would increase taxable income and create problems for student athletes that may not be able to afford the additional tax liability).[21] Some opponents of paying student athletes argue that the free education and college degree that student athletes receive is sufficient compensation.[22] Others believe that paying student athletes makes them select schools not because of their quality or reputation, but because of the money they could make, which one author argues would erode the association of value or excellence that prestigious

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[14] *E.g.*, Bernie Sanders (@BernieSanders), TWITTER (Sept. 6, 2019, 11:10 AM), https://twitter.com/BernieSanders/status/1169991265200562176 ("College athletes are workers. Pay them."); Lebron James (@KingJames), TWITTER (Sept. 5, 2019, 11:21 AM), https://twitter.com/KingJames/status/1169631712009080832 ("Everyone is California—call your politicians and tell them to support SB 206! This law is a GAME CHANGER. College athletes can responsibly get paid for what they do and the billions they create.").

[15] *See, e.g.*, Thomas R. Hurst & J. Grier Pressly III, *Payment of Student-Athletes: Legal & Practical Obstacles*, 7 VILL. SPORTS & ENT. L.J. 55 (2000).

[16] *Id.* at 60.

[17] *Id.*

[18] *Id.* at 66–70.

[19] *Id.* at 70–71.

[20] *Id.* at 71–73.

[21] *Id.* at 73–74.

[22] *Id.* at 59.

Vol. 39, No. 1 (2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.205 ● http://jlc.law.pitt.edu

universities have cultivated.[23] Tim Tebow, former quarterback of the Florida University football team and current ESPN College Football Analyst, believes that paying student athletes "changes what's special about college football."[24]

The NCAA's response to the Fair Pay to Play Act has been interesting to say the least. After the Act passed through the California House of Representatives and Senate, members of the NCAA Board of Governors sent a letter to California Governor Gavin Newsom warning him of the consequences of enacting the legislation.[25] The Board of Governors said the Act "would erase the critical distinction between college and professional athletics and, because it gives those schools an unfair recruiting advantage, would result in them eventually being unable to compete in NCAA competitions."[26] After taking such a strong stance against the Act, the NCAA made the unexpected announcement that it would allow students to earn compensation.[27] With the NCAA seemingly on board with the Act, the Fair Pay to Play Act must now turn its attention to a more difficult obstacle: The United States Constitution.

Part I of this Article establishes a historical background on the NCAA's policies towards student athletes receiving compensation during their collegiate careers. Section II discusses the history of the Commerce Clause, its evolution through history, and the breadth of power it bestows on Congress to regulate interstate commerce. Section III discusses the Dormant Commerce Clause, its doctrinal foundation, and how it is used to restrict states from enacting legislation that effects interstate commerce. Sections IV and V discuss the key Ninth Circuit decision *NCAA v. Miller*[28] and whether

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[23] Ekrow N. Yankah, *Why N.C.A.A. Athletes Shouldn't be Paid*, NEW YORKER (Oct. 14, 2015), https://www.newyorker.com/sports/sporting-scene/why-ncaa-athletes-shouldnt-be-paid.

[24] Jenna West, *Tim Tebow on Fair Pay to Play Act: 'It Changes What's Special About College Football,'* SPORTS ILLUSTRATED (Sept. 13, 2019), https://www.si.com/college/2019/09/13/tim-tebow-fair-pay-play-act-playing-college-players-video.

[25] *NCAA Responds to California Senate Bill 206*, NCAA (Sept. 11, 2019), http://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206.

[26] *Id.*

[27] Colin Dwyer, *NCAA Plans to Allow College Athletes to Get Paid for Use of Their Names, Images*, NPR (Oct. 29, 2019), https://www.npr.org/2019/10/29/774439078/ncaa-starts-process-to-allow-compensation-for-college-athletes.

[28] Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633 (9th Cir. 1993).

Vol. 39, No. 1 (2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
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the Fair Pay to Play Act in fact violates the Commerce Clause. This Article concludes with an outlook into the future of paying student athletes.

I. A BRIEF HISTORY OF THE NCAA'S OPPOSITION TO PAYING STUDENT ATHLETES

The commercialization of college sports can be traced back to as early as the late 19th century.[29] One of the earliest revenue generating events was the 1893 Thanksgiving Day football game between Princeton University and Yale University, which attracted 40,000 spectators and generated $13,000 in revenue for each university.[30] Today, collegiate athletics is a billion dollar industry, the NCAA alone generating just over $1 billion in revenue for the year ending on August 31, 2018.[31] Despite the change in commercialization over time, the NCAA has not changed its stance on amateurism. As early as 1910, the NCAA (and its predecessors) believed in amateurism as a core component of collegiate athletics, mirroring the amateurism of the Olympic Games at the time.[32] College sports remained a regional affair for most of the mid-20th century.[33] In the 1950s, 60s, and 70s, college sports began its evolution into the juggernaut it is today, with television deals marking this beginning.[34] The NCAA and its officials stood by its amateurism policies through it all.[35] Today, the NCAA describes it principles of amateurism in Bylaw 2.9.[36]

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[29] Berri, *supra* note 8, at 481.

[30] *Id.*

[31] DELOITTE & TOUCHE LLP, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND SUBSIDIARIES CONSOLIDATED FINANCIAL STATEMENTS AS OF AND FOR THE YEARS ENDED AUGUST 31, 2018 AND 2017 (2018), https://ncaaorg.s3.amazonaws.com/ncaa/finance/2017-18NCAAFin_NCAAFinancialStatement.pdf.

[32] Matt Hinton, *The Origins of Amateurism; Or, Why College Sports Are So Fucked Up*, DEADSPIN (Apr. 25, 2014), https://deadspin.com/the-origins-of-amateurism-or-why-college-sports-are-s-1566714902.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] NCAA MANUAL, *supra* note 1, at art. 2.9 ("Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.").

Vol. 39, No. 1 (2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.205 ● http://jlc.law.pitt.edu

In the past decade, the NCAA has faced a number of legal challenges to its amateurism rules. United States District Court Judge Claudia Wilken held in *O'Bannon v. NCAA*[37] that the NCAA amateurism rules did in fact violate federal antitrust laws.[38] The court awarded players $5,000 per year in connection with the rights to their name, image, and likeness.[39] On appeal, the Ninth Circuit Court of Appeals upheld the federal antitrust violation, but reduced the payment to a cost of attendance payment,[40] which most schools that provide athletic scholarships already provide.[41] In 2014, football players at Northwestern University brought an appeal for a proposed union before the National Labor Relations Board (NLRB).[42] The initial ruling favored the athletes, supporting the argument that they were employees who had the right to unionize.[43] However, the NLRB refused to rule on the appeal, effectively denying the student athletes the right to unionize.[44] The results of these challenges demonstrate the unlikelihood that the NCAA will be forced to change its amateurism policies, meaning student athletes will continue to participate in collegiate athletics without pay.

II. WHAT CAN CONGRESS REGULATE UNDER ITS COMMERCE CLAUSE AUTHORITY?

Article I, Section 8 of the United States Constitution grants Congress "the power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[45] The history of Commerce Clause jurisprudence is filled with debate over the extent of federal power to

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[37] O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

[38] *Id.* at 1007 (finding that the NCAA's challenged rules unreasonably restrain trade in violation of § 1 of the Sherman Act).

[39] *Id.* at 1008 (prohibiting the NCAA from paying less than $5,000 for every year that the student-athlete remains academically eligible to compete).

[40] O'Bannon v. NCAA, 802 F.3d 1049, 1075–76 (9th Cir. 2015).

[41] Michael McCann, *What the Appeals Court Ruling Means for O'Bannon's Ongoing NCAA Lawsuit*, SPORTS ILLUSTRATED (Sept. 30, 2015), https://www.si.com/college/2015/09/30/ed-obannon-ncaa-lawsuit-appeals-court-ruling.

[42] Berri, *supra* note 8, at 479.

[43] *Id.* at 480.

[44] *Id.*

[45] U.S. CONST. art. I, § 8, cl. 3.

Vol. 39, No. 1 (2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.205 ● http://jlc.law.pitt.edu

regulate interstate activity.[46] In the country's earliest years, the Supreme Court construed the Commerce Clause narrowly, defining "interstate commerce" as trade, covering the buying and selling of goods in interstate markets, the interstate transportation of those goods, and interstate travel.[47] While the earliest Commerce Clause cases narrowly defined congressional commerce power, the Court recognized that "the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects."[48]

Today, Congress's powers to regulate under the Commerce Clause are much broader than the narrow construction applied in the 19th century. Generally, the Court accepts that Congress may regulate the channels of interstate commerce, the instrumentalities of interstate commerce, any goods or persons that travel in interstate commerce, and any activities that substantially affect interstate commerce.[49] Congress may only regulate existing commercial activity and may not compel individuals to become active in commerce.[50] The power to regulate activities that substantially affect interstate commerce gives Congress expansive power.[51] This expansive power has permitted congressional regulation of local matters, including a farmer's decision to grow wheat for his livestock and a loan shark's extortionate collections from a local butcher shop.[52] The Supreme Court has held that the NCAA is an organization engaged in interstate commerce, and therefore regulation of the NCAA can be considered regulation of interstate commerce.[53] The NCAA markets intercollegiate athletic competition, which was found to sufficiently implicate NCAA engagement in interstate commerce, subjecting the NCAA to federal antitrust regulations.[54]

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[46] David S. Schwartz, *An Error and An Evil: The Strange History of Implied Commerce Powers*, 68 AM. U. L. REV. 927, 930 (2019).

[47] *Id.*

[48] Cooley v. Bd. of Wardens, 53 U.S. 299, 319 (1852).

[49] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012).

[50] *Id.* at 552.

[51] *Id.* at 539.

[52] *See* Wickard v. Filburn, 317 U.S. 111 (1942); Perez v. United States, 402 U.S. 146 (1971).

[53] *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101–02 (1984).

[54] *Id.*

Vol. 39, No. 1 (2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.205 ● http://jlc.law.pitt.edu

III. THE DORMANT COMMERCE CLAUSE

A. History

The Commerce Clause is a not a prohibitory clause—it grants power to Congress to regulate interstate commerce but does not expressly prohibit states from regulating interstate commerce.[55] The Commerce Clause does, however, possess a prohibitory effect on state legislation through the Supremacy Clause[56] and years of Supreme Court decisions.[57] This prohibitory effect on states is known as the Dormant Commerce Clause.[58] The Commerce Clause is not only a power-allocating provision that gives Congress authority over the regulation of interstate commerce; it is also a substantive "restriction on permissible state regulation" of interstate commerce.[59] The Commerce Clause has long been recognized as a self-executing limitation on the power of the state to enact laws imposing substantial burdens on such interstate commerce.[60]

The earliest Supreme Court cases decided that states may not enact legislation that infringes on Congress's authority to regulate interstate commerce, prohibiting states from enacting legislation that has any effect on interstate commerce while reserving the power to regulate "completely internal commerce of a State" to the State.[61] In 1841, the Supreme Court reinforced the standard that "[t]he commercial power, as it regards . . . commerce among the several states, has been decided . . . to be exclusively vested in [C]ongress."[62] Supreme Court rulings from the pre-Civil War 19th century prohibited states from taxing interstate commerce, but allowed states

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[55] James L. Buchwalter, *Construction and Application of Dormant Commerce Clause, U.S. Const. Art. I, § 8, cl. 3—Supreme Court Cases*, 41 A.L.R. FED. 2d 1, 2 (2020).

[56] U.S. CONST. art. VI, § 2.

[57] *See generally* Buchwalter, *supra* note 55 (reciting Supreme Court cases discussing the Dormant Commerce Clause).

[58] Buchwalter, *supra* note 55, at 5.

[59] Dennis v. Higgins, 498 U.S. 439, 447 (1991) (quoting Hughes v. Oklahoma, 441 U.S. 322, 326 (1979)).

[60] S. Cent. Timber Dev. v. Wunnicke, 467 U.S. 82, 87 (1979).

[61] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).

[62] Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 505 (1841).

Vol. 39, No. 1 (2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.205 ● http://jlc.law.pitt.edu

to exercise their police power to regulate commerce that was not interstate in nature.[63]

The development of the national economy, however, created tension between the federal government and the states, as interstate and intrastate activities became increasingly intertwined, and demanded a new formulation of interstate commerce regulation.[64] The post-Reconstruction Era Supreme Court decided that state legislation that directly affected interstate commerce intruded on federal authority and therefore violated the Commerce Clause.[65] Courts permitted state legislation regulating intrastate activities that indirectly affected interstate commerce, provided that any indirect effect was not unreasonable.[66] This direct effect versus indirect effect test of the Dormant Commerce Clause endured into the 20th century.

The New Deal Court of the 1930s and 1940s, in conjunction with its broadening of the Commerce Clause power,[67] redefined the Dormant Commerce Clause framework. The Court expressed concerns with its ability to reliably and consistently distinguish between state legislation with a direct effect on interstate commerce from that with an indirect effect on interstate commerce.[68] The Court recognized that "there is a residuum of power in the

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[63] *See, e.g.*, Case of State Freight Tax, 82 U.S. (15 Wall.) 232, 279 (1872) ("If, then, this is a tax upon freight carried between States, and a tax because of its transportation, and if such a tax is in effect a regulation of interstate commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States."); Robbins v. Taxing Dist., 120 U.S. 489, 497 (1887) ("Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state.").

[64] Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 275 (2017).

[65] *See, e.g.*, Atl. Coast Line R.R. Co. v. Wharton, 207 U.S. 328, 334 (1907) ("That any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution is obvious.").

[66] *See, e.g.*, Barrett v. New York, 232 U.S. 14, 31 (1914) ("the exertion of the power essential to assure needed protection to the community may extend incidentally to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands."); Buck v. Kuykendall, 267 U.S. 307, 315 (1925) ("It may be assumed . . . that appropriate state regulations adopted primarily to promote safety upon highways and conservation in their use are not obnoxious to the Commerce Clause, where the indirect burden imposed on interstate commerce is not unreasonable.").

[67] *See generally* Schwartz, *supra* note 46, at 1004–11 (discussing the expansion of Commerce Clause power during the 1930s and 1940s).

[68] *See, e.g.*, Galveston, Harrisburg and San Antonio Ry. Co. v. Texas, 210 U.S. 217, 227 (1908) ("[L]ook[ing] for a practical rather than a logical or philosophical distinction."); W. Live Stock v. Bureau of Revenue, 303 U.S. 250, 259 (1938) ("Practical rather than logical distinctions [between local effect and interstate effect] must be sought.").

state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it."[69] The Court addressed these concerns in *Wickard v. Filburn*.[70] The Court's decision in *Wickard* granted Congress power to regulate purely intrastate activities if the activities substantially affect interstate commerce.[71] This essentially prohibits States from enacting legislation that regulates purely intrastate activities if they substantially affect interstate commerce.[72] Considering whether a state statute discriminated against interstate commerce and whether there was a substantial effect on interstate commerce forms the foundation of modern Dormant Commerce Clause jurisprudence.

B. Modern Framework: A Two-Tiered Test

The Supreme Court has outlined a two-tiered test for analyzing state legislation under the Dormant Commerce Clause.

1. Discriminatory State Legislation

State legislation is held *per se* invalid when it "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out of state economic interests."[73] There are two major types of discrimination seen in Dormant Commerce Clause cases: facial discrimination and effect-based discrimination.[74]

a. Facial Discrimination

State legislation that is facially discriminatory explicitly discriminates against interstate or out-of-state commerce on its face.[75] It can also include legislation which discriminates explicitly against business, activities, or other

[69] S. Pac. Co. v. Arizona, 325 U.S. 761, 767 (1945).
[70] 317 U.S. 111 (1942).
[71] *Id.* at 124.
[72] *Id.*
[73] Healy v. Beer Inst., 491 U.S. 324, 337 n.14 (1989).
[74] Francis, *supra* note 64, at 261.
[75] *Id.*

Vol. 39, No. 1 (2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.205 ● http://jlc.law.pitt.edu

entities that operate interstate or wholly out of state.[76] For example, a New Jersey statute that explicitly prohibited the import of out-of-state waste was found facially discriminatory and condemned under the Dormant Commerce Clause.[77] There is no *de minimis* exception to the rule against facial discrimination, so if the legislation is found to be facially discriminatory, a showing that its burden on interstate commerce is negligible cannot save it.[78]

b. Effect Based Discrimination

Effect based discrimination is found when the overall tendency of the legislation is to affect interstate or out of state commerce.[79] "The critical consideration is the overall effect of the statute on local and interstate activity."[80] This can occur when interstate or out-of-state effected entities are subject to the regulations more often or are subject to a heavier burden than equivalent intrastate entities.[81] For example, the Supreme Court found effect based discrimination where an Alaska statute required that timber taken from state lands be processed within Alaska before being exported.[82]

c. Legitimate State Interest

State legislation can survive a finding of discrimination if the state demonstrates that the legislation advances a legitimate local interest that cannot be adequately served by reasonable non-discriminatory alternatives.[83] While the Court originally analyzed the legitimacy of the state's interest under strict scrutiny, the analysis has evolved into a more permissive analysis, closer to rational basis scrutiny.[84]

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[76] *Id.* at 261–62.
[77] *See* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).
[78] Wyoming v. Oklahoma, 502 U.S. 437, 455–56 (1992).
[79] Francis, *supra* note 64, at 262–63.
[80] Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).
[81] Francis, *supra* note 64, at 262.
[82] S. Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 84–85 (1984).
[83] Francis, *supra* note 64, at 264.
[84] *Id.* at 265.

Vol. 39, No. 1 (2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.205 ● http://jlc.law.pitt.edu

2. Burden on Interstate Commerce

The Court will proceed with its analysis of the state legislation if it "regulates even handedly" (i.e. is not discriminatory) or if it "effectuates a legitimate local public interest."[85] That being said, the tendency of modern courts has been to require that a statute advance a legitimate state interest, even when found to be non-discriminatory.[86] If a legitimate interest exists and the effects on interstate commerce are only incidental, the Court considers "whether the burden on interstate commerce clearly exceeds the local benefits."[87] This balancing test is commonly referred to as the *Pike* balancing test.[88] The Court considers factors like the nature of the local interest and the existence of alternative measures for promoting the local interest that do not burden interstate commerce.[89] The Court conducts its analysis of burdens on interstate commerce with significant deference to the state.[90] As such, burden balancing only comes into play in clear cases.[91]

IV. *NCAA V. MILLER*

A seemingly unimportant decision by the Ninth Circuit Court of Appeals from 1993 is likely to decide whether the Fair Pay to Play Act is constitutional. Before the court in *Nat'l Collegiate Athletic Ass'n v. Miller*[92] was a Nevada statute requiring any national collegiate athletic association[93] to provide a Nevada institution, employee, student-athlete, or booster accused of a rules infraction with procedural due process protection during enforcement proceedings in which sanctions may be imposed.[94] The statute required procedures not required by the NCAA, like the right to confront all

[85] Pike v. Bruce Church, 397 U.S. 137, 142 (1970).
[86] *See, e.g.*, *Pike*, 397 U.S. at 141–42.
[87] Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).
[88] Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 422 n.8 (2008).
[89] *Pike*, 397 U.S. at 142.
[90] Denning, *supra* note 88, at 422 (noting that *Pike* calls for a deferential balancing test).
[91] Francis, *supra* note 64, at 267.
[92] Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633 (9th Cir. 1993).
[93] NEV. REV. STAT. § 398.055 (2019) (defining a national collegiate athletic association as a "group of institutions in 40 or more states who are governed by the rules of the association relating to athletic competition").
[94] *Miller*, 10 F.3d at 637.

Vol. 39, No. 1 (2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.205 ● http://jlc.law.pitt.edu

witnesses.[95] In addition, the statute effectively prohibited the NCAA from expelling its Nevada member institutions in order to comply with the statute.[96]

The court of appeals overturned the district court's decision and held that the statute does violate the Commerce Clause because the statute is clearly directed at interstate commerce and interstate commerce alone.[97] The court of appeals applied the two tiered test described in Section III.B of this Article, holding the statute per se invalid because it directly regulates interstate commerce.[98] The statute directly regulates national collegiate athletic associations, which are defined as groups operating in forty or more states, meaning that the statute only regulates interstate state organizations like the NCAA.[99] Thus, the court of appeals states, "[t]he Statute regulates only interstate organizations which are engaged in interstate commerce, and it does so directly."[100]

Forcing the NCAA to comply with the Nevada statute would have a negatively profound effect on the way the NCAA enforces its rules and regulates the integrity of its product, a result the court says is unacceptable.[101] To comply with the statute, the NCAA would be forced to adopt Nevada's procedural rules for Nevada schools.[102] In order to preserve the integrity of its own product, the NCAA would be forced to adopt the Nevada procedures nationwide, as enforcing a uniform set of procedures amongst its member institutions is a key pillar of the NCAA.[103] This forced adoption of the statute's procedures runs afoul of the Commerce Clause because "the practical effect of the regulation is to control conduct beyond the boundaries of the State,"[104] regardless of what the intent of the legislature was.[105] It also runs afoul of the Commerce Clause because it would conflict with similar

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[95] *Id.*
[96] *Id.*
[97] *Id.* at 638.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 638–39.
[102] *Id.* at 639.
[103] *Id.* at 638–39.
[104] Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (citing Brown-Forman Distiller Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986)).
[105] *Miller*, 10 F.3d at 639.

statutes in other states.[106] "[T]he Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."[107] If one state requires greater procedural guarantees than another, or one requires proof beyond a reasonable doubt and another by a preponderance of the evidence, then the NCAA's preservation of a uniform set of procedures would be significantly disrupted.[108] The inconsistent obligations of the NCAA caused by the extraterritorial effects of the statute "demonstrate why it constitutes a per se violation of the Commerce Clause."[109]

While the court of appeals reversed the decision on the basis of the statute being per se invalid, it noted in a footnote that "[i]f balancing were necessary or appropriate, the balance struck by the learned trial judge was exactly right."[110] Upon applying the *Pike* balancing test, the district court in *Miller* found that the burden on interstate commerce clearly exceeded the local benefits.[111] The public interest served by the Nevada statute was to afford basic due process safeguards, one that the district court deemed legitimate.[112] However, the burden on the NCAA clearly exceeded the benefit to the local interest.[113] The statute substantially restricts the NCAA from establishing uniform rules to govern interstate collegiate athletics and effectively compels the NCAA to adopt the procedural rules enacted by the Nevada statute nationwide.[114] For these reasons, the district court decided that the harm to the NCAA's system of internal governance and enforcement clearly outweighed any benefits of the additional due process safeguards and held the statute invalid.[115]

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[106] *Id.*

[107] *Healy*, 491 U.S. at 336–37 (citing CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88–89 (1987)).

[108] *Miller*, 10 F.3d at 639–40.

[109] *Id.* at 640.

[110] *Miller*, 10 F.3d at 640 n.8.

[111] Nat'l Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1483–85 (D. Nev. 1992).

[112] *Id.* at 1483.

[113] *Id.* at 1484.

[114] *Id.* at 1484–85.

[115] *Id.* at 1485.

Vol. 39, No. 1 (2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
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V. APPLYING THE TWO-TIERED TEST TO THE FAIR PAY TO PLAY ACT

Upon applying the two-tiered test for analyzing state legislation under the Commerce Clause, it is clear that the Fair Pay to Play Act must be struck down as per se invalid.[116] Furthermore, even if the statute is not found to be per se invalid under the first tier, the burden on interstate commerce clearly exceeds the local benefits and therefore must be held invalid under the second tier of the *Pike* balancing test.

A. Tier One: The Fair Pay to Play Act is Per Se *Invalid*

The Fair Pay to Play Act is *per se* invalid because it directly regulates interstate commerce. The Act provides that,

> An athletic association, conference, or other group or organization with authority over intercollegiate athletics, including but not limited to, the *National Collegiate Athletic Association*, shall not prevent a student of a postsecondary educational institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness. (emphasis added).[117]

By its terms, the Act directly regulates interstate organizations, explicitly listing the NCAA. This is an example of an even more direct regulation of interstate commerce than the statute in *Miller*, which regulated national collegiate athletic associations generally (although its effect was to regulate the NCAA and no other organization). As previously stated, the NCAA is engaged in interstate commerce by way of its interstate marketing, coordination of events that require transporting students across state lines, and control of national television broadcasting of collegiate athletics.[118] Because the NCAA is engaged in interstate commerce, regulation of the NCAA is regulation of interstate commerce. As a result, the Fair Pay to Play

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[116] Sarah Traynor, *California Says Checkmate: Exploring the Nation's First Fair Pay to Play Act and What it Means for the Future of the NCAA and Female Student-Athletes*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 203, 216–20 (2020) briefly discusses the validity of the Fair Pay to Play Act under the Commerce Clause. The author cites *NCAA v. Miller*, concluding that the Fair Pay to Play Act violates the extraterritoriality principle of the Commerce Clause because the burden on interstate commerce outweighs the local benefit. The author restricts her discussion of *Miller* to the opinion of the District Court of Nevada and fails to recognize the opinion of the Ninth Circuit Court of Appeals (discussed *infra* Section VI), which held the Nevada statute *per se* invalid.

[117] S.B. 206, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

[118] Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633 (9th Cir. 1993).

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Act is a direct regulation of interstate commerce, the kind of regulation that is prohibited under the Commerce Clause.

The Fair Pay to Play Act is also similar to the statute in *Miller* because in order to avoid liability under the Act, the NCAA would be forced to adopt the Act's requirements for California schools. For example, the Fair Pay to Play Act prohibits the NCAA from preventing students from participating in intercollegiate athletics if the student hires an agent or other professional representation.[119] NCAA bylaws deem ineligible for participation in intercollegiate sports any individual who has ever agreed to be represented by or has been represented by an agent.[120] In order to comply with the Fair Pay to Play Act, the NCAA would be forced to allow individuals attending California schools to hire agents. If the NCAA wishes to preserve the uniform enforcement of rules and requirements so central to the integrity of its product, it would be forced to adopt the Fair Pay to Play Act nationwide. By forcing the NCAA into compliance with its terms nationwide, the effect of the Fair Pay to Play Act would be to control the regulation of the NCAA's product occurring wholly outside of California. This sort of extraterritorial effect of state legislation is exactly the type forbidden by the Commerce Clause.

For the reasons described above, the Fair Pay to Play Act directly regulates interstate commerce and is per se invalid because it represents the sort of extraterritorial-affecting legislation that the Commerce Clause was designed to prohibit.

B. Tier Two: The Burden on Interstate Commerce Clearly Exceeds the Local Benefits

In the unlikely event that the Fair Pay to Play Act is not held per se invalid, it will still be held invalid under the Commerce Clause because the burden it creates on interstate commerce clearly exceeds any local benefits. The intent of the Fair Pay to Play Act, as described in the Act's text, is to avoid the exploitation of student athletes, colleges, and universities.[121] Other purposes of the Act articulated by some of its supporters include to "restore

[119] S.B. 206, *supra* note 117.
[120] NCAA MANUAL, *supra* note 1, at art. 12.3.1.
[121] S.B. 206, *supra* note 117.

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to student athletes a right everyone else has: the right to earn money from their name, image, and likeness,"[122] and addressing civil rights issues of equity and fairness resulting from coaches and universities earning millions off of the labor of the student athletes.[123] Promoting equity, fairness, and the preservation of fundamental rights are certainly legitimate state interests.

However, the burden on interstate commerce exceeds any local benefits because of the excessive burden it places on the NCAA. Like compliance with the statute in *Miller*, compliance with the Fair Pay to Play Act would require the NCAA to either abandon the set of uniform rules of governance it enforces with its member institutions or change its rules nationwide in accordance with the Fair Pay to Play Act in order to preserve its set of uniform rules. If the NCAA takes the former route, it will be abandoning one of its core beliefs—that a system of nationally uniform rules ensures competition on an equal basis. If it takes the latter route, then the Fair Pay to Play Act will have the effect of regulating the NCAA by forcing it to comply with regulations nationwide. In either case, the Fair Pay to Play Act significantly burdens the NCAA by invalidating its system of internal governance and forcing it to change its rules nationwide. The Commerce Clause was created to prevent state legislation from having that exact nationwide, extraterritorial effect.

While the state interests of ensuring equity, fairness, and protection of fundamental rights are legitimate, they are hardly more legitimate than providing due process safeguards like those in *Miller*. Both pieces of legislation seek to protect a fundamental right among its citizens. Since the *Miller* court found that the state interest was not compelling enough to outweigh the harm to the NCAA and interstate commerce, I see no distinction in this case to justify a contrary conclusion; the Ninth Circuit Court of Appeal opinion in *Miller* is binding precedent. It is therefore clear that the Fair Pay to Play Act is invalid under the *Pike* balancing test because its effect in the NCAA and interstate commerce far exceeds the furtherance of the state's legitimate interests.

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[122] *Governor Newsom Signs SB 206, Taking on Long-Standing Power Imbalance in College Sports*, OFFICE OF GOVERNOR GAVIN NEWSOM (Sept. 30, 2019), https://www.gov.ca.gov/2019/ 09/30/governor-newsom-signs-sb-206-taking-on-long-standing-power-imbalance-in-college-sports/.

[123] *Id.*

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VI. CONCLUSION

The Fair Pay to Play Act marked a significant step forward for student athletes. Unfortunately for supporters of paying student athletes, it does not seem like the Act will survive Commerce Clause scrutiny. To date, the Act has not faced any formal challenges to its legality, so only time will tell. The pressure on the NCAA to develop a regulatory scheme that allows student athletes to earn compensation is on the rise as more states propose similar legislation.[124] Interestingly enough, the NCAA, since 2001, has allowed U.S. Olympians to compete in college sports despite receiving thousands of dollars from the U.S. Olympic Committee for winning a gold, silver, or bronze medal, so it is not completely averse to allowing student athletes to earn money for their athletic skills.[125]

Since the Fair Pay to Play Act's passage, the NCAA and its member organizations have demonstrated that they are willing to adapt and allow student athletes to earn compensation from their name, image, and likeness. In October 2019, the NCAA's Board of Governors voted unanimously to permit student athletes the opportunity to benefit from the use of their name, image, and likeness.[126] The Board's vote tasked the NCAA's three major divisions with considering updates to bylaws and policies that will modernize the NCAA while preserving the association's core principles and guidelines, including prioritizing education and fair and balanced competition.[127]

In July 2020, the NCAA's Power 5 conferences, which include the ACC, Big 10, Big 12, Pac 12, and SEC, proposed legislation governing name, image, and likeness that they plan to introduce to Congress.[128] The proposal grants each student athlete the right to license his or her name,

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[124] Alan Blinder, *After California Law, Statehouses Push to Expand Rights of College Athletes*, N.Y. TIMES (Jan. 13, 2020), https://www.nytimes.com/2020/01/13/sports/ncaa-athletes-pay-california.html.

[125] Jon Solomon, *The History Behind the Debate Over Paying Student Athletes*, THE ASPEN INST. (Apr. 23, 2018), https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/.

[126] Stacy Osborn, *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities.

[127] *Id.*

[128] Ross Dellenger, *Proposed NCAA NIL Legislation Is a Restrictive First Step for Student-Athletes*, SPORTS ILLUSTRATED (July 17, 2020), https://www.si.com/college/2020/07/17/ncaa-proposed-name-image-likeness-legislation-student-athletes.

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image, and likeness subject to "narrow safeguards,"[129] which permit the NCAA to prohibit certain types of payments, like ones meant to induce a prospective athlete to attend a particular institution.[130] The NCAA presented Congress with a version of a proposal for name, image, and likeness legislation in July 2020 that one reporter described as "skew[ing] bold."[131] The NCAA argues that without sufficient safeguards, any name, image, and likeness legislation threatens gender equity, creates tax liability for student athletes, establishes an employer-employee relationship between schools and athletes, and invites corruption into college campuses.[132] The NCAA's proposal grants students athletes certain rights to profit from their name, image, and likeness, but significantly restricts those rights.[133] As described by New Jersey Senator Cory Booker in a Senate Judiciary Committee hearing on July 22, 2020, "[t]he proposal is so restrictive that it would prevent college athletes from receiving any endorsement deals from any organization that doesn't have an existing or prospective contract with their institution or with any of their competitors."[134]

The NCAA's proposal and state legislation like the Fair Pay to Play Act represent opposite ends of the spectrum, the former being restrictive of student athletes and retaining control for the NCAA, the latter granting student athletes virtually uninhibited use of their name, image, and likeness. The NCAA vowed to establish new rules and standards that address name, image, and likeness use no later than June 30, 2021.[135] However, given their initial proposal, the two sides do not seem to be close to an acceptable scheme. The Fair Pay to Play Act does not take effect until 2023,[136] leaving ample time for the NCAA to adapt, for the Act to be challenged, or for Congress to step in and pass federal legislation on the issue. It seems clear that the NCAA is determined to change its rules and regulations to allow

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[129] *Summary of "Student-Athlete Equity Act of 2020,"* https://www.keepandshare.com/doc5/27533/a5-summary-of-draft-legislative-language-21-pdf-178k?da=y (last visited Sept. 27, 2020).

[130] Dellenger, *supra* note 128.

[131] Ross Dellenger, *NCAA Presents Congress with Bold Proposal for NIL Legislation*, SPORTS ILLUSTRATED (July 31, 2020), https://www.si.com/college/2020/07/31/ncaa-sends-congress-nil-legislation-proposal.

[132] *Id.*

[133] *Id.*

[134] *Protecting the Integrity of College Athletics Before the S. Judiciary Comm.*, 116th Cong. (2020) (statement of Sen. Cory Booker, U.S. Sen. for N.J.).

[135] Dellenger, *supra* note 128.

[136] S.B. 206, *supra* note 117.

Vol. 39, No. 1 (2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
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student athletes to profit from their name, image, and likeness. How exactly those rules and regulations will change is a mystery.

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