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POWER TO THE PLAYER: FREEDOM OF SPEECH, THE RIGHT TO PROTEST, AND STUDENT-ATHLETE CLAIMS AGAINST THE NCAA

TYLER M. HORN*

INTRODUCTION

The world in which we live has become exceedingly political. It seems that every facet of our lives is filled with political speech. There is certainly no exception in the realm of athletics. For many decades, the world of sport has been filled with athletes who fought to effectuate change. Muhammad Ali, Jackie Robinson, Billie Jean King—all American icons known not only for what they did in the field of play, but for what they stood for outside of it. Today, activism in sport is as prevalent as ever, and it seems to be only a matter of time until large scale activism spreads into the world of intercollegiate athletics, which begs the question: are student-athletes at National Collegiate Athletic Association (NCAA) member institutions provided First Amendment protections for free speech, and if so, how far does that protection exist? Further, what other claims (constitutional or otherwise) may be available in this ever-changing world of intercollegiate athletics?

In this comment, there will be an examination of the recent history of NCAA student-athlete protests and boycotts, the laws which govern such activity, and what the future may look like when considering the current landscape of athlete empowerment. Although the case law does not lend itself to student-athlete protests nor First Amendment claims against the NCAA, there are powerful changes occurring. Players are more empowered than ever at every level. Furthermore, with name, image, and likeness (NIL) guidance and legislation, the amateur athletic model the NCAA strives to uphold may, in a sense, be changed forever. This too may lead to significant opportunities for change, including boycotts and perhaps, (another) attempt at unionization. The age of the “student-athlete activist” has merely just begun.

I. STUDENT-ATHLETE SPEECH AND PROTESTS HISTORICALLY UTILIZED TO SPARK CHANGE: A NON-LEGAL HISTORY

History is laden with examples of students taking a stand and protesting for what they believe in. The same can be said for student-athletes. One need not look far back in time to see protests. In the summer of 2020, our nation saw numerous protests from intercollegiate student-athletes. Amid the COVID-19 pandemic, sports at every level faced postponements or cancellations. Universities struggled to make plans to bring back any sports, with a particular interest in bringing back football. Despite institutions' plans for a return to campus, some Pac-12 football players were unimpressed. Student-athletes from nearly every Pac-12 school threatened to sit out for fall 2020 practices (and for some, the season) if their health and safety were not taken more seriously and greater measures were put in place.¹

Moreover, in response to instances of police brutality in 2020, intercollegiate student-athletes around the nation protested on campuses and spoke for change, with massive support from coaches, faculty, and administration alike.² Powerful change can be on the horizon with such protests, and the perception is often good. However, when more severe action is taken—action that may damage an institution's bottom line—it can be met with mixed opinions.

In November 2015, the University of Missouri dealt with a series of events on campus that were racist in nature.³ With tensions high, the Missouri football team took an exceptional stance. To the university's president, they said, “step down, or we will not play.”⁴ Players were ready to sit out the upcoming game versus Brigham Young University.⁵ If there was no contest, losses for Missouri

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1. Greta Anderson, *Taking a Stand and Sitting It Out*, INSIDE HIGHER ED (Aug. 5, 2020), <https://www.insidehighered.com/news/2020/08/05/pac-12-players-threaten-boycott-football-games>.

2. See Austin Hough, *Notre Dame Football Team Leads Prayer, Walk in Celebration of Juneteenth*, GOSHEN NEWS (June 19, 2020), https://www.goshennews.com/sports/notre-dame-football-team-leads-prayer-walk-in-celebration-of-juneteenth/article_7c5ee234-b26a-11ea-ad67-03cea8507810.html; Des Bier, *Nick Saban Leads Alabama Football Players on March for Racial Justice*, WASHINGTON POST (Sept. 1, 2020), <https://www.washingtonpost.com/sports/2020/09/01/nick-saban-racial-justice-march/>.

3. Eric D. Bentley, *Fair Play?*, INSIDE HIGHER ED (Feb. 4, 2016), <https://www.insidehighered.com/views/2016/02/04/do-college-athletes-have-first-amendment-right-strike-essay>.

4. *Id.*

5. *Id.*

were expected to be \$1 million at the minimum.⁶ The stance was powerful, and it was backed by the head football coach.⁷ Within a day, the president of the university resigned.⁸ This example from a few years ago epitomizes the power of protest and boycott. However, it may also show that when student-athletes cross a line most others will not, individuals in the public (even public office at times) have an adverse reaction.⁹ In response to the boycott and the potential for substantial losses, state legislators proposed a bill that would strip athletic scholarships of athletes who refused to play for reasons unrelated to health concerns. Kurt Bahr, Missouri state representative, openly stated the proposition was a response to the football team's boycott, stating "if they're going to receive state money, there are going to be ramifications."¹⁰ Each type of circumstance above deserves examination, for both its legal background and potential future implications.

II. LEGAL HISTORY

The legal examination of these issues involves inquiry into some of the most integral aspects of our nation's history and how subsequent doctrines may assist, or hinder, student-athletes in their pursuit to become activists for causes near and dear to them. From these inquiries, analysis pertaining to contemporary issues will follow.

A. State Action and the Public Forum Doctrine

Perhaps the most celebrated amendment in our Bill of Rights, the First Amendment, states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹¹ Enumerated here is the freedom of speech as well as the right to peacefully assemble. Although these freedoms exist, they are not absolute. Peaceful assembly has been a heavily litigated issue throughout our nation's history. From the case law comes the public forum doctrine, which examines the particular nature of the space where the expressive activity occurs and how it affects any restrictions the government

6. *Id.*

7. *Id.*

8. *Id.*

9. Monique T. Curry, Comment, "*Get That Son of a ***** Off the Field*": Regulating Student-Athlete Protest Speech in Public University Sports Facilities, 61 *HOW. L.J.* 669, 693 (2018).

10. *Id.*

11. U.S. CONST. amend. I.

may impose.¹²

First, for action to be considered under the Constitution, an individual or an entity must be a “state actor.” In *Brentwood*, the Supreme Court held that a state high school athletic association (SHSAA) is a state actor if there is such “‘a close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”¹³ Writing for the majority, Justice Souter found the Tennessee SHSAA had “pervasive entwinement of public institutions and public officials in its compositions and workings.”¹⁴ The Court asserted, “Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement shown to the degree here requires it.”¹⁵ Moving forward, this has been a method for courts to determine state action for public schools and universities.

Generally speaking, public entities—“state actors”—control public spaces. State actors control how such spaces can be used, when they can be used, and what punitive measures should be implemented for individuals who elect to misuse them. The public forum doctrine lays out three levels of forums: (1) traditional or quintessential public forums such as parks and sidewalks; (2) designated and limited public forums such as government-owned auditoriums dedicated to certain purposes; and (3) nonpublic forums such as governmental offices and other government-owned spaces not generally open to the public.¹⁶ Each level has its own defining characteristics, and as such, the government’s ability to limit speech is determined.¹⁷

“Traditional public forums are defined by objective characteristics of the property.”¹⁸ If the type of property has historically been used and associated with expressive activities, the government’s ability to restrict speech is limited.¹⁹ The government may only impose reasonable time, place, and manner restrictions insofar as there are other ways to communicate the expressive activity.²⁰ Different than the traditional public forum, designated and limited public forums have a determinative factor: the government’s intent in creating the property.²¹

12. Curry, *supra* note 9, at 673.

13. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)).

14. *Id.* at 298.

15. *Id.* at 302.

16. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 817-818 (1985).

17. *Id.*

18. Curry, *supra* note 9, at 674.

19. *Id.*

20. *Id.*

21. *Id.*

If a place has traditionally been open for expressive activity by the government, then it is a designated public forum.²² Here, restrictions on speech must be narrowly tailored to achieve a compelling interest if the restriction pertains to more than time, place, or manner.²³ An example of a designated public forum is a library.²⁴ On the other hand, limited public forums may exist via express designation or implication—public spaces that are not typically open for speech, but a limited purpose.²⁵ An example here would be a sports arena. In these designated public forums, only reasonable and viewpoint neutral speech restrictions will remain.²⁶

Lastly, nonpublic forums are government property that is not open to the public for speech purposes.²⁷ Here, the state has its broadest power, similar to that of an owner of private property. Examples of such forums include hospitals, military bases, and prisons. The only restrictions on speech that can be made by the government in a nonpublic forum are ones that are viewpoint neutral and reasonable.²⁸

B. The Public Forum Doctrine Applied—Public Universities and Intercollegiate Athletics

As an institution funded by public dollars, public universities are inherently public forums. However, since university grounds have numerous forums within, the public forum doctrine permits some areas of campuses to enjoy First Amendment protections more liberally than others. School university grounds are traditional public forums because the public generally has continuous access. Limited public forums with greater restrictions would include, most notably, the classroom. Even forums that are intangible have their limitations.²⁹ These limitations have their rationale, but for intercollegiate athletics, certain rationale is not free of a fair amount of confusion.

At state-run institutions, sports facilities are most often deemed limited public forums or nonpublic forums.³⁰ Thus, administrations have the ability to

22. *Id.*

23. *Id.*

24. *See* *Brown v. Louisiana*, 383 U.S. 131 (1966) (holding that defendants' convictions for being African Americans in a segregated reading room be reversed).

25. *Curry*, *supra* note 9, at 671 (citing *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 46 (1983)).

26. *Id.* at 678.

27. *Id.* at 679.

28. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

29. *See* *Rosenburger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 819-820 (1995) (holding that a student activities fund was a limited public forum).

30. *See* *Curry*, *supra* note 9, at 681.

restrict speech, including protest speech. Over the years, a determinative factor for courts has been the nature of the property and how it is used.³¹ The facilities' use as a place for sporting events lends itself to having the restrictions of a nonpublic forum. However, it should be noted that throughout a college sporting arena, one will surely see a vast variety of "speech" present. It may be a Coca-Cola sign, a religious symbol on a patron's shirt, or even a shirt with political implications. Political speech has certainly reached the ranks of intercollegiate athletics this year. Division I football and basketball teams can be seen donning shirts and jerseys with certain phrases or mantras pertinent to the Black Lives Matter movement. Although this may not be inherently "political" speech, it is certainly one's viewpoint, which is absolutely protected, so long as the viewpoint does not incite violence or disturb the peace.³²

C. Protests

Although the prevalence of protests is currently quite high, this phenomenon is not new. For many decades, courts have pondered what limitations exist with regards to political speech. When conduct conveys a certain message, the speech itself may not be restricted based on its content.³³ In *Tinker*, public high school students wore armbands to school to show their support for the end of the Vietnam War.³⁴ As a result, each student was suspended until they would return without wearing the armbands.³⁵ Plaintiffs and parents filed suit in federal district court, seeking an injunction preventing the school from punishing plaintiffs under the color of state law.³⁶ Reversing the opinion of the lower courts, the Supreme Court held suspending the students was an unconstitutional denial of their right of expression of opinion.³⁷ This opinion has remained a seminal case in freedom of speech for students.

Furthermore, protest speech is oftentimes a viewpoint. Hence, subject to viewpoint regulations. "[T]he First Amendment forbids the government to regulate speech in ways that favors some viewpoints or ideas at the expense of others."³⁸ As such, intercollegiate student-athletes have some latitude as to what they can protest. A contemporary example may be kneeling for the National Anthem, which over the past five years has become a form of protest

31. *Id.* at 683.

32. *Id.* at 688.

33. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

34. *Id.* at 504.

35. *Id.*

36. *See* 42 U.S.C. § 1983 (2022).

37. *Tinker*, 393 U.S. at 514.

38. *See Curry, supra* note 9, at 689 (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)).

speech because it shows a particular viewpoint—dissatisfaction with police conduct and race relations across the United States.³⁹ If such a viewpoint is disfavored over another (e.g., standing for the anthem) viewpoint, regulations may be implicated. Nevertheless, certain concerns may justify the prohibition of viewpoint speech. Schools may be able to compel student-athletes to stand for the anthem or not protest in any other manner that takes away from team objectives such as unity, discipline, or on-field success.⁴⁰

In *Lowery*, high school football players at a public high school signed a petition, citing discontent with their head coach due to his unsavory coaching methods.⁴¹ Once assistant coaches heard about the petition, the players were then called in to speak with their head coach about the situation.⁴² After probing questions, players who did not apologize and state their desire to play under the head coach were told to leave the team.⁴³

Reversing the decision of the District Court, the *Lowery* court determined that coaches have the right to maintain the control of the team over its players.⁴⁴ Despite the player's concerns, the Sixth Circuit previously recognized:

Unlike the classroom teacher whose primary role is to guide students through the discussion and debate of various viewpoints in a particular discipline, [the role of a coach] is to train his student athletes how to win on the court. The plays and strategies are seldom up for debate. Execution of the coach's will is paramount.⁴⁵

Following this rationale, the *Lowery* court proved that state employees have functions that necessitate a certain level of discretionary control. With team unity and a focus on winning being of the utmost importance, there is certainly a likelihood that protests at the college level may be balked.⁴⁶

39. *See id.* at 690.

40. *Lowery v. Euverard*, 497 F.3d 584, 589 (6th Cir. 2007).

41. *Id.* at 585 (“Plaintiffs alleged that Euverard struck a player in the helmet, threw away college recruiting letters to disfavored players, humiliated and degraded players, used inappropriate language, and required a year-round conditioning program in violation of high school rules.”).

42. *Id.* at 586.

43. *Id.*

44. *Id.* at 601.

45. *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1190 (6th Cir. 1995).

46. Despite the rise of student-athlete empowerment, there continue to be coaches and administrations who are not comfortable with National Anthem protests. *See* Rainer Sabin, *We Asked Every Michigan College If They'd Allow Athletes to Protest. Not All Said Yes*, DETROIT FREE PRESS (June 14, 2020, 6:02 AM), <https://www.freep.com/story/sports/college/2020/06/14/michigan-football-universities-athlete-protests-national-anthem/3184113001/>.

D. Boycotts and Labor Disputes

When examining boycotts in intercollegiate athletics, one can return to the action of the Missouri football team a few years ago. Their threat to boycott if the university's president did not resign showed more than the immediate power of their actions, it provided a blueprint.⁴⁷ When drastic measures are the right measures, student-athletes may now see this as a tool they can wield to bring about change. Determining the legality of such a move is another issue altogether. Generally speaking, student-athletes at NCAA member institutions are not employees. Furthermore, they do not have the right to unionize.⁴⁸ Nonetheless, the right to boycott may not be preventable, especially in this day and age.

The Norris-LaGuardia Act⁴⁹ forbids federal courts from issuing injunctions or asserting jurisdiction in labor disputes.⁵⁰ More importantly, since the purpose of the statute was to keep courts out of labor disputes, the Norris-LaGuardia Act defines "labor dispute" as "any controversy concerning terms or conditions of employment."⁵¹ This could prove to be a safe harbor for student-athletes if they so choose to boycott. While the NCAA may argue student-athletes have no right to boycott, there may be numerous scenarios where the student-athletes argue the Norris-LaGuardia Act provides sufficient protections from federal court injunctions.⁵² As such, institutions and the NCAA alike may face great pressure to adhere to the desires of student-athletes.

Despite previous rulings of student-athletes inability to unionize, recent developments provide further hesitancy from the NCAA to diminish student-athlete benefits and as a result, their platform. In late June 2021, the Supreme Court of the United States issued its decision in *Alston*⁵³ which upheld an injunction prohibiting the NCAA from limiting educated-related benefits that conferences and schools are able to provide student-athletes.

47. See Jake New, *The Power of a Football Boycott*, INSIDE HIGHER ED (Nov. 11, 2015), <https://www.insidehighered.com/news/2015/11/11/u-missouri-football-boycott-demonstrates-economic-power-athletes>; SI Staff, *One Year After Protest Rocked Missouri, the Effects On the Football Team and University Remain Tangible*, SPORTS ILLUSTRATED (Nov. 8, 2016), <https://www.si.com/college/2016/11/08/how-missouri-football-has-changed-1-year-after-boycott>.

48. Nw. Univ. & CAPA, 13-RC-121359 (N.L.R.B.. Mar. 26, 2014).

49. 29 U.S.C. § 101 *et. seq.*

50. See Michael H. LeRoy, *Courts and the Future of "Athletic Labor" in College Sports*, 57 ARIZ. L. REV. 475, 510-13 (2015).

51. *Id.* at 512.

52. See *id.* at 513-15.

53. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

III. ANALYSIS

Simply put, student-athletes lack much of an opportunity to file First Amendment claims against the NCAA due to it not being a state actor.⁵⁴ However, the public forum doctrine, opportunities to boycott, and societal changes all may give way to a brighter future for intercollegiate athletes having the right to speak up for their beliefs without having to worry about potential legal disputes.

A. The Shifting Tides: The Rise of the “Athlete Activist”

Professional athletes have the undeniable power to effectuate change. In August of 2020, the Milwaukee Bucks led a boycott of games played in the National Basketball Association (NBA) in response to the police shooting of Kenosha, Wisconsin, native Jacob Blake.⁵⁵ The move made waves throughout not just the sports world, but the greater social-political landscape in the United States.⁵⁶ Although the move has its critics, the boycott and the resulting calls to trigger change set the stage for this becoming a strategy in sports. As high-level college athletics and professional sports continue to seem less and less distinguishable over time, the next question should be when does this happen on a college campus, and what will the ramifications be for the student-athletes involved?

Life for college student-athletes is far different than that of their non-athlete peers. They have a unique opportunity to use their position as highly visible individuals in their community to speak on issues that matter to them and bring about change on campus and beyond. Not long ago, this was a concept many frowned upon, but as of recent events, more people than ever have supported athlete protests. Their bravery to stand for change as “athlete activists”⁵⁷ has not only changed the physical landscape of many campuses, but it has changed the hearts of many more individuals. At the start of a Juneteenth march organized by the football team, Notre Dame head coach Brian Kelly provided some poignant insight and, more importantly, an enthusiastic backing of his players:

[L]ook, it's easy to come out one day and talk about change. It's

54. See *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988) (holding that the NCAA is not a state actor, but rather a private association often at odds with the states, especially when an investigation of one public university it being handled).

55. Jill Martin, et al., *Athletes Across U.S. Sports Take a Stand, As Games Are Called Off in Solidarity with Buck's Boycott*, CNN (Aug. 28, 2020, 2:51 PM), <https://www.cnn.com/2020/08/26/sport/milwaukee-bucks-boycott-playoff-game/index.html>.

56. *Id.*

57. See Curry, *supra* note 9, at 697.

easy to have one rally. But to keep that change moving, substantial change, it requires a spirit and an energy like no other. And so when we look at real change, it's easy to take a confederate flag down. We can do that from the office. It's easy to take Quaker Oats, Aunt Jemima off the shelves. That's not what this is about. This is about making substantial change. Better public schools for black men and women, better health care available to all, funding for private businesses across the board. This is the change that really matters and Black Lives Matters when it comes to those things.⁵⁸

In a time of evil, light was shed by student-athletes like Daelin Hayes, Javon McKinley, and Myron Tagovailoa-Amosa in efforts to educate not only their head coach, but their community.⁵⁹ This was a beautiful sight to see in South Bend, Indiana and across the nation.

With this beauty in solidarity comes promise. First Amendment claims against the NCAA remain a virtual impossibility due to lack of state action. However, if teams come together to speak up about a need for change, *Tinker* will be guiding precedent. Furthermore, a unified front will make protests more likely and more effective. Notre Dame was not the only institution that saw protests and marches in the summer of 2020. Numerous major college athletic programs led marches to protest in the name of social justice reform.⁶⁰ If institutions face no issues of team unity, such actions protests will likely be permissible and there will be no need for claims against the NCAA in this manner. Indeed, such unity may lead to a stronger bond on and off the field, leading to better chemistry, and performance. Thus, the objectives of teams and their institutions are not hindered, but bolstered.

The past few years provided us with many examples of protest to an action

58. Tom Loy, *Here's What Notre Dame's Brian Kelly Had to Say on Juneteenth*, 24/7 SPORTS: IRISH ILLUSTRATED (June 21, 2020), <https://247sports.com/college/notre-dame/Article/Heres-What-Notre-Dames-Brian-Kelly-Had-to-Say-on-Juneteenth-148396669/#:~:text=It's%20a%20long%20road%20ahead,Thank%20you.%22>.

59. See Andrew Mentock, *It's Time to Listen, Learn from Notre Dame Athletes*, RIVALS (June 23, 2020), <https://notredame.rivals.com/news/column-it-s-time-to-listen-learn-from-notre-dame-athletes>.

60. See Theresa Waldrop, *Alabama Football Players' March for Equality Ends at the Spot Where Blacks Were Told They Weren't Welcome Years Ago*, CNN (Sept. 1, 2020, 12:42 AM), <https://www.cnn.com/2020/08/31/us/alabama-football-players-march-for-equality/index.html>; Matt Connolly, *'Today I Have Hope': Clemson Football Players Lead March for Change*, THE STATE (June 14, 2020, 5:00 AM), <https://www.thestate.com/sports/college/acc/clemson-university/article-243491461.html>; Zach Abolverdi, *Mullen Joins UF Players at Gainesville for Social Justice Protest*, RIVALS: GATORS TERRITORY (Aug. 28, 2020), <https://florida.rivals.com/news/mullen-joins-uf-players-at-gainesville-for-social-justice-protest#:~:text=Florida%20coach%20Dan%20Mullen%20walked,the%20march%20down%20University%20Avenue>.

that led to a dialogue, unity, and eventually, a successful season. In the summer of 2020, Oklahoma State head football coach Mike Gundy posed for a picture wearing a t-shirt with the symbol for OAN: a conservative network that had been highly critical of all Black Lives Matter protests in the prior weeks.⁶¹ The picture made its way to social media, and numerous players on the team were outraged by their coach's blatant disregard for the moment and general insensitivity.⁶² One player, star running back Chuba Hubbard, even took to Twitter, claiming he would have *nothing* to do with Oklahoma State until changes were made.⁶³ A strong statement from a strong young man.

In the subsequent days, Gundy and Hubbard engaged in long discussions, learning the viewpoints, and at times, ignorance, one another had regarding OAN and the Black Lives Matter movement.⁶⁴ The discussion led to a team meeting, which concluded with a public apology by Gundy to the entire team, former players, and their families.⁶⁵

At that point in time, the team and Coach Gundy moved forward and continued to prepare for the college football season. Now unified as a team, with a better understanding of one another, Oklahoma State went on to have a successful 2020 campaign, ending the year ranked in the Associated Press Top 25.⁶⁶ This anecdote can be highly instructive on how to effectively communicate with one another to achieve understanding and mutual success. More specifically, in elite intercollegiate athletics. Everyone has a different story and a different lens through which they see the world, but when one takes the time to listen and understand another individual, beautiful relationships form. At that moment, true change can occur.

With regard to boycotts and/or labor strikes, recent attempts to unionize by NCAA football players, and the rise of NIL legislation; the NCAA model is looking far less "amateur" than it did a few decades ago. Not only do college athletes want to get paid, the growing sentiment is that they *should* be receiving compensation. In a time where protests remain prevalent, who is to say student-

61. Jack Harris, *Oklahoma State Coach Mike Gundy's OAN T-Shirt Spurs Outrage from Star Players*, L.A. TIMES (June 15, 2020, 6:38 PM), <https://www.latimes.com/sports/story/2020-06-15/oklahoma-state-coach-mike-gundys-oan-t-shirt-spurs-outrage-chuba-hubbard>.

62. *Id.*

63. *Id.*

64. See Kyle Boone, *Oklahoma State Coach Mike Gundy Calls Himself a 'Dumbass' for Wearing OAN T-Shirt*, CBS SPORTS (June 18, 2020, 10:44 AM), <https://www.cbssports.com/college-football/news/oklahoma-state-coach-mike-gundy-calls-himself-a-dumbass-for-wearing-oan-t-shirt/>.

65. See Andrea Adelson, *Oklahoma State's Mike Gundy Apologizes for 'Pain, Discomfort' Caused*, ESPN (June 16, 2020), https://www.espn.com/college-football/story/_/id/29319943/oklahoma-state-mike-gundy-apologizes-pain-discomfort-caused.

66. See CollegeFootballNews.com, *AP Top 25 College Football Poll, Rankings: 2020 Final*, COLLEGE FOOTBALL NEWS (Jan. 12, 2020, 1:46 AM), <https://collegefootballnews.com/2021/01/ap-top-25-college-football-poll-rankings-2020-final>.

athletes will not soon boycott a major televised event in efforts to receive compensation to which they feel entitled? The Norris-LaGuardia Act may very well provide insulation from federal courts.⁶⁷

Even with Congress on its way to making boycott opportunities less prevalent and less effective, labor disputes could prove more of a reality after the *Alston* decision. The opinion of the Court examined NCAA limits on student-athlete benefits from a strictly antitrust perspective; however, Justice Kavanaugh's concurrence seems to advise the NCAA that future antitrust litigation could severely damage the association:

The NCAA's business model would be flatly illegal in almost any other industry in America . . . Price-fixing labor is price-fixing labor . . . Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.⁶⁸

These lines suggest that if future antitrust litigation were pursued against the NCAA, the Court may find the NCAA subject to full rule of reason scrutiny and if liable, substantial damages. From this, the question arises whether the NCAA should negotiate with conferences and schools, *or* student-athletes by way of unionization.⁶⁹ Once an unthinkable move, student-athlete unionization, despite its challenges, may prove useful for the survival of the NCAA—for unionization precludes antitrust claims. Nonetheless, with courts backing student-athlete rights, good is likely to follow for student-athlete empowerment and activism.

B. NIL Implications

Unionization and “labor disputes” may see another wrinkle in the context of intercollegiate athletics very soon. In December of 2020, a new NIL bill was to be introduced to Congress.⁷⁰ The bill will permit monies to be earned by

67. See LeRoy, *supra* note 50, at 513.

68. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2167-69 (2021) (Kavanaugh, J., concurring).

69. W. Drew Kastner & Stephanie Wingyuen Yeung, *What Does the Future Hold for College Athletics after the Supreme Court Decision in NCAA v. Alston?*, JD SUPRA (July 2, 2021), <https://www.jdsupra.com/legalnews/what-does-the-future-hold-for-college-3787786/>.

70. Ross Dellenger, *In Significant Step Around NCAA Athlete Rights, New Name, Image and 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->

boosters from directly and/or indirectly paying student-athletes and their families for any NIL purposes.⁷⁶ This would assure student-athletes do not receive employee status at universities, as all business activity is not permitted on university grounds or while wearing any institutional marks.⁷⁷ If all aspects are duly considered in the passing of any NIL legislation, boycott opportunities may remain sparse and ineffective for student-athletes.

CONCLUSION

The world of sport remains one of the most powerful aspects of culture in the United States and the world. It provides refuge, excitement, and now more than ever, it is a catalyst for change. In recent years, athletes have gone above and beyond to speak up about important matters. This is not exclusive to professional sports—student-athletes are now joining the ranks of “athlete activists” in great numbers. What must come from this is not merely acceptance, but encouragement. Student-athletes must be emboldened, like all other Americans, to express their opinions freely. Although legal precedent sets its parameters, certain ones should be set to the side, and perhaps they will.

Public forums have different levels of restriction dependent upon the nature and intent of the property’s formation. The restrictions are virtually the same for everyone—everyone but student-athletes, that is. First, public forums at a public university deserve to be an area where ideas flourish. College years are part of one’s formative years. A time to ponder and grow both physically and intellectually (affectionately dubbed a “marketplace of ideas”⁷⁸). There should be no reason to have less of an opportunity to express your opinion just because you are a student-athlete. Over the past few years, student-athletes have seen their power increase, speaking up for causes they believe in as a vehicle to affect the masses, just as many of them would like it to be.

Moreover, when acting in unity and not affecting the team in a negative way, protests should be permissible. The summer of 2020 showed us this was possible, with unity between players, coaches, and administrations emerging in increasingly large numbers. Solidarity provides an opportunity for education, understanding, and real change. This not only emboldens young men and women to speak up for what they believe to be right, it will likely eliminate numerous First Amendment claims against the NCAA. Although those claims would likely be thwarted anyway, it is surely a better look for the organization not to have so much extraneous litigation on its hands.

These options deserve serious consideration. If not, student-athletes are

76. *Id.*

77. DI Council, *supra* note 71.

78. *Healy v. James*, 408 U.S. 169, 180 (1972).

likely to protest anyway. There is even precedent for boycotts, which clearly have loopholes present that could prove troublesome for the NCAA and its member institutions—especially as unionization or future antitrust suits loom. To prevent such occurrences, the NCAA should strive to emulate many institutions’ administrations, faculties, and coaching staffs. Taking the time to listen and understand the circumstances of the matter can lead to growth and a better future for all.