

The Day the Fight Song Died: The *Alston* Concurrence that Became the Playbook

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“The pessimist complains about the wind; the optimist expects it to change; the realist adjusts the sails.”¹

ABSTRACT

The landscape of collegiate athletics has shifted dramatically over the past two years. Much of the change has the potential to benefit not only the enterprise of college sports, but also the *raison d'être* of college sports—the student-athlete.² Sadly, however, the litigation-induced and media-propelled antagonism for amateurism stands to harm, rather than benefit, the student-athlete experience. This paper will examine how the paradigm of the collegiate model has fared, both in theory and in practice,³ in the face of numerous legal assaults.⁴ As a

1. William Arthur Ward Quotes, BRAINYQUOTE, https://www.brainyquote.com/quotes/william_arthur_ward_110212 (last visited May 20, 2023).

2. The term “student athlete” was coined by the NCAA to underscore the primary role of the student athlete on campus, that of being a student. This term has become much maligned with the counsel for the NLRB, Jennifer Abruzzo, expressly rejecting the term as a per se violation of section 8(a)(1) of the National Labor Relations Act. Memorandum from Jennifer A. Abruzzo, Gen. Couns., NLRB, to All Reg. Dirs., Officers-in-Charge, and Resident Officers 1 (Sept. 29, 2021), file:///Users/williamstevens/Downloads/Statutory%20Rights%20of%20Players%20at%20Academic%20Institutions%20_Student_Athletes_%20%20Under%20the%20National%20Labor%20Relations%20Act.pdf.

3. Yogi Berra once said, “In theory there is no difference between theory and practice. In practice there is.” Yogi Berra Quotes, BRAINYQUOTE, https://www.brainyquote.com/quotes/yogi_berra_141506 (last visited May 20, 2023).

4. The NCAA has faced numerous legal challenges to its collegiate model which are addressed in detail by this article. See, e.g., *NCAA v. Bd. of Regents of*

faculty athletics representative⁵ to the NCAA for a Division 1 FBS institution,⁶ the author prioritizes the resulting, practical impact of the demise of amateurism on the paradigmatic student-athlete over the theoretical correctness of the legal and economic theories espoused by lawyers, economists, and pundits and then embraced by judges and justices, most of whom never walked in the shoes (or should I say cleats?) of the student-athlete. Victory in the courts just might mean losing our way with collegiate sports.

I. INTRODUCTION

Amateurism in collegiate sports once embodied the idyllic notion of competitive physical sports as a pleasurable activity in which the student-athlete engaged for the attendant physical, mental, and social game—sport for sport’s sake, an intrinsically rewarding endeavor. However, sentiments have changed. Amateurism now connotes an exploitative⁷ restriction upon the student-athlete’s freedom to monetize

Univ. of Okla., 468 U.S. 85, 120 (1984) (holding the NCAA’s control over television broadcast rights for all NCAA member schools violated the Sherman Anti-trust Act); *NCAA v. Alston*, 141 S. Ct. 2141 (2021); *O’Bannon v. NCAA*, 802 F.3d 1049, 1075 (9th Cir. 2015) (holding that the restrictions on student-athlete compensation below the full cost of attendance were more restrictive than necessary to serve the NCAA’s procompetitive justification of maintaining amateurism); *Nw. Univ.*, 362 N.L.R.B. 1350 (2015); Thomas A. Baker, III et al., *White v. NCAA: A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS SPORT 75, 77 (2011) (discussing settlement NCAA reached with student-athletes challenging the NCAA’s restrictions on the reach of athletics scholarships as violating the Sherman Anti-trust Act).

5. A faculty athletics representative (“FAR”) “is a member of an institution’s faculty or administrative staff who is designated by the institution’s president or chancellor or other appropriate entity to represent the institution and its faculty in the institution’s relationships with the NCAA and its conference(s), if any.” NCAA, 2021–22 NCAA DIVISION I MANUAL art. 4.02.2, at 16 (2021) [hereinafter NCAA DIVISION I MANUAL].

6. NCAA member institutions are classified as Division I, II, or III, with the Division I conferences holding the lion’s share of governing authority. *See generally id.* art. 4, 15–27 (describing the organizational structure and distribution of authority between each division’s conferences).

7. Multiple scholarly articles utilize the concept of exploitation to describe the collegiate model of sports. *See, e.g.,* Keely Grey Fresh, *Blood, Sweat, Tears: A Re-Examination of the Exploitation of College Athletes*, 28 WASH. & LEE J. CIV. RTS. & SOC. JUST. 163 (2022); Ellen J. Stauvowsky, *How Colleges Exploit Student-Athletes*, THE ATLANTIC (Sept. 14, 2011),

his or her athletic ability and popularity and to maximize the potential for future professional contracts. This fundamental change in the perception of amateurism underlies the recent legal challenges to the collegiate model of athletics. The NCAA's foundational principle that student-athletes are amateurs and, therefore, cannot be paid to play or be deemed to be employees has not withstood the legal challenges of the past three years. Yet, the ideals embedded in the concept of amateurism—ideals frequently reflected in the exit interviews with graduating student-athletes often conducted by the institution's Faculty Athletics Representative—should not be jettisoned entirely. Furthering the holistic model of the student-athlete (whereby education is the primary purpose of the four-to-five-year college experience and the training of life skills that transition youth into adulthood) remains the mission and the responsibility of higher education.⁸ This article begins with a brief history of amateurism within college athletics. Part III examines a few of the early legal challenges to the NCAA's reliance on the principle of amateurism, and Part IV tracks the demise of the NCAA's collegiate model. Part V makes a succinct (but admittedly futile) appeal for viewing the demise of amateurism as a legally unnecessary conclusion. Part VI focuses on several unresolved dimensions of collegiate athletics post-*Alston* which will shape the future of college sports.

II. THE HALCYON DAYS OF AMATEURISM

While ubiquitous within the United States, the collegiate model of athletics is not part of the natural order; it is a construct of the NCAA, which is composed of membership institutions all founded upon educational pillars.⁹ With a constitution and by-laws,¹⁰ the NCAA functions as a regulatory agency overseeing a monopsonistic¹¹ market.

<https://www.theatlantic.com/entertainment/archive/2011/09/how-colleges-exploit-student-athletes/244945/>; Derek Van Rheen, *Exploitation in College Sports: Race, Revenue and Educational Reward*, 48 Int'l Rev. for Socio. Sport 550 (2012), <https://journals.sagepub.com/pb-assets/cmscontent/IRS/IRS-Exploitation-in-college-sports-1470753935907.pdf>.

8. See discussion *infra* Part VI.D.

9. See NCAA DIVISION I MANUAL, *supra* note 5, art. 3, at 5–14 (describing the principles and requirements for NCAA membership).

10. See *id.*, art. 1.2(b), at 1.

11. In economic theory, a monopsony is a “market situation in which there is only one buyer. An example of pure monopsony is a firm that is the only buyer of

Technically, the NCAA is not a separate “them” governing the “us” (the member institutions). Rather, the NCAA is the membership. Apart from its membership institutions, the NCAA does not exist. Notably, the institutions are all institutions of higher education, each of which boasts a mission statement prioritizing education.¹² Since 1912, the University of Alabama’s motto has been the “capstone of higher education.”¹³ The “Mission & Objectives” page of the University’s website mentions the primacy of academics no fewer than seven times.¹⁴ With such a straightforward dependence upon the educational model, the NCAA’s embrace of “The Principle of Sound Academic Standards”¹⁵ and “The Principle of Amateurism”¹⁶ cemented the obvious and necessary pillars of its mission.

The NCAA Division I Manual states, “[s]tudent-athletes shall be *amateurs* in an intercollegiate sport, and their participation should be motivated by *education* and by the physical, mental, and social benefits to be derived.”¹⁷ A user-friendly summary of NCAA regulations prepared by the NCAA for student-athletes¹⁸ lists amateurism (along with ethical conduct, financial aid, employment earnings, academic standards, transfer status, and drug usage) as a determining factor for

labour in an isolated town. Such a firm is able to pay lower wages than it would under competition. Although cases of pure monopsony are rare, monopsonistic elements are found wherever there are many sellers and few purchasers.” *Monopsony*, BRITANNICA: BRITANNICA MONEY, <https://www.britannica.com/money/monopsony> (last visited Apr. 23, 2023).

12. For example, the mission statement of UCLA provides, “UCLA’s primary purpose as a public research university is the creation, dissemination, preservation and application of knowledge for the betterment of our global society.” *Mission & Values*, UCLA, <https://www.UCLA.edu/about/mission-and-values> (last visited May 23, 2023).

13. *Traditions*, UNIV. ALA., <https://www.ua.edu/about/traditions> (last visited Apr. 23, 2023).

14. *Mission & Objectives*, UNIV. ALA., <https://www.ua.edu/about/mission> (last visited Apr. 23, 2023).

15. NCAA DIVISION I MANUAL, *supra* note 5, art. 2.5, at 3.

16. *Id.*, art. 2.9, at 3.

17. *Id.* (emphasis added).

18. NCAA, SUMMARY OF NCAA REGULATIONS—NCAA DIVISION I pt. I.2, at 2 (2011–12), http://fs.ncaa.org/Docs/AMA/compliance_forms/DI/DI%20Summary%20of%20NCAA%20Regulations.pdf.

eligibility for intercollegiate competition.¹⁹ Interestingly, amateurism is listed second, with only ethical conduct receiving a higher billing.²⁰ Under NCAA bylaws, amateurism casts a wide net, disallowing not only “pay for play”²¹ but also, prior to 2021,²² the receipt of any pay for promoting “a commercial product or service,” which includes the commercial use of the student-athlete’s name or picture.²³ Even payment in excess of the market rate for the value of a student-athlete’s reputation transgresses the principle of amateurism.²⁴ One cannot fault the NCAA’s eligibility requirements for lacking breadth or detail. With hindsight, they appear prophetic.

Amateur is defined as “one who engages in a pursuit, study, science, or sport as a pastime rather than as a profession.”²⁵ The pertinent distinction is between “pastime” and “profession.” The primary motivation behind a pastime is enjoyment, and behind a profession is income.²⁶ Time spent in the endeavor is not, however, a determinative factor. Admittedly, student-athletes are devout adherents to their avocation,²⁷ motivated by competition and the desire to excel. Taken as a group, however, it would be inaccurate to state student-athletes are motivated by income when deciding whether to participate in intercollegiate athletics as many student-athletes receive little or no grant-in-aid funds.²⁸ Furthermore, payment for the playing of a college sport is

19. *Id.*

20. *Id.*

21. See NCAA DIVISION I MANUAL, *supra* note 5, art. 12.1.2(a), at 63.

22. See *infra* Part VI.A (discussing the current rules regarding on NIL).

23. NCAA DIVISION I MANUAL, *supra* note 5, art. 12.5.2.1(a), at 77.

24. See *id.* art. 12.4.1, at 73.

25. *Amateur*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/amateur> (last visited Apr. 22, 2023).

26. Pastime is defined as “something that amuses and serves to make time pass agreeably.” *Pastime*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/pastime> (last visited May 25, 2023).

27. “Students’ participation in intercollegiate athletics is an avocation” NCAA DIVISION I MANUAL, *supra* note 5, art. 2.9, at 3.

28. See Jesse Marsh, *SE Perspective: 5 Misconceptions About College Sports*, SPORTSEPRENEUR (Aug. 11, 2022), <https://sportsepreneur.com/misconceptions-about-college-athletic-scholarships/> (discussing the financial limitations of athletic scholarships). Grant-in-aid as defined by the NCAA Division I Manual is “financial aid that consists of tuition and fees, room and board, books and other expenses related

anathema to the principle of amateurism. President Theodore Roosevelt, who has been called the “Sports President,” espoused a philosophy of athletics which greatly influenced the pillars upon which the collegiate model of sports was built.²⁹ President Roosevelt noted the importance and purpose of amateurism is to ensure the pursuit of education and knowledge beyond that of the sports we all love:

[I]n defending athletics I would not for one moment be understood as excusing that perversion of athletics which would make it the end of life instead of merely a means in life. It is first-class, healthful play, and is useful as such. But play is not business, and it is a very poor business indeed for a college man to learn nothing but sport.³⁰

Roosevelt perceived athletics to be functional and utilitarian, producing a benefit to the participant in the form of positive physical and characterological development—not pecuniary profit.³¹ But just as Roosevelt himself was on the losing side of the emerging landscape of athletics,³² so too has the collegiate model of sports suffered major setbacks.³³

Simply stated, the amateur model of the NCAA means that athletes do not receive remuneration for their services as athletes from their college or institution. Lack of remuneration in the form of direct

to attendance at the institution up to the cost of attendance established pursuant to Bylaws.” NCAA DIVISION I MANUAL, *supra* note 5, art. 15.02.6, at 210.

29. See Ryan A. Swanson, “*I Was Never a Champion at Anything*”: Theodore Roosevelt’s Complex and Contradictory Record as America’s “Sports President,” 38 J. SPORT HIST. 425, 438 (2011) (discussing how the NCAA has linked its history to Theodore Roosevelt).

30. Cody J. McDavis, *The Value of Amateurism*, 29 MARQ. SPORTS L. REV. 275, 340 (2018) (quoting President Theodore Roosevelt’s 1907 speech to Harvard students).

31. Swanson, *supra* note 29, at 430.

32. *Id.* at 441. Roosevelt’s opposition to professional sports had little impact on the trajectory of sports as we experience them today. *Id.* Neither his crusade to ban prizefighting in boxing nor his boycott of baseball significantly impacted the growth or appeal of the sport. *Id.*

33. See *infra* Part IV (discussing the erosion of amateurism as a core principle of collegiate athletics).

pay does not mean lack of incentives, however, as even the earliest of collegiate athletes were provided free room and board. With the adoption of the Sanity Code in 1948, the athletic scholarship was born, providing grant-in-aid to student-athletes without paying them directly.³⁴ Since the athletic scholarship was tied directly to the education the student-athlete was receiving, the hard line between amateurism and professionalism remained.

The NCAA model of amateurism has consistently regarded the athletic participation of the student-athlete as part of the holistic educational experience. While the prioritization of education is itself an unlikely target for criticism, the disconnect (or at least the perceived disconnect) between the ideology of the NCAA and the experience of the student-athlete demanded critique of the collegiate model. The accelerants for this critique of the NCAA fall into two categories: The grotesque monetization of collegiate athletics, evident in the value of media deals³⁵ and the extraordinary payments being made to coaches,³⁶ and the rising voice of the student-athlete.

34. For a real-time report on the adoption of the sanity code, see *COLLEGES ADOPT THE 'SANITY CODE' TO GOVERN SPORTS; N.C.A.A. Bans Scholarships in Which Athletic Ability Is the Major Factor*, N.Y. TIMES (Jan. 11, 1948), <https://www.nytimes.com/1948/01/11/archives/colleges-adopt-the-sanity-code-to-govern-sports-ncaa-bans.html>.

35. The reported value of the SEC television package with ESPN is mind boggling: “the package is worth in the neighborhood of \$300 million per year.” Jon Lewis, *ESPN-SEC Deal Finally Official, Will Go into Effect in 2024*, SPORTS MEDIA WATCH, <https://www.sportsmediawatch.com/2020/12/sec-espn-deal-official-abc-replacing-cbs/#:~:text=According%20to%20Sports%20Business%20Daily,of%20%24300%20million%20per%20year> (last visited May 27, 2023).

36. One anonymous administrator expressed concern over the value of coaches’ contracts:

I think the primary exacerbating issue is the extraordinary amounts of money that some coaches (and administrators) are making. Prior to the recent significant growth in salaries, there was much less concern about student-athlete compensation or exploitation. Throughout most of the history of college athletics— i.e, before the current economic paradigm— one could argue that NCAA amateurism rules were fair and worked effectively. In the current environment, there is too large of a disparity between coach compensation and student-athlete compensation. If we believe that

III. THE BEGINNING OF THE END

A. A Tale of Two Student-Athletes

Michael McLaren of Memphis, Tennessee, was a talented basketball player and a strong academic performer. His skillset landed him a place on the Dartmouth men's basketball team from 2001 to 2005. As a student-athlete, McLaren embodied the paradigm of amateurism by fundamentally focusing his energy while at Dartmouth on the goal of attaining a valuable college education. While he enjoyed the training, competition, and perquisites of being a Division I college athlete,³⁷ his primary focus was on preparing for life after sports. As the NCAA has reminded the viewing public in ubiquitous television advertisements, most college athletes "go pro in something other than sport."³⁸ Like McLaren, Ed O'Bannon was also a student-athlete just a few years earlier in the 1990s. Unlike McLaren, who followed his basketball days by attending law school, O'Bannon followed his collegiate basketball days at UCLA with a short stint in the NBA.³⁹ Statistically speaking, McLaren, not O'Bannon, was the paradigmatic student-athlete.

When EA Sports produced its NCAA basketball video game, the likenesses of both McLaren and O'Bannon were used without

providing student-athletes with more compensation runs counter the educational values of college athletics, then we should figure out ways to rebalance by rolling back and limiting coach (and administrator) compensation.

What Do Athletic Directors Think About Name, Image and Likeness?, ADU, <https://athleticdirector.com/articles/what-do-athletic-directors-think-about-name-image-and-likeness/> (last visited May 30, 2023).

37. While McLaren, like most student-athletes, did not pursue his sport professionally, he does hold a Dartmouth school record as having the sixth highest three-point field goal percentage in school history.

38. NCAA, *NCAA PSA: Careers*, YOUTUBE, <https://www.youtube.com/watch?v=yKWRy2Zmd8> (last viewed May 31, 2023).

39. See *Ed O'Bannon*, WIKIPEDIA, https://en.wikipedia.org/wiki/Ed_O%27Bannon (last visited May 31, 2023) (describing O'Bannon's professional basketball career).

compensation being paid to either student-athlete.⁴⁰ Payment of compensation to McLaren, O'Bannon, and the other student-athletes serving as avatars in the video game would have resulted in their ineligibility under NCAA Rules. For McLaren, being an avatar in the popular video game was a highlight of his basketball memories.⁴¹ For O'Bannon, the video game served as the opportunity to attack the pillar of amateurism through which the NCAA had denied him the ability to profit from his name, image, and likeness ("NIL"). O'Bannon was the named plaintiff in the lawsuit—a consolidation of several lawsuits against the NCAA—which marked the beginning of the end of the halcyon days of amateurism.

EA Sports and the Collegiate Licensing Company ("CLC"), the entities sued by O'Bannon in addition to the NCAA, settled the claims for damages.⁴² As part of the class, McLaren's settlement was much smaller than O'Bannon's. For McLaren, the collegiate experience was not about the monetary payment for the use of his likeness in a video game. His framed, never-deposited check serves as a memento of his student-athlete days. However, for O'Bannon⁴³ (or at least for the attorneys driving the lawsuit which bears his name), the attack on the NCAA represented more than a settlement of a past usurpation of his likeness; it was the beginning of a quest for a share in the vast business of college athletics.⁴⁴ As McLaren and O'Bannon demonstrate, "student-athlete" is not a one-size-fits-all designation.

40. The very popular video game known as NCAA March Madness was published by EA Sports from 1998 until being discontinued in 2009 in the wake of legal challenges. Eamonn Brennan, *The College Basketball Video Game Is Dead*, ESPN (July 10, 2013, 12:30 PM), https://www.espn.com/blog/collegebasketballnation/post/_/id/86183/the-college-basketball-video-game-is-deadHYPERLINK.

41. Interview with Michael McLaren.

42. Audrey C. Sheetz, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 866 (2016).

43. See *O'Bannon v. NCAA*, 802 F.3d 1049, 1075 (9th Cir. 2015) (holding that the NCAA's rules limiting compensation to student-athletes below the full cost of attendance were more restrictive than necessary to serve the procompetitive goal of maintaining amateurism). The Ninth Circuit concluded that the Supreme Court's discussion of amateurism as a defense to antitrust violations in *NCAA v. Board of Regents* was nonbinding dicta. *Id.* at 1063.

44. See Ben Kercheval, *What the EA Settlement Could Mean for NCAA in Ed O'Bannon Lawsuit*, BLEACHER REPORT (June 2, 2014),

What does it mean to be a college athlete? Much ink has been spilled sorting out the answer to this question.⁴⁵ This seemingly simple question has burdened the NCAA with extensive defensive litigation for (at least) the past nine years comprising (at least) three separate clusters of legal battles,⁴⁶ which certainly have consumed a sizeable portion of the NCAA's revenue⁴⁷ and yielded unstoppable commentary by sports pundits, athletic directors, commissioners, coaches, academics, and the college athletes themselves.⁴⁸ While the definition of student-athlete remains uncertain, the distinct differences between McLaren and O'Bannon exemplify the certainty that the paradigm existing before 2014 is no longer the paradigm.

<https://bleacherreport.com/articles/2083110-what-the-ea-settlement-could-mean-for-ncaa-in-ed-obannon-lawsuit>; Ben Kercheval, *5 Key Takeaways from the Ruling Against NCAA in Ed O'Bannon Case*, BLEACHER REPORT (Aug. 11, 2014), <https://bleacherreport.com/articles/2159071-5-key-takeaways-from-the-ruling-against-ncaa-in-ed-obannon-case>, for a summary of *O'Bannon v. NCAA* and its implications.

45. For insight into the perspectives of several student-athletes at Michigan Tech, see Allison Mills, *A Day in the Life of a Student-Athlete*, 56 MICH. TECH MAG., no. 1, 2019, at 26–31. For a more scientific study, see Mariya A. Yukhymenko-Lescroart, *The Role of Passion for Sport in College Student-Athletes' Motivation and Effort in Academics and Athletics*, 2 INT'L J. EDUC. RSCH. OPEN 1 (2021), <https://www.sciencedirect.com/science/article/pii/S266637402100025X>.

46. The legal challenges to the NCAA can be sorted into three clusters, namely, (1) antitrust-based challenges such as the *Regents*, *O'Bannon*, and *Alston* cases, (2) employment-law-based challenges such as *Northwestern* and *Johnson*, and (3) other oversight challenges such as the concussion litigation cases.

47. The NCAA's revenue for fiscal 2022 has been reported as \$1.14 billion. Eben Novy-Williams, *NCAA Revenue Dips to \$1.14 Billion as Self-Insurance Costs Kick In*, SPORTICO (Jan. 26, 2023, 12:14 PM), <https://www.sportico.com/leagues/college-sports/2023/ncaa-revenue-2022-1234707661/>.

48. Here is a representative smattering of the commentary by an athletic director: “[n]ever before has the intercollegiate athletics model faced a more pressing inflection point that threatens to unravel the very foundation on which the amateur sport model is built upon in this country.” *What Do Athletic Directors Think About Name, Image and Likeness?*, ADU, <https://athleticdirector.ucla.edu/articles/what-do-athletic-directors-think-about-name-image-and-likeness/> (last visited May 30, 2023); And here is similar commentary by a student-athlete: “[look, football and school don’t go together.” Ben Bolch, *UCLA Quarterback Josh Rosen Says College Football and Studying are Incompatible*, L.A. TIMES (Aug. 8, 2017, 6:35 PM), <https://www.latimes.com/sports/ucla/la-sp-josh-rosen-20170808-story.html>.

B. Prior Attacks on Amateurism

The legal darts hurled against the NCAA and its amateurism model predate the current cluster of NIL cases. In *Worldwide Basketball and Sport Tours, Inc. v. NCAA*, promoters of exempt pre-season Division I basketball tournaments challenged the NCAA's "Two in Four Rule,"⁴⁹ which restricted a Division I team from playing in more than two multiple team events over a rolling four-calendar year period.⁵⁰ Wanting to feature the top-drawing teams at their annual tournament, the promoters challenged the Two in Four rule as an illegal restraint of trade.⁵¹ As far back as 2004, the NCAA was encountering hostility to its claim that the governance of collegiate athletics is for academic and not commercial purposes, the explicit limitation on the reach of Section 1 of the Sherman Act.⁵² Although the promoters failed to prevail on their assertion that the NCAA's Two in Four rule constituted an unreasonable restraint of trade in the relevant market,⁵³ the protracted legal battle resulted in the NCAA "adjusting the sails" with respect to participation in multiple-team events.⁵⁴

49. 388 F.3d 955, 957 (6th Cir. 2004).

50. For a full explanation of the "Two in Four Rule" in play from 1999–2006, see Chris Dobberteau, *College Basketball's Exempt Tournaments: A Primer*, SB NATION: BLOGGING THE BRACKET (July 11, 2015, 7:38 PM), <https://www.bloggingthebracket.com/2015/7/9/8916893/2015-16-college-basketball-early-season-tournaments-exempt-background>. These pre-season multi-game basketball events, often held at enticing locations like Maui, during November or December, were exempt from the NCAA's annual game limit. See *id.* Beginning with the 1999–2000 basketball season, the NCAA's restriction on pre-season tournament play was intended to "make participation in this cottage industry a bit more equitable." Chris Dobberteau, *College Basketball Exempt Tournaments 101*, SB NATION: BLOGGING THE BRACKET (Aug. 9, 2016, 12:37 PM), <https://www.bloggingthebracket.com/2016/7/18/12172716/2016-17-college-basketball-exempt-holiday-preseason-tournaments-MTE-background>.

51. *Worldwide*, 388 F.3d at 958–59.

52. See *id.* at 957–58.

53. *Id.* at 963.

54. For an overview of the changes made to multiple-team event rules, see *DI Council Advances Multi-Team Event Proposal*, NCAA (June 26, 2019, 5:07 PM), <https://www.ncaa.org/news/2019/6/26/di-council-advances-multi-team-event-proposal.aspx>.

In 2006, a class of Division 1 student-athletes again took up the sword of the Sherman Act against the NCAA,⁵⁵ alleging that the governing body and its member institutions were parties to horizontal price fixing under the NCAA's grant-in-aid policy cap which, at that time, restricted a student-athlete's scholarship to tuition, fees, room and board, and required books.⁵⁶ The question presented by *White*, namely, whether grant-in-aid caps violate the Sherman Act, never reached judicial resolution as the parties entered a Settlement Agreement with the U.S. Central District Court of California in 2008.⁵⁷ However, this legal challenge did advance the student-athlete's cause, as the NCAA both expanded the benefits which could permissibly be provided to student-athletes to include year-round comprehensive health insurance and established a \$10,000 fund to reimburse former student-athletes for their bona fide educational expenses.⁵⁸

IV. THE SHIFTING LANDSCAPE: AMNESTY FROM AMATEURISM⁵⁹ BECOMES ANIMOSITY FOR AMATEURISM

A. Antitrust Attacks on the NCAA: Comparing Regents and Alston

In *NCAA v. Board of Regents of the University of Oklahoma*, the University of Oklahoma and the University of Georgia challenged the NCAA's limitation on televised intercollegiate football games.⁶⁰ The Supreme Court found that the television plan contained sufficient redeeming virtues to avoid condemnation as a per se violation of the Sherman Act.⁶¹ It acknowledged the inherent characteristics of competitive athletics and the NCAA's justifiable role in regulating

55. *White v. NCAA*, No. CV 06-0999-RGK, 2006 WL 8066803, at *1 (C.D. Cal. Oct. 19, 2006)

56. *Id.*

57. Thomas A. Baker, III et al., *White v. NCAA: A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS SPORT 75, 77 (2011).

58. *See id.*

59. The term "amnesty from amateurism" was coined by University of Memphis Cecil C. Humphreys School of Law student Alexis C. Hivner in her student note, *Clock-Out or Time-Out: Alston's Game-Changing Impact on Student-Athletes Employment Status* (Mem. L. Rev. Vol. 54., Forthcoming 2024).

60. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 88 (1984).

61. *Id.* at 100–01.

athletics.⁶² Nevertheless, the Court reached the narrower holding that the NCAA's rules constituted horizontal price fixing with output limitations, which is an unreasonable restraint of trade.⁶³

Although the Court did not explicitly address the issue of the NCAA using student-athletes' NILs without compensating those student-athletes, it did emphasize that the NCAA's interest in maintaining a competitive balance among amateur teams is both legitimate and important.⁶⁴ The Court, in dicta, stressed the importance of the NCAA's task as a regulatory body to preserve the tradition of amateurism and the academic status of student-athletes, noting its significance in maintaining the integrity of its product.⁶⁵ The Court noted "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."⁶⁶ The Court also gave weight to the NCAA's procompetitive justification of preserving amateurism,⁶⁷ noting its significance in maintaining the integrity of its product.⁶⁸

The Court also stated that "[i]n order to preserve the character and quality of the [NCAA's] 'product,' athletes must not be paid, must be required to attend class, and the like."⁶⁹ Relying on the Court's discussion of the NCAA's legitimate justifications for its regulatory measures, courts have analyzed whether the challenged NCAA regulation has an effect on amateurism or fair competition when determining the legality of NCAA restraints on competition.⁷⁰ For example, in *McCormack v. NCAA*, the Fifth Circuit held that a group of Southern

62. *Id.* at 117.

63. *See id.* at 120.

64. *Id.* at 117.

65. *Id.* at 120. *See also* Matthew N. Korenoski, *O'Bannon v. NCAA: An Antitrust Assault on the NCAA's Dying Amateurism Principle*, 54 DUQ. L. REV. 493, 502 (2016) (describing the Court's discussion of amateurism in *Board of Regents*).

66. *Bd. of Regents*, 468 U.S. at 117.

67. *See id.* at 101–02. *See also* Edward H. Grimmer, *NCAA Amateurism and Athletics: A Perfect Marriage or a Dysfunctional Relationship? – An Antitrust Approach to Student-Athlete Compensation*, 30 TOURO L. REV. 823, 851 (2014) (describing the Court's treatment in *Board of Regents* of the NCAA's justification for preserving amateurism).

68. *See Bd. of Regents*, 468 U.S. at 102.

69. *Id.*

70. Korenoski, *supra* note 66, at 502.

Methodist University student-athletes failed to state a claim in alleging that the NCAA's eligibility rules constituted unreasonable price fixing and are therefore illegal.⁷¹ The court noted that the rules determining eligibility for college football games "enhance public interest" and are therefore procompetitive.⁷² Scholars have also acknowledged that the NCAA's justifications for its regulations act as a "shield against prospective antitrust violations."⁷³

Because the *Board of Regents* Court assumed that "most of the regulatory controls of the NCAA are justifiable means of fostering competition," the NCAA continued to maintain "a body of eligibility rules designed to prohibit student-athletes from being compensated for their play."⁷⁴ In *NCAA v. Alston*, a group of current and former student-athletes challenged the NCAA's rules that limited "the compensation they may receive in exchange for their athletic services."⁷⁵ The Supreme Court held that the NCAA's rules restricting the education-related benefits that student-athletes may receive violated antitrust laws.⁷⁶

The Supreme Court's holding in *Alston* was, appropriately, limited to the issues brought before the Court, specifically the challenge to the NCAA's rules limiting education-related compensation and benefits to student-athletes. The majority opinion provided the framework for analyzing the NCAA's restrictions and regulations: The rule of reason test, which side steps the per se finding of antitrust violations in the presence of restraints on trade in favor of a detailed analysis of the relevant market.⁷⁷ Under the rule of reason test, the NCAA must supply

71. McCormack v. NCAA, 845 F.2d 1338, 1343 (5th Cir. 1988).

72. *Id.* at 1344 (quoting *Bd. of Regents*, 468 U.S. at 117).

73. See, e.g., Grimmet, *supra* note 68, at 833–34 (stating that the NCAA will most likely be able to rebut the presumption of anticompetitive conduct based on *Board of Regents*).

74. Brief for Petitioner at 6, *NCAA v. Alston*, 141 S. Ct. 2141 (2021) (No. 20-520), 2021 WL 398167 (quoting *Bd. of Regents*, 468 U.S. at 117).

75. *NCAA v. Alston*, 141 S. Ct. 2141, 2151 (2021) (quoting the lower court's opinion: *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1062 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *aff'd sub nom*, 141 S. Ct. 2141 (2021)).

76. See *id.* at 2166.

77. See *id.* at 2155. For a careful discussion of *NCAA v. Alston*, see *Sherman Act — Antitrust Law — NCAA v. Alston*, 135 HARV. L. REV. 471, 474–80 (2021).

a legally valid procompetitive justification for the compensation restrictions.⁷⁸ In *Alston*, the NCAA argued, as it had in *Regents* and *O'Bannon*, that the procompetitive justification for restraining student-athletes' compensation was the preservation of amateurism in college sports.⁷⁹ This reasoning had been belittled by the *O'Bannon* court, which stated that "[t]he Court's long encomium to amateurism, though impressive-sounding, was therefore dicta . . . [b]ut we are not bound by *Board of Regents* to conclude that every NCAA rule that somehow relates to amateurism is automatically valid."⁸⁰ With *Alston*, the NCAA's prior ability to survive antitrust-based attacks,⁸¹ a so-called "amnesty from amateurism,"⁸² had reached its juridical end.

B. Labor Law Attacks on Student-Athlete Status: Comparing the Northwestern University Petition and Johnson

Just as the antitrust attacks on the NCAA were accorded a previously unrecognized judicial respect in *Alston*, the labor law attacks on the NCAA are being met with judicial approval. In one case, the National Labor Relations Board ("NLRB") dismissed a petition by Northwestern University football players who were seeking employee status, declining to assert jurisdiction over the matter.⁸³ Although the NLRB did not directly consider whether student-athletes are employees under the National Labor Relations Act,⁸⁴ its decision effectively rejected the athletes' claim that they were university employees and had the right to collectively bargain.⁸⁵ The NLRB emphasized the

("The principal contribution of the Court's decision was to make clear that the NCAA's compensation rules are subject to Sherman Act scrutiny.").

78. *Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring).

79. *Id.* at 2157.

80. *O'Bannon v. NCAA*, 802 F.3d 1049, 1063 (9th Cir. 2015).

81. *See, e.g., McCormack v. NCAA*, 845 F.2d 1338, 1344-45 (5th Cir. 1988) (holding that because the NCAA's compensation rules did not violate antitrust laws, as established by *Board of Regents*, NCAA enforcement actions based on such rules were not tantamount to an illegal group boycott).

82. Hivner, *supra* note 59.

83. *Nw. Univ. & Coll. Athletes Players Ass'n (CAPA)*, 362 N.L.R.B. 1350, 1355 (2015).

84. *Id.*

85. *See Ben Strauss, N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug. 17, 2015),

petition's ability to have adverse effects on the "stability in labor relations."⁸⁶

More recently, in *Johnson v. NCAA*, a group of student-athletes at various colleges and universities argued that student-athletes who "engage in interscholastic athletic activity for their [schools] are employees who should be paid for the time they spend related to those athletic activities."⁸⁷ In response, the NCAA filed a motion to dismiss, asserting that college athletes cannot be employees of the university because the Department of Labor has determined that student participation in extracurricular activities, including that of interscholastic athletes, does not result in an employer-employee relationship under the Fair Labor Standards Act ("FLSA").⁸⁸ The NCAA relied on the Field Operations Handbook ("FOH")—published by the Department of Labor—which states that "[u]niversity or college students who participate in activities generally recognized as extracurricular are generally not considered to be employees."⁸⁹ In support of this argument, the NCAA cited to 29 U.S.C. § 259, which provides that no employer is liable for the failure to pay employees minimum wages if done in good faith and in compliance with any written administration regulation or agency.⁹⁰

The *Johnson* court held that the plaintiffs successfully pled that college athletes can plausibly be deemed employees, for purposes of FLSA, of their attended schools, rejecting the NCAA's argument.⁹¹ The court noted that there was nothing in the NCAA's motion to dismiss with which the court could determine whether the universities failed to pay minimum wages to their student-athletes in reliance on the FOH, and, therefore, the court was unable to determine whether this

<https://www.nytimes.com/2015/08/18/sports/ncaafball/nlrbsays-northwestern-football-players-cannot-unionize.html#:~:text=The%20National%20Labor%20Relations%20Board,be%20allowed%20to%20collectively%20bargain.>

86. *Nw Univ.*, 362 N.L.R.B. at 1355.

87. 556 F. Supp. 3d 491, 495 (E.D. Pa. 2021). The court in *Johnson* uses the term "interscholastic." *Id.* For purposes of this article, no difference is intended from the more common term intercollegiate.

88. *Id.* at 502.

89. *Id.* (quoting U.S. DEP'T OF LAB., FIELD OPERATIONS HANDBOOK § 10b03(e) (2016) [hereinafter FOH], <https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-10#B10b03>).

90. *Id.*

91. *Id.* at 512.

was a complete defense to the plaintiff's claim.⁹² Additionally, the court found that the student-athletes' complaint plausibly alleged that NCAA Division 1 interscholastic athletics are not the types of activities listed in the FOH "that do not result in an employer-employee relationship between the student and the school or institution."⁹³ The court reasoned that NCAA Division 1 "interscholastic athletics are not conducted primarily for the benefit of the student athletes who participate in them," but for the monetary benefit of the NCAA and the universities that those athletes attend.⁹⁴

This outcome is currently on appeal in the Third Circuit, in which the court will address "whether NCAA Division I student athletes can be employees of the colleges and universities they attend for the purposes of [FLSA], solely by virtue of their participation in interscholastic athletics."⁹⁵ Granting the student-athlete employee status would further kill the fight song by diminishing the uniqueness of the status of collegiate athletes as compared to their professional counterparts.

C. Economic Theory

Traditional antitrust law is aimed at protecting product markets against anticompetitive behavior.⁹⁶ Consequently, monopolists and other anticompetitive actors that set prices for products above the market competitive level (or, alternatively, reduces their output of products to drive up price) can face antitrust challenges. In *Board of Regents*, the Supreme Court referenced this product-based view in stating that the

92. *Id.* at 503.

93. *Id.* at 506. (quoting FOH § 10b03(e)).

94. *Id.*

95. Max A. Lamcken, *Pregame Intro: Class Action Filed Under FLSA*, VILL. L. REV. (Apr. 15, 2022), <https://www.villanovalawreview.com/post/1476-third-circuit-to-review-game-changing-play-in-johnson-v-ncaa>.

96. See John M. Newman *Procompetitive Justifications in Antitrust Law*, 94 IND. L. J. 501, 506–16 (2019) (analyzing market-based justifications for antitrust law); John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 195 (2015) (describing the market-based origins of antitrust law).

NCAA seeks to market a particular brand of football — college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “product,” *athletes must not be paid*, must be required to attend class, and the like.⁹⁷

However, nothing in antitrust law restricts its relevance to product markets. Antitrust law is equally applicable to labor markets, which in turn should also be subject to restrictions on anticompetitive conduct. When a monopsonistic provider of labor to a given market suppresses wages below a competitive level, a misallocation of productive resources occurs, and such market behavior should constitute an antitrust violation.⁹⁸ In a recent book, Eric Posner explains how employers have used market power to suppress wages in sticky labor markets.⁹⁹ Posner argues that antitrust law has a role to play not only in helping labor markets stay competitive but in helping labor and employment rules protect workers.¹⁰⁰ This expansive application of antitrust law is in accord with the recent court rulings which have loosened the permissive grip of the monopsonistic NCAA on the labor market of college athletics.

D. The Shifting Fiscal and Societal Landscape

Section A of Part IV revealed the similarity between the legal theories which (limitedly) won the day for the NCAA in *Board of Regents* but proved to be a powerless defense of amateurism in *Alston*. Similarly, Section B established that the same principles relied upon in *Johnson* to advance employee status to student-athletes were unsuccessful tools years earlier in the Northwestern University petition. Neither of the more recent decisions in *Alston* nor *Johnson* has developed novel or emerging legal theories. The plaintiffs in the antitrust attacks

97. 468 U.S. 85, 101–02 (1984) (emphasis added).

98. ERIC A. POSNER, *HOW ANTITRUST FAILED WORKERS* 2–3 (2021).

99. *Id.* at 1–7

100. *Id.* at 7.

and the employment law attacks changed in name only; the underlying facts on which the lawsuits rest are functionally identical.¹⁰¹ And yet each of these cases—*Alston* in the antitrust arena and *Johnson* with respect to employment law—represents a “chink in the armor”¹⁰² of amateurism that for so long shielded the NCAA and its collegiate model. This section looks at the shifting fiscal and societal landscapes and notes the external undercurrents which produced a revised receptiveness by the *Alston* court to rehashed legal attacks on the student-athlete model.

Whether you view the NCAA as a separate entity or as representative of intercollegiate athletics as a whole, the influx of millions of dollars into this system was largely based on the ability to bring intercollegiate sports into the homes of sports fans across the world through television. The Court’s holding in *Board of Regents* that the NCAA’s television plan violated the Sherman Act allowed for the increased infusion of television revenue into the NCAA and its member colleges at a rapid pace.¹⁰³ In 2022 alone, the NCAA grossed “870 million U.S. dollars in revenue from television broadcast payments and licensing rights.”¹⁰⁴ As the money infused into the NCAA and college sports grew to obscene levels, the media began to direct people’s attention to how that money was being spent.¹⁰⁵ Often, authors of articles

101. Compare *NCAA v. Alston*, 141 S. Ct. 2141, 2147 (2021) (addressing NCAA’s compensation restrictions for student-athletes), with *Johnson v. NCAA*, 556 F. Supp. 3d 491, 495 (E.D. Pa. 2021) (addressing an action brought by student-athletes seeking employee status).

102. See generally Baker, *supra* note 57 (discussing antitrust challenges to the NCAA’s regulations of student-athletes).

103. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 119–20 (1984).

104. Christina Gough, *NCAA Television and Licensing Rights Revenue 2012–2027*, STATISTA (Mar. 23, 2023), <https://www.statista.com/statistics/219608/ncaa-revenue-from-television-rights-agreement/> (“Over the term of the contract the multi-media and marketing rights payments will reach a total of almost 10.55 billion U.S. dollars.”). See also Alan Blinder & Kevin Draper, *Topping \$1 Billion a Year, Big Ten Signs Record TV Deal for College Conference*, N.Y. TIMES (Aug. 18, 2022), <https://www.nytimes.com/2022/08/18/sports/ncaafootball/big-ten-deal-tv.html> (discussing revenue generated from television deals).

105. See, e.g., *Concerned About Rising Tuition? Look At The Coaches’ Salaries*, KNIGHT COMM’N ON INTERCOLLEGIATE ATHLETICS (Sept. 16, 2010), <https://www.knightcommission.org/2010/09/concerned-about-rising-tuition-look-at-the-coaches-salaries/> (examining college coaches’ salaries); Paula Lavigne & Mark

conflate the NCAA as an entity with the outrageous spending of its members.¹⁰⁶

In many ways, the NCAA itself shifted away from what reasonably could be understood by the public to be a benign governing body of college sports and into a governing body of a vast entertainment system that happened to be about sports. The NCAA failed to recognize the loss of its fundamental role in providing the framework for the valuable student-athlete experience. Instead, the fiscal numbers undermined the ability of the NCAA to say with a straight face that care and concern for the student-athlete was its primary focus.

Despite the downfall of the public's perception of the NCAA as financially driven, the *Board of Regents* ruling is now forty-one years old.¹⁰⁷ Courts and administrative entities such as the NLRB have seen the NCAA's financial takeover while still upholding the NCAA's arguments of amateurism.¹⁰⁸ The question becomes whether exorbitant

Schlabach, *FBS Schools Spent Over \$533.6 Million in Dead Money Over 10+ Years*, ESPN (Nov. 5, 2021, 7:42 AM), https://www.espn.com/college-football/story/_/id/32552130/schools-spent-5336-million-dead-money (discussing money owed to fulfill FBS coaches' contracts); Natalie Colarossi, *College Sports Paid Over \$500M in 'Dead Money' to Fired Coaches Over Last Decade*, NEWSWEEK (Nov. 8, 2021, 2:55 PM), <https://www.newsweek.com/college-sports-paid-over-500m-dead-money-fired-coaches-over-last-decade-1647115> (discussing money owed to fulfill FBS coaches' contracts); Gilbert M. Gaul, *How College Football Coaches Became Multi-Million-Dollar Money Pits*, TIME (Aug. 25, 2015, 11:26 AM), <https://time.com/4006558/college-football-coach-salaries/> (discussing wasted revenue on coaches' contracts in college football). Cf Joe Jares, *Victory by Mystique*, SPORTS ILLUSTRATED: VAULT (Mar. 30, 1970), <https://vault.si.com/vault/1970/03/30/victory-by-mystique> (discussing the success of the 1970 UCLA basketball team, propelled by their legendary coach, John Wooden); Robert Lipsyte, *The Plot*, N.Y. TIMES (Jan. 24, 1970), <https://www.ny-times.com/1970/01/24/archives/article-8-no-title-the-plot.html> (discussing various criticisms of the NCAA in 1970)..

106. Cf Mark Schlabach, *NCAA: Where Does the Money Go?*, ESPN (July 12, 2011, 3:00 AM), https://www.espn.com/college-sports/story/_/id/6756472/following-ncaa-money (laying out the multitude of ways the NCAA itself spends its funds, including earmarking specific funds to its members for grants-in-aid, student assistance funds, payments for participation in tournaments, and school sponsored sports).

107. *Bd. of Regents*, 104 S.Ct. at 2948 (1984).

108. See, e.g., *O'Bannon v. NCAA*, 802 F.3d 1049, 1053 (9th Cir. 2015); *Nw. Univ. & Coll. Athletes Players Ass'n (CAPA)*, 362 N.L.R.B. 1350, 1355–56 (2015).

television deals are the only culprit behind this potential upheaval of what should stand as good law.¹⁰⁹

The purpose of the law is not simply to control the citizens it governs, but to benefit them. Society has always shaped the trajectory and evolution of the law as it adapts to meet the needs of the people. This section will analyze the thread between three pivotal societal movements and how they fundamentally changed the voice of student-athletes and the narrative surrounding their compensation.

1. Occupy Wall Street Movement

To many, the phrase “Occupy Wall Street” represents a movement which failed at its ultimate goal.¹¹⁰ However, this movement in many ways laid the foundation for the attacks on the NCAA. The concerns related to Wall Street ultimately turned the establishment into the enemy. By pointing out the wealth inequity that lay at the foundation of Wall Street, protestors left behind the language of the ninety-nine versus the one percent.¹¹¹ More than that, however, the movement “injected activists with a new sense of courage: [c]onfronting power and issuing demands through civil disobedience is now an ingrained part of our political culture.”¹¹²

The accumulation of wealth, even if merit based, came under heightened scrutiny and criticism.¹¹³ The Occupy Wall Street

109. See *Johnson v. NCAA*, 556 F. Supp. 3d 491, 505 (E.D. Pa. 2021) (addressing a challenge brought by student-athletes to share in college sports television revenue); *NCAA v. Alston*, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring) (discussing how the NCAA’s refusal to share revenue with student-athletes could violate antitrust laws).

110. See Michael Levitin, *Occupy Wall Street Did More Than You Think*, THE ATLANTIC (Sept. 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/how-occupy-wall-street-reshaped-america/620064/> (discussing the legacy of the Occupy Wall Street movement).

111. *Id.*; see also Astra Taylor, *Occupy Wall Street’s Legacy Runs Deeper Than You Think*, TEEN VOGUE (Dec. 17, 2019), <https://www.teenvogue.com/story/occupy-wall-street-legacy>.

112. Levitin, *supra* note 111.

113. President Barack Obama stated, “I did not run for office to be helping out a bunch of, you know, fat-cat bankers on Wall Street.” David Jackson, *Obama: ‘Fat Cat’ Bankers Owe Help to U.S. Taxpayers*, USA TODAY, Dec. 14, 2009, at 7A; see also Kevin Roose, *Bonuses Dip on Wall St., but Far Less Than Earnings*, N.Y. TIMES:

movement marked a shift in popular sentiment toward the wealthy establishment, from tacit resentment to wholesale mistrust and open animosity. Under no scenario would the American economy be better without Wall Street.¹¹⁴ Yet, “[o]n a fundamental level, ‘[Occupy Wall Street] changed the way that people hear and see and understand and process a narrative of resistance.’”¹¹⁵ The wake of Occupy Wall Street is not simply the view of high and mighty financial industries no longer being indestructible, but the impact on people’s perception that vocally scrutinizing authority can be a path for change, or more cynically, a path for impact as measured by social media in the modern era.

2. The “Me Too” Movement

The “Me Too” movement shone a spotlight on the sexual harassment and assaults taking place across the world.¹¹⁶ Hollywood Hills

DEALBOOK (Feb. 29, 2012, 8:48 AM), <http://dealbook.nytimes.com/2012/02/29/as-bank-profits-plunge-wall-street-bonuses-fall-modestly> (“Wall Street continues to be a lightning rod for politicians and critics who contend that the industry’s pay packages are too high.”).

114. Nitin Nohria, *Imagine an Economy Without Wall Street*, WALL ST. J. (June 1, 2016, 6:48 PM) <https://www.wsj.com/articles/imagine-an-economy-without-wall-street-1464821303> (“The global financial system has certainly shown excesses in the past decade, and without a doubt some players have behaved irresponsibly. Nonetheless, *Wall Street remains a fundamentally value-creating enterprise.*”) (emphasis added).

115. Levitin, *supra* note 111.

116. There is a clear and direct impact from the “Me Too” movement. The year following the “Me Too” movement took off globally, the EEOC published a press release stating:

Sexual harassment charges with the EEOC increased by over 12% from the previous calendar year; the first increase in year-to-year harassment complaints in a decade. Sexual harassment lawsuits filed by the EEOC increased by 50% over 2017. Total recovery for sexual harassment complainants in 2018 jumped to approximately \$70 million from \$47.5 million in 2017.

Jonathan Clark, *EEOC Data Confirms #MeToo’s Impact: Six Keys for Employers in the Wake of This Powerful Cultural Moment*, SHEPPARDMULLIN: LAB. & EMP. L. BLOG (Oct. 31, 2018) (citing Press Release, Equal Employment Opportunity Commission, EEOC Releases Preliminary FY 2018 Sexual Harassment Data (Oct. 4,

took the Occupy Wall Street mentality and personalized it to individual interactions. Where the mentor and mentee or mentor and aspiring actor was considered a valid personal relationship, Me Too created a scrutiny of the power structure that had always existed, leading to trials, convictions, and firings starting first in Hollywood and spreading to a multitude of industries.¹¹⁷ Unlike Occupy Wall Street, the Me Too movement responded to true wrongs and abuses of the power structure.¹¹⁸ There is no question that there was a paradigm shift in the ability of victims to speak up, the perception of the public in the legitimacy of those who did speak up, and the newfound hope that it is possible to change the power structures that facilitated these abuses.¹¹⁹

An important difference between the Occupy Wall Street movement and the Me Too movement is that many people complaining about the power structure within the Me Too movement in fact benefited from it. That is in no way meant to say that anyone benefits from sexual

2018)), <https://www.laboremploymentlawblog.com/2018/10/articles/retaliation/eeoc-metoo-impact/>.

117. See Renalia DuBose, *An Unexpected Result of Gender Equality Initiatives in Sports - the Sexualization of Female Athletes*, 48 MITCHELL HAMLINE L. REV. 1139, 1171 (2022) (“The effects of historical events, such as the Civil War, Women’s Suffrage Movement, World War II, and Civil Rights Movement, are worthy of in-depth study in order to grasp the profound results of women’s demands for changes in the social order The ‘Me Too Movement’ has recently redefined topics such as sexual harassment and sexual assaults.”); Jane K. Stoevers, *Title IX, Esports, and #Etoo*, 89 GEO. WASH. L. REV. 857, 867–69 (2021) (“Especially as national attention during the popularization of the #MeToo movement expanded from an initial focus on famous actors and celebrities to farmworkers, hotel workers, law clerks, and USA Olympic gymnasts, vast institutional failures were revealed.”); CBC News: The National, *The Legacy of the ‘Me Too’ Movement 5 Years Later*, YOUTUBE (Oct. 31, 2022), <https://www.youtube.com/watch?v=9VO5va9yIMM&list=PLmNt6xcgFNFJ-WoTi14SZ3ip7odpeQ7Xi&index=11> (discussing the Harvey Weinstein and Bill Cosby trials, Hockey Canada’s scandal, and the outrage involving Larry Nassar and U.S. Gymnastics).

118. See, e.g., Doha Madani, *60 Women Accused Bill Cosby. His Conviction Had Been Considered a Big Win For #Metoo*, NBC NEWS (July 1, 2021, 5:38 AM), <https://www.nbcnews.com/news/us-news/60-women-accused-bill-cosby-his-conviction-had-been-considered-n1272864>. See also Stoevers, *supra* note 118, at 868 (“Sites of vulnerability and problematic power differentials were exposed, millions of people spoke out in bold demonstrations of solidarity, and abusers faced consequences.”).

119. See Loren Galloway, *How the Courts Fumbled on Sexual Assault—and What the NCAA Can Still Do About It*, 26 SPORTS LAWYERS J. 203 (2019) (discussing legal strategies to combat sexual assault in college sports).

harassment or sexual assault. Nor is it meant to insinuate that those who were harmed but also profited by using the structure to their benefit should have stayed quiet because of their profit. Instead, the difference between these movements is that even with the corruption and evils in the Hollywood and media empires, the participants within the structure gained value.¹²⁰ The experience of going through Hollywood made actors and actresses better at their crafts, reaped financial rewards for participants, and increased the American economy. While the Me Too movement rightfully exposed abuses, advocates of the movement often failed to acknowledge the value that would be lost by stripping away the Hollywood casting system in its entirety.¹²¹

The Me Too movement “created opportunities for conversations and action about accountability, healing, redemption, and what it takes to create sustained social change.”¹²² The Me Too movement can be seen as building upon the “us versus them” mentality of the Occupy Wall Street movement by further exposing the interpersonal corruption within a system and solidifying society’s shift to believing more readily those who speak up.¹²³ Against the backdrop of the Me Too Movement, student-athletes’ voices for change have been validated.

120. Similarly, the NCAA provides value to student-athletes through scholarships, life lessons such as teamwork and time-management, and a platform to educate oneself and others. Stripping away the NCAA governing abilities in its entirety can only harm student-athletes.

121. See How To Academy Mindset, *Has the #MeToo Movement Gone Too Far*, YOUTUBE (Mar. 24, 2018), <https://www.youtube.com/watch?v=iX1gNTF7liM&list=PLmNt6xcgFNFJ-WoTi14SZ3ip7odpeQ7Xi&index=9&t=1954s> (discussing the consequences of the Me Too movement, and Melanie Phillips stating, “[w]e are all victims now”).

122. Stoevers, *supra* note 118, at 869.

123. See *Sports, Politics & Social Movements*, 25 JEFFREY S. MOORAD SPORTS L. J. 147, 147 (2018) (“I think that those of us who are listening to #MeToo should also be listening to those other movements, and thinking, and listening for belief. . . . [I]f people are repeatedly saying this is my experience, this is what’s happened to me, and we’re not listening, . . . then that’s something, again the onus on the individual to be learning . . . if your mind was changed by hearing the sheer number of people that can say #MeToo, our mind should also be changed by listening to the sheer number of people who say, ‘This is my different experience because of who I am.’”).

3. Black Lives Matter

With voices being lifted among the voiceless, the place meant to protect all Americans came under scrutiny: the police department. After the tragic death of Trayvon Martin, Black Lives Matter was founded in 2013.¹²⁴ In 2020, George Floyd's horrific death at the hands of police brought the Black Lives Matter movement to the forefront of the public's daily news.¹²⁵ The justice system has never operated flawlessly, with disparate impact on minority and poor populations.¹²⁶ But not until the Black Lives Matter movement was there such a lens and national support on the problem of police brutality and racial injustice

124. *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> (last visited Mar. 29, 2023).

125. George Floyd was murdered by police officer Derek Chauvin in May of 2020. See Evan Hill et al, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> (reconstructing what happened to George Floyd); *How George Floyd Died, and What Happened Next*, N.Y. TIMES (Sept. 8, 2020), <https://www.nytimes.com/article/george-floyd.html> (recapping George Floyd's death and the aftermath of outrage due to his brutal murder).

126. See *Race, Trust and Police Legitimacy*, NAT'L INST. JUST. (Jan. 9, 2013), <https://nij.ojp.gov/topics/articles/race-trust-and-police-legitimacy> ("Research consistently shows that members of racial and ethnic minority groups are more likely than whites to view law enforcement with suspicion and distrust. Such individuals frequently report that the police disproportionately single them out because of their race or ethnicity."); Rick Jervis, *Who Are Police Protecting and Serving? Law Enforcement Has History of Violence Against Many Minority Groups*, USA TODAY (June 15, 2020, 3:20 PM), <https://www.usatoday.com/story/news/nation/2020/06/13/mistrust-police-minority-communities-hesitant-call-police-george-floyd/5347878002/> ("Police departments have a long history of violence and aggression toward many minority communities in the U.S., including Latino, Muslim, LGBTQ and Black Americans, creating a deep mistrust of police that has resulted in many minority communities already under-using police departments because they are reluctant to call them for help.").

in the modern era.¹²⁷ Black Lives Matter exposed truths the public had previously been uncomfortable acknowledging.¹²⁸

Black Lives Matter served as the microphone with respect to how policies need to change within institutions, even those with the intent to protect. Likewise, the attacks on the NCAA gave student-athletes the ability to use their voices to change the policies within the NCAA, an institution meant to govern and protect student-athletes. The NCAA has undergone scrutiny for years for the racial disparities and the wealth gap between student-athletes and those who run the NCAA.¹²⁹ “[Student-athletes], specifically those in sports that are

127. See Don Corbett, *Changing the Game: George Floyd, Athlete Protest, and the Counterspeech Doctrine*, 98 U. DET. MERCY L. REV. 197, 201 (2021) (“[George] Floyd’s death forced many whites to acknowledge how shielded they are from the racial inequity that gives rise to the frustration and anger black people feel when they die at the hands of police officers. This resulted in a louder white protest voice regarding racism and considerable pressure for local, state, and federal government to meet the urgent need for policy and legal change.”); Jason Silverstein, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World*, CBS NEWS (June 4, 2021, 7:39 PM), <https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact/> (“George Floyd’s murder in Minneapolis in May 2020 sparked the largest racial justice protests in the United States since the Civil Rights Movement. But the movement went far beyond this nation’s borders - it inspired a global reckoning with racism.”).

128. See Rashawn Ray, *Black Lives Matter at 10 Years: 8 Ways the Movement Has Been Highly Effective*, BROOKINGS (Oct. 12, 2022), <https://www.brookings.edu/blog/how-we-rise/2022/10/12/black-lives-matter-at-10-years-what-impact-has-it-had-on-policing/> (discussing the lasting impact of the Black Lives Matter Movement).

129. Brandon Posivak, *The Demise of the Hub-and-Spoke Cartel and the Rise of the Student Athlete: A Significant Step Toward a New Era of Conferences in NCAA v. Alston*, 31 U. MIAMI BUS. L. REV. 38, 72 (2022) (citing *NCAA v. Alston*, 141 S. Ct. 2141, 2151 (2021)) (“Justice Gorsuch explicitly noted [in *Alston*] that at its core, the leaders of the NCAA ‘profit in a very different way than the student-athletes whose activities they oversee’, with NCAA President Mark Emmert earning almost \$ 4 million annually.”); see also Daniel Bartlett, *The Seal Has Been Lifted: NCAA and Predominantly White Colleges Must Soon Stop Exploiting Their Black Athletes*, 11 AM. U. BUS. L. REV. 185, 196–97 (2022) (discussing how the NCAA has profited off the work of Black athletes); Chloe McKenzie, *Yes, Some College Athletes Face Food Insecurity. Colleges Can Change That.*, GLOBAL SPORT MATTERS (Mar. 22, 2022), <https://globalsportmatters.com/health/2022/03/22/colleges-can-prevent-athlete-food-insecurity/> (“Considering that we have overwhelming pay and wealth gaps across race and gender in American society, our goal should not be to introduce new

revenue generating, are much more likely to be Black than their student peers.”¹³⁰ The face of the NCAA has been cast as a white male establishment making money off the backs of black male athletes.¹³¹ Yet, the NCAA and its member colleges once again failed to reexamine its policies to improve upon its potential downfalls, including the need to ensure the fulfillment of the education it alleges is the value that all student-athletes, including minority student-athletes, receive by playing at these universities.¹³² The Black Lives Matter movement was

compensation structures that look like existing ones. Instead, we should create an architecture rooted in wealth justice that closes those gaps.”).

130. Marc Edelman et al., *Exploring College Sports in the Time of Covid-19: A Legal, Medical, and Ethical Analysis*, 2021 MICH. ST. L. REV. 469, 532 (2021); see also Shaun R. Harper, *Black College Football and Basketball Players Are the Most Powerful People of Color on Campus*, WASH. POST (Nov. 11, 2015, 6:30 AM), <https://www.washingtonpost.com/posteverything/wp/2015/11/11/black-college-football-and-basketball-players-are-the-most-powerful-people-of-color-on-campus/> (reporting on a 2013 study that found “black men were 2.8 percent of undergraduate students but 57.1 percent of football players and 64.3 percent of men’s basketball players across the 77 major sports programs in our study”).

131. Even looking solely at the names of various law review articles, there is a clear racial connection being made by authors regarding substantial problems the NCAA failed to recognize. See, e.g., Robert A. McCormick & Amy Christian McCormick, *Major College Sports: A Modern Apartheid*, 12 Tex. Rev. Ent. & Sports L. 13, 23 (2010) (“[T]he ideal of ‘amateurism’ prevents athletes from sharing in the profits they help create, and reserves those profits for universities and their officials. . . . [M]ajor universities, corporate sponsors, television networks, coaches, conference commissioners, and others reap a surfeit of riches, without bearing the cost of the players’ labor, while the athletes themselves, many of whom come from impoverished backgrounds, work for substandard compensation, and with extremely little likelihood of ever playing professionally.”); Jonathan Bateman, *The New Plantation: Black Athletes, College Sports, and Predominantly White NCAA Institutions*, 21 MARQ. SPORTS L. REV. 793 (2011); Maria L. Ontiveros, *NCAA Athletes, Unpaid Interns, and the S-Word: Exploring the Rhetorical Impact of the Language of Slavery*, 2015 MICH. ST. L. REV. 1657 (2015); Elisia J.P. Gatmen, *Academic Exploitation: The Adverse Impact of College Athletics on the Educational Success of Minority Student-Athletes*, 10 SEATTLE J. FOR SOC. JUST. 509 (2011).

132. See Gatmen, *supra* note 132, at 543–47 (discussing academic underperformance of minority student-athletes); McDavis, *supra* note 30, at 307 (discussing the educational goal of college athletics); Patrick Hruby, *‘They Don’t Feel Adequately Prepared’: How Schools Struggle to Ready Athletes for Success After College Sports*, GLOBAL SPORT MATTERS (Sept. 21, 2021), <https://globalsportmatters.com/research/2021/09/21/schools-struggle-ready-athletes-success-after-college-sports-ncaa-eddie-comeaux/> (“People point to overall graduation rates for college athletes being

instrumental in reshaping the public's perception of authority and the approach to challenging authority when its ostensible purpose is failing to be fulfilled.¹³³

Ultimately, the Occupy Wall Street, Me Too, and Black Lives Matter movements changed the way that American society and the world view authority and the public's ability to change the views of those in power. These movements not only shifted the minds of many but contributed to both the majority holding in *NCAA v. Alston* and its concurrence, which has changed the trajectory of the NCAA forever.

E. The Concurrence that Became the Playbook

As the newly established right to monetize student-athletes' NIL has upended the previously established principle of amateurism, the question of the source of NIL rights must be addressed. As explained in Part A, the issue before the Supreme Court in *Alston* was a limited antitrust attack, and the holding was limited to the issues presented by the plaintiffs, namely a challenge to education-related compensation and benefits.¹³⁴ In a strongly worded concurrence, Justice Kavanaugh stated that the NCAA's remaining limitations on student-athlete compensation, namely those unrelated to education like NIL, raise their own significant antitrust issues.¹³⁵ The concurrence can be viewed as "foreshadowing a litany of litigation."¹³⁶ Justice Kavanaugh's skepticism that the NCAA's eligibility bylaws would successfully hurdle a subsequent antitrust challenge was the open invitation for more litigation which prompted the NCAA to revise its stance on NIL rights. Almost oozing with disdain for the principle of

higher than for their non-athlete peers. But they don't mention the racial component. . . . When you disaggregate that graduation data by race and by type of sport, you find that Black athletes in football and men's basketball [in the Power Five conferences] are graduating at rates around 55 percent. For them, there is not the opportunity to pursue and earn a meaningful education.").

133. See Ray, *supra* note 129 (discussing how the Black Lives Matter movement changed societal structures).

134. See *supra* notes 76–83 and accompanying text.

135. *NCAA v. Alston*, 141 S. Ct. 2141, 2166–67 (2021) (Kavanaugh, J., concurring).

136. *The Supreme Court and New NIL Legislation Usher In an Era of Change for the NCAA and Student-Athletes*, CRABBE BROWN JAMES (Aug. 3, 2021), <https://cbjlawyers.com/ncaa-student-athletes-compensation/>.

amateurism which had throughout its history provided the NCAA with amnesty from the full impact of antitrust scrutiny, Justice Kavanaugh declared that the NCAA's business model for collegiate sports would be "flatly illegal in almost any other industry in America."¹³⁷ Chastising the NCAA for capping permissible economic benefits to student-athletes and mocking as circular the NCAA's reasoning that paying student-athletes a fair share of the revenue generated by them is inconsistent with the completely modifiable definition of student-athlete that the NCAA uses,¹³⁸ the concurrence pays little deference to the history and tradition of college athletics. As Justice Kavanaugh provided the playbook for future legal challenges to the NCAA eligibility rules, it was the concurrence and not the majority holding of *Alston* that ushered in the era of NIL.

V. BRACKETING AMATEURISM

There is an argument that *Alston* was simply wrongly decided on antitrust grounds. Such an argument rests upon the uniqueness of secondary education (and the arena of athletic competition it provides) as not being interchangeable with a paradigmatic market held up to antitrust scrutiny. Specifically, "there are material differences between college athletics and ordinary industries such as the restaurants, law firms, hospitals, news organizations, and movie studios that Justice Kavanaugh raised by way of comparison" in the *Alston* concurrence.¹³⁹ The "atypical nature of sports requires atypical antitrust review."¹⁴⁰ In applying antitrust laws to the NCAA, the courts have given some lip service to the uniqueness of the market for college sports by acknowledging that "'a certain degree of cooperation' is necessary to market athletics competition."¹⁴¹ Arguably, much more than a degree of

137. *Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring).

138. *Id.* at 2167–68.

139. Richard D. Friedman, *Alston and the Dejudicialization of Antitrust*, HARV. J. SPORTS & ENT. L. (SPECIAL ISSUE) 1 (2021), <https://harvardjsel.com/wp-content/uploads/sites/9/2021/08/Friedman-Alston-essay.pdf>.

140. *Sherman Act — Antitrust Law — College Athletics — NCAA v. Alston*, 135 Harv. L. Rev. 471, 477 (2021).

141. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1066 (N.D. Cal. 2019) (quoting *O'Bannon v. NCAA*, 802 F.3d 1049, 1069 (9th

cooperation is warranted. The market for college sports simply would not exist without a governing, rule-making body. The NCAA is a unique embodiment of a monopsonist, a fact that should have led to a limited antitrust exception for the NCAA. This uniqueness has been based upon “[t]wo principal factors [which] complicate the [antitrust] situation in Alston: games and students. Games require limits on the nature of the competition. Eligibility rules—who can play?—are one such limit.”¹⁴² The NCAA is not an ordinary supplier within a market; the NCAA creates the market. As perfectly stated by Professor Richard Friedman:

the relationship between college and athlete is not merely one between purchaser and supplier of labor. . . . Colleges do not maintain sports teams merely to sell the spectacle to the outside world College sports, like the full range of extracurricular activities, are also maintained *for the benefit of* the athletes themselves.¹⁴³

The two procompetitive justifications which could have upended the antitrust attack on the NCAA’s grant-in-aid restrictions, namely, the preservation of amateurism and the furtherance of competitive balance with intercollegiate sports, have lost all foothold as “revered tradition of amateurism in college sports.”¹⁴⁴ That revered tradition is gone, and along with it the rightful acknowledgment that collegiate sports is a unique market in which competition simply cannot exist without mandated coordination and collective cooperation to horizontally imposed rules.¹⁴⁵

Notwithstanding the prophetic musings of academics over the inevitable fall of amateurism,¹⁴⁶ musings which predated *Alston* by

Cir. 2015)), *aff’d*, 958 F.3d 1239 (9th Cir. 2020), *aff’d sub nom*, 141 S. Ct. 2141 (2021)).

142. Friedman *supra* note 140, at 1.

143. *Id.* (emphasis added).

144. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

145. College sports are an industry in which “horizontal restraints on competition are essential if the product is to be available at all.” *Id.* at 86.

146. See e.g., Gordon E. Gouveia, *Making a Mountain out of a Mogul*: Jeremy Bloom v. NCAA and Unjustified Denial of Compensation Under NCAA Amateurism

decades, the viability of the “amnesty through amateurism”¹⁴⁷ concept was proven in the courts.¹⁴⁸ Prior to 2021, the bracketing of amateurism with a recognized antitrust exemption might have been a legitimate path forward for the NCAA. The failed litigation strategies of the NCAA in *Alston*, together with the loss of public support, have eliminated the limited antitrust exemption as an option for saving the collegiate model.

It could be said that in *Alston*, the plaintiffs’ attorneys won the game by missing the point. Some might see the madness of an unregulated industry of college athletics marching on. But just because amateurism has fallen, that does not mean the end to a collegiate model of athletics.¹⁴⁹ In fact, some commentators believe the landscape of college sports “will figure itself out”¹⁵⁰ while conceding that “college sports is a train wreck right now.”¹⁵¹ Shannon Terry, founder of the recruiting services Rivals, 247 Sports, and On3, voiced his optimism in an interview with Mike Bratton by saying “college sports is trending” and calling college sports “a rocket ship,” adding, “[w]e are in the second inning of what this beast is going to be.”¹⁵² Hopefully, Terry is correct, and the market of college sports will find its equilibrium with NCAA oversight modified by NIL and transfer freedom.

Rules, 6 VAND. J. ENT. L. & PRAC. 22 (2003); Virginia A. Fitt, *The NCAA’s Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555 (2009); Amy Christian McCormick & Robert A. McCormick, *The Emperor’s New Clothes: Lifting the NCAA’s Veil of Amateurism*, 45 SAN DIEGO L. REV. 495 (2008); Christian Dennie, *Amateurism Stifles a Student Athlete’s Dream*, 12 SPORTS LAW. J. 221 (2005); Richard T. Karcher, *Broadcast Rights, Unjust Enrichment, and the Student-Athlete*, 34 CARDOZO L. REV. 107 (2012).

147. Hivner, *supra* note 59.

148. See, e.g., *Bd. of Regents*, 468 U.S. at 120 (concluding the NCAA plays a vital role in upholding amateurism).

149. The April 3, 2023, interview with Shannon Terry can be found at <https://www.thatsecpodcast.com/>.

150. *Rivals, 247 Sports & On3 Founder Shannon Terry*, THAT SEC PODCAST, at 25:00 (Apr. 3, 2023, 5:00 AM) [hereinafter *Terry Interview*], <https://www.thatsecpodcast.com/podcast/rivals-247sports-on3-founder-shannon-terry/>.

151. *Id.*

152. *Id.* at 25:30.

VI. THE FUTURE OF COLLEGE ATHLETICS

As advised by the quote introducing this article, the changes to the collegiate model set forth in Parts II, III, and IV demand that the governing body of collegiate athletics and all those invested in the experience of the student-athlete must collectively “adjust the sails.”¹⁵³

A. NIL Is Here to Stay

Shortly after *Alston* was decided, the NCAA, of its own volition,¹⁵⁴ wiped out a series of restrictions on the ability of student-athletes to earn money or other in-kind benefits through endorsements, known colloquially as name, image and likeness rights. In less than two years’ time, name, image and likeness (commonly shortened to NIL but, ironically, pronounced by some as “nil”)¹⁵⁵ has become part of the framework of collegiate sports. This is quite remarkable given the public stance taken by representatives of the NCAA in the not-too-distant past. Former president of the NCAA Mark Emmert identified the quest for NIL rights as an “existential threat” to the collegiate model of sports and the “single biggest issue” in his ten years at the helm of the governing body.¹⁵⁶ His stance on NIL experienced a 180 degree (involuntary) turn. Emmert’s resistance to NIL weakened, as did his respect. On June 30, 2021, Emmert stated, “this is an important day for college athletes since they all are now able to take advantage of

153. Ward, *supra* note 1.

154. Technically, the lifting of the requirement of amateurism was done voluntarily by the NCAA in the wake of *Alston*. However, the actions of the NCAA are reminiscent of a term of art within college athletics: “voluntold.” Voluntold is a phrase used by student-athletes to refer to activities related to their sport which technically are not required but are expected. Similarly, the holding in *Alston* did not require the abandonment of amateurism in its application to NIL, but Justice Kavanaugh’s concurrence certainly functioned to make the resulting removal of restrictions on NIL appear to be voluntold and not fully volitional.

155. At the annual meeting of FARA in Indianapolis in November of 2022, economist Andy Schwartz used the “nil” pronunciation during his presentation.

156. Dennis Dodd, *NCAA Prez Calls Name, Image and Likeness Rights an ‘Existential Threat’ to College Sports*, CBS: NCAA FB (Sept. 25, 2019, 9:35 AM), <https://www.cbssports.com/college-football/news/ncaa-prez-calls-name-image-and-likeness-rights-an-existential-threat-to-college-sports/>.

name, image and likeness opportunities.”¹⁵⁷ What was a threat to student-athletes has become an opportunity.

In the aftermath of *Alston*, interim guidance from the NCAA failed to replace the clear demarcation between amateurism and professional sports (which was the hallmark of collegiate athletics pre-*Alston*) with a clear demarcation between NIL and pay-for-play. The verbiage asserted the distinction, but in practice the distinction was blurred at best. Commenting on the blurred line between NIL and pay-for-play, the commissioner of the American Athletic Conference Mike Aresco wryly identified the acronym as “now it’s legal.”¹⁵⁸ The payments to student-athletes that once would have rendered them ineligible to compete became public fodder for coaches to criticize their opponents.¹⁵⁹ Directors of Athletics have also expressed concerns over NIL. In a survey compiled by AthleticDirectorU and AthleteViewpoint, only fifty-three percent favored some sort of student-athlete compensation from NIL.¹⁶⁰ One administrator anonymously expressed concern over the pressure on athletic departments to funnel even more revenue into the elite programs in order to satisfy the new demands from NIL by asking, “[h]ow does that shift of revenue impact Olympic sports, that are 100% funded from revenues generated by football and men’s basketball? We as administrators must start finding solutions to

157. Michelle Brutlag Hosac, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.NCAA.org/news/2021/6/30/NCAA-adopts-interim-name-image-and-likeness-policy.aspx>.

158. Justin Williams, *AAC Commissioner Mike Aresco Again Wants to Abolish the Power5/Group of 5 Divide*, THE ATHLETIC (Mar. 9, 2023), <https://theathletic.com/4293727/2023/03/09/aac-mike-aresco-power-5-group-5/>.

159. In the highly publicized feud between the head football coaches of Alabama and Texas A&M, Coach Nick Saban stated to Alabama fans at a fundraising event, “A&M bought every player on their team. Made a deal for name, image and likeness.” Bill Bender, *Nick Saban vs. Jimbo Fisher Feud: Revisiting the Offseason Feud Between Alabama, Texas A&M*, THE SPORTING NEWS (Oct. 8, 2022), <https://www.sportingnews.com/us/ncaa-football/news/nick-saban-jimbo-fisher-feud-revisited-will-alabama-texas-am/wl39bszoixvcowxrfk16yxhv#:~:text=Fisher%20took%20several%20shots%20at,his%20way%2C%22%20Fisher%20said.>

160. *What Do Athletic Directors Think About Name, Image and Likeness?*, ADU, <https://athleticdirectorU.com/articles/what-do-athletic-directors-think-about-name-image-and-likeness/> (last visited Apr. 22, 2023).

these questions, or it appears as though the legislators will end up doing it for us.”¹⁶¹

Lead1 Association¹⁶² provides insight into the important issues facing the sports world and student-athletes with the immergence of NIL.¹⁶³ The monetization of one’s NIL requires “a balance between athletic performance and branding initiative.”¹⁶⁴ With more opportunities, there emerge more disparities through geography, conference, and among teammates, as well as new complex responsibilities “such as entrepreneurship, taxes, reading contracts, increased time management and more.”¹⁶⁵ Additionally, there is no clear authority on who governs the regulation of NIL and though “a federal solution could help address some of these issues, . . . as we get deeper and deeper into NIL, a federal solution may be harder to implement.”¹⁶⁶ A survey by Lead1 Association containing the “feedback from approximately 80 FBS athletic directors around the nation” evidenced that “90% [of athletic directors] are concerned (73% being extremely concerned) that NIL payments from collectives are being used as improper recruiting inducements,¹⁶⁷ both for high school athletes or college transfers.”¹⁶⁸ With societal questions about paying athletes and regulation issues, including those surrounding transfer portal, still looming large, the lack of guidance regarding NIL and how to prepare student-athletes for the

161. *Id.*

162. LEAD1 Association represents the athletics directors of the 130 member universities of the Football Bowl Subdivision as it advocates for “policy facing NCAA Division I FBS athletic departments, promot[es] consensus among FBS athletic directors, and provid[es] valuable services to member schools – all dedicated towards supporting the success of student-athletes and future of college sports.” *Lead1 Survey Reveals 90% of FBS Athletic Directors Polled Are Concerned NIL Used as Improper Recruiting Tool*, LEAD1 ASS’N (May 4, 2022) [hereinafter *Lead1 Survey*], <https://lead1association.com/whoweare/>

163. *See id.*

164. *Lessons Learned: 30 Days into the NIL Era*, LEAD1 ASS’N, <https://lead1association.com/lessons-learned-30-days-into-the-nil-era/> (last visited June 25, 2023).

165. *Id.*

166. *Id.*

167. While NIL deals are no longer barred, the use of such deals to recruit players remains an NCAA violation.

168. *Lead1 Survey*, *supra* note 163.

responsibilities that come along with these opportunities is an issue that cannot be ignored.¹⁶⁹

The statistics on NIL reveal that the opportunity for NIL payments was both a monumental change to the cornerstone of collegiate sports and not much of a change at all. As Emmert predicted, most student-athletes have not benefited greatly from NIL opportunities.¹⁷⁰ The quarterback for the University of Alabama Bryce Young¹⁷¹ and LSU gymnast Olivia Dunn¹⁷² are the exceptions, not the rule. But even with the NIL superstars, NIL is not always a positive experience.¹⁷³ While “the Rashada deal screwed everybody’s mind up,”¹⁷⁴ failed deals through an institution’s collective will likely be the exception.¹⁷⁵

The benefits from NIL are not shared equally. Reports show that most of the money from NIL deals goes to male student-athletes.¹⁷⁶ Unlike other participation opportunities in sports, which are governed

169. “92% [of athletics directors] disagree [with] NIL payments being used as pay for performance” while “87% agree more structure should be implemented for the transfer portal such as designated time windows on transferring.” *Id.*

170. See Dodd, *supra* note 157 (statement of Mark Emmert) (“One or two will be making some significant amount of money. Nobody else will.”).

171. Bryce Young finished his career with an estimated NIL valuation of 3.5 million dollars. Griffin Adams, *Boardroom NIL Report Card: Alabama Quarterback Bryce Young*, BOARDROOM (Jan. 22, 2023), <https://boardroom.tv/bryce-young-nil-money-deals-alabama/>.

172. With 11 million followers on social media, Dunn has ruled the market of NIL opportunities. See Pete Nakos, *Cactus AI, Livvy Dunne Partnership One of ‘Most Disruptive NIL Campaigns’*, ON3: NIL (Mar. 10, 2023), <https://www.on3.com/os/news/cactus-ai-livvy-dunne-partnership-lsu-tigers-gymnastics-reponse-statement-nil-deal/> (discussing Olivia Dunne’s NIL market value).

173. Livvy Dunne’s NIL endorsement of an artificial intelligence tool has been criticized as potentially fostering academic misconduct. *Id.*

174. Terry Interview, *supra* note 151, at 29:45. Rather than fueling harmful NIL deals, Shannon Terry believes that in time the efficient marketplace will create more competition and more parity among institutions. *Id.* at 27:20.

175. See *A \$13-million Deal Gone Wrong, a Top Recruit and What Happens Next*, ESPN (Jan. 20, 2023, 9:00 AM), https://www.espn.com/college-football/story/_/id/35482485/jaden-rashada-faq-top-recruit-nil-deal-florida-football (stating NIL deal will likely become more professional).

176. Carly Wana & Bloomberg, *Men Make Twice as Much Money as Women Under the NCAA’s New Rules that Allow College Basketball Players to Cash In*, FORTUNE (Mar. 16, 2023, 2:54 PM), <https://fortune.com/2023/03/16/how-much-do-college-basketball-players-make-ncaa-men-twice-as-much-women-nil/>.

by Title IX, NIL is market driven. The market does not ensure equal opportunities between the genders. Additionally, all sports do not benefit equally from NIL. Not surprisingly, the two sports whose players have reaped the most lucrative deals are football¹⁷⁷ and men's basketball. Athletic departments will be most interested in brokering NIL deals with the so-called revenue sports, as these sports are generally the only programs on campus with positive cash flow for the institutions.¹⁷⁸ Just as NIL deals are not equal among the genders or among sports, they are not shared equally among the three Divisions within the NCAA. While most of the institutions benefitting from NIL deals are in Division I, Memphis' Rhodes College, a Division III school, has become the first Division III program to land an all-athlete NIL deal.¹⁷⁹

There is one demographic completely excluded from the NIL conversation: international student-athletes. With over 20,000 international student-athletes competing through the NCAA, the discussion of their opportunity, or lack of opportunity, to receive NIL deals or potential employee status through a pay-for-play model is an important fairness consideration.¹⁸⁰ International student-athletes on F-1 visas are greatly restricted in their ability to partake in opportunities to earn compensation as violating those visa requirements can lead to dire

177. Pete Nakos, *Latest NIL Data Shows Dollars Continue to Flow in College Football*, ON3: NIL (Oct. 12, 2022), <https://www.on3.com/nil/news/latest-nil-data-shows-dollars-continue-flow-college-football-inflcr-average-deal/>.

178. See Tim Buckley, *What's This NIL Deal Really All About?*, DAILY MEMPHIAN (Nov. 24, 2022, 8:45 AM), <https://dailymemphian.com/subscriber/article/32484/tim-buckley-nil-deal-memphis-tigers-athletics-director-laird-veatch> (discussing NIL deals for various football and basketball student-athletes).

179. Corey Davis, *Rhodes College Scores NIL Deal with MOGL It Hopes Will Be Model for Other D-III Schools, Athletes*, MEMPHIS BUSINESS JOURNAL (Mar. 21, 2023), <https://www.bizjournals.com/memphis/news/2023/03/21/rhodes-college-division-iii-nil-deal-mogl.html#:~:text=The%20school%20announced%20this%20month,the%20terms%20of%20the%20deal>.

180. See Anayat Durrani, *3 Things International Student-Athletes Should Know*, U.S. NEWS (Feb. 15, 2022, 3:51 PM), <https://www.usnews.com/education/global-universities/articles/things-international-student-athletes-should-know> (discussing legal complications with international student-athletes on student visas landing NIL deals); Holt Hackney, *Everything You Need To Know About the NIL and International College Athlete Issue*, SPORTS LAW EXPERT (May 9, 2022), <https://sportslawexpert.com/2022/05/09/everything-you-need-to-know-about-the-nil-and-international-college-athlete-issue/> (discussing various challenges for international student-athletes).

consequences. When international students are required to provide services in exchange for compensation, typically their employment must be one of the following:

(1) on campus work up to 20 hours per week (whether related to their field of study or not); (2) Curricular Practical Training (CPT), or practical training tethered to a student's curriculum (i.e., such as an internship); [or] (3) Optional Practical Training or typically a one year work permit post-graduation related to the student's field of study.¹⁸¹

This question is not just how to get the best deals for one student-athletes, but how to create equally accessible opportunities for all student-athletes making NIL and international student-athletes an issue “that the college sports industry could possibly coalesce around . . . and would likely receive bipartisan support.”¹⁸²

While NIL opportunities have been unavailable to international student-athletes due to the restrictions attendant to international student-athlete visas, the University of Connecticut is among the institutions seeking a way for their international student-athletes to participate in NIL opportunities without jeopardizing their visa status.¹⁸³

NIL is here to stay notwithstanding the critics. However, what NIL portends for the future of college athletics is uncertain.¹⁸⁴ Would severing the word “student” from “athlete” be a viable path forward? Should the “class-optional” model be endorsed because “[s]chools [which are] comfortable [with] spending huge donations on recruiting the best players— funds that might have been used to strengthen their

181. Hackney, *supra* note 181.

182. *Id.*

183. Paul Doyle, *UConn Announces Plan to Expand Name, Image, and Likeness Opportunities for Athletes*, CT INSIDER (June 27, 2022, 4:26 PM), <https://www.ctinsider.com/sports/uconn/article/UConn-announces-plans-to-expand-name-image-and-17268857.php>.

184. See Mitch Daniels, *It Looks Like Pay-For-Play in College Sports Is Here to Stay. Too Bad.*, WASH. POST (May 26, 2022, 7:00 AM), <https://www.washingtonpost.com/opinions/2022/05/26/college-sports-pay-for-play/> (discussing potential consequences of paying student-athletes).

academic missions—will be free to do so.”¹⁸⁵ Instead of a requirement, education could become “an optional fringe benefit of the job” for the employed athlete affiliated with a school.¹⁸⁶ Justifying the class-optional model is the argument that university presidents might favor it over bending admission standards to accommodate some prospective recruits, and “[a]dministrators could pitch this as refocusing on their academic core mission.”¹⁸⁷

The anticipated separation of the student role from the athletic one applies generally to football, as its economic market makes it the most easily identifiable for creating a minor league or university sponsorship approach. With football as “its own entity, [it] would have no compulsion to fund other sports” causing universities to be forced “to recoup tens of millions through negotiating license and lease fees” to save other sports.¹⁸⁸ Title IX compliance may also be impacted as without football the ratio of male-female scholarships provided by universities would be vastly disproportionate. Thus, as universities scramble to compete with the larger and more well-funded programs by cutting out non-revenue sports so their “athletic department budgets come close to balancing,” the devaluation of the purpose of student-athletics through corporate takeover by NIL may ultimately be what brings about the end of the “college” sports.¹⁸⁹ What exists post-*Alston* is a college sports multibillion dollar industry¹⁹⁰ comprising more than 350 Division I institutions no longer playing by a singular rule book.¹⁹¹

185. *Id.*

186. *Id.*

187. G. Allan Taylor, *Moving the Goal Posts: AD Predicts a Pay-To-Play Future for Big-Time College Football — With Classes Optional*, THE ATHLETIC (Nov. 16, 2021), <https://theathletic.com/2952855/2021/11/16/moving-the-goal-posts-ad-predicts-a-pay-to-play-future-for-big-time-college-football-with-classes-optional/>.

188. *Id.*

189. Daniels, *supra* note 185 (“I’m sure the new league of sponsored professionals will be highly entertaining and a huge financial success. Just please don’t call it ‘college’ sports.”).

190. Christy Gren, *College Sports Is Multibillion Dollar Industry in the U.S.*, INDUSTRY LEADERS (Oct. 16, 2021), <https://www.industryleadersmagazine.com/college-sports-is-multibillion-dollar-industry-in-the-us/>.

191. See *Our Division I Members*, NCAA <https://Ncaa.org/sports/2021/5/11/our-division-i-members> (last visited June 28, 2023), for a detailed breakdown of NCAA Division I schools.

B. The Transfer Portal

While NIL moves the goalpost of the collegiate model,¹⁹² it is the juxtaposition of the NIL with the relaxed transfer rules that truly challenged the landscape of college sports. As recently as 2018, a Division I student-athlete's eligibility to play his or her sport hinged not only on amateur status but also on enrollment and academic eligibility¹⁹³ at a member institution.¹⁹⁴ Just as the requirement of amateurism has been gutted by NIL, the enrollment piece of eligibility has changed dramatically with the loosening of the transfer rules. Under the former transfer rule, a student-athlete who transferred enrollment from one four-year Division I institution to another would not be eligible to play his or her sport at the new institution during the first academic year in residence.¹⁹⁵ The 'sit-a-year' penalty to transferring served as a powerful deterrent to student-athlete mobility. In addition to the NCAA transfer rules, conferences were free to adopt even more restrictive policies for intra-conference transfers. These policies were designed to ward off poaching from the teams with whom coaches and players had the most familiarity. With the adoption of the one bite of the apple—one time transfer rule a student-athlete may transfer to a new institution and play in the upcoming season without having to sit out a year. The availability of immediate eligibility fueled the popularity of the transfer portal.

When the transfer portal debuted on October 15, 2018, not only did the freedom to transfer enter a new era but the process was

192. See Daniels, *supra* note 185.

193. Initial eligibility requirements have changed with the removal of standardized test scores, but student-athletes must still be deemed academic qualifiers. Courtney Rickard, *Understanding the Revised NCAA Initial-Eligibility Requirements*, HONESTGAME (Jan. 18, 2023), <https://honestgame.com/2023/01/18/NCAA-test-score-ruling>.

194. See generally NCAA, SUMMARY OF NCAA REGULATIONS — NCAA DIVISION I (2011–12), http://fs.ncaa.org/Docs/AMA/compliance_forms/DI/DI%20Summary%20of%20NCAA%20Regulations.pdf (stating the NCAA academic and enrollment requirements for student-athletes).

195. *Id.* pt. I.10, at 8.

streamlined.¹⁹⁶ All information about an available student-athlete, once gathered by the current school's compliance officers and shared with the prospective school's compliance staff, is now housed in a database into which any student-athlete may enter by directing his or her school's compliance officer to add their name to the portal. The transparency and immediacy of information communicated by the transfer portal represent progress; however, the promise of landing a better opportunity by entering the portal falls unfulfilled by many student-athletes.¹⁹⁷ Data published by the NCAA reveals that only half of the 9,567 student-athletes who entered the portal in 2021 landed at another institution.¹⁹⁸

In theory, granting student-athletes greater mobility and greater opportunity to play their sport is a positive thing. Many coaches, however, have been outspoken in their criticism of the transfer portal as applied against the backdrop of NIL. In an interview with ESPN's Chris Low, Clemson head football coach Dabo Swinney describes the transfer portal as "an absolute mess and a trainwreck[.]"¹⁹⁹ adding that the detriment will ultimately fall on the student-athletes who "end up with no degrees and make decisions . . . [that] sacrifice the long-term value of education, relationships and connectivity."²⁰⁰ The intersection of mobility with the lure of lucrative NIL deals creates the perfect storm to incentivize recruitment violations. Despite the NCAA's guidance on NIL explicitly prohibiting the use of NIL opportunities for recruitment,²⁰¹ the practice belies the guidance. Many have commented upon

196. See Sam Herder, *History of the NCAA Transfer Portal*, BETMGM: THE ROAR (June 16, 2021), <https://sports.betmgm.com/en/log/history/NCAA-transfer-portal/>.

197. Dean Golembeski, *Half of College Athletes in Transfer Portal Go Unsigned*, BestColleges (May 2, 2022), <https://www.bestcolleges.com/news/2022/05/02/ncaa-transfer-portal-dashboard/>.

198. *Id.*

199. *Id.*

200. *Id.*

201. Each time the NCAA has issued guidance regarding NIL, whether in the interim NIL policy of July 2021, the later Q&A document issued in November 2021, or the October 2022 further guidance, the NCAA has been clear: NIL deals which are contingent upon a student-athlete's enrollment at a designated institution are strictly prohibited. See James Fielding & Phil Lu, *NCAA Rules to Be Aware of Before Reaching an NIL Deal*, LITTLER (Nov. 28, 2022), <https://www.littler.com/publication-press/publication/NCAA-rules-to-be-aware-reaching-NIL-deal#>

the apparent use of NIL for recruitment of top talent. Commenting on a \$800,000.00 NIL deal, calling it a “watershed moment in transfer recruiting” Marquette’s men’s basketball head coach Shaka Smart criticized both the practice of recruiting players using NIL deals and the NCAA’s culpability of having “really mangled [the] rules.”²⁰²

Despite concerns over the intersection of NIL and the transfer portal, the transfer portal has been viewed through a positive lens as “the ultimate counterbalance”²⁰³ to NIL as the freedom of student-athletes to transfer will force most NIL money into the hands of current student-athletes instead of new recruits.

C. States Check into the Game

On June 30, 2021, the Board of Directors of the NCAA adopted an interim NIL policy applicable to student-athletes in all three Divisions. The interim policy did little more than concede that student-athletes can receive compensation for their NIL, thereby adding to the misperception that such was the holding of the *Alston* case. The only throwbacks to the principle of amateurism were the two limitations on NIL that would, in theory, still trigger ineligibility, namely, deals which were prohibited pay-for-play (as the quid pro quo for the payment was the student-athletes play or performance for a designated team) and impermissible recruitment incentives. The vacuum of NCAA leadership evidenced by this policy and the resulting absence of a single national playbook for NIL has caused some to seek congressional intervention.²⁰⁴ However, the interim policy further concedes that state law trumps NCAA regulations, athletic conference policies, and the individual rules of colleges and universities, so student-athletes in states

202. *Evening Standard*, D1.TICKER (Feb. 15, 2023, 4:39 PM), <https://my.ameda.com/portal/report/EmailPreviewDeploymentExternal.jsp?aW5Ccm93c2VyPXMU3BsaXRJZD0xMzgXJkV-udmlyb25tZW50SWQ9MTI1Njg=>.

203. *Terry Interview*, *supra* note 151, at 45:30.

204. Speaking at the NCAA Convention Chairperson of the NCAA’s Board of Governors and Baylor University President Linda Livingston voiced the concern that preemptive federal law was needed to prevent the emergency practice of state legislators passing laws to give in state universities “a competitive edge over their neighbors.” See Beth Harris et al., *College Athletes Could Be Paid as Much as \$25,000*, *FORTUNE* (Jan. 20, 2023, 6:14 AM), <https://fortune.com/2023/01/20/college-athlete-protection-act-chris-holdens-california-bill-revenue-sharing/>.

with state adopted NIL laws may and must comply with such laws. The inescapable deference to state law added to the responsibility attached to the newly established NIL opportunity.

NIL has become the topic du jour among state lawmakers,²⁰⁵ and as some states are seeking to preemptively codify their state NIL rules,²⁰⁶ the window for a national playbook appears to have closed. Of particular note is Oklahoma's Senate Bill 840, which simplifies the NIL playbook by eliminating most of the restrictions thereon.²⁰⁷ Senate Bill 840 eliminates the requirement that NIL payments be commensurate with the student-athlete's market value, thereby giving a not-so-subtle high five to pay-for-play and simultaneously giving a disrespectful gesture to the NCAA by stating such NIL payments do not impact student-athlete eligibility.²⁰⁸ The rhetoric of accompanying the support of the Oklahoma NIL bill is hyperbolic,²⁰⁹ but so was Justice Kavanaugh's concurrence in *Alston*. Tackling head on (or perhaps flipping) the next big issue on the collegiate sports landscape, the Oklahoma Bill prohibits the classification of student-athletes as employees.²¹⁰ Other states, like Alabama, have repealed the short-lived NIL statute, preferring to operate in a guard-rail-free zone.²¹¹

205. For a comprehensive summary of state NIL laws and proposed legislation, see Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, OPENDORSE (Jan. 31, 2023), <https://biz.opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/>.

206. See, e.g., Jeremy Crabtree, *Oklahoma Moves Closer to Significantly Reshaping State NIL Laws*, ON3: NIL (Apr. 4, 2023), <https://www.on3.com/nil/news/oklahoma-moves-closer-to-significantly-reshaping-state-nil-laws-ou-sooners-osu-cowboys/>.

207. See generally S.B. 840, 59th Leg., 2023 Reg. Sess. (Okla. 2023) (permitting universities in Oklahoma broad power to support NIL activities).

208. *Id.* § 820.23.

209. According to On3, Representative Jon Echols advocated for the Bill by saying, "not passing this is tantamount to saying we no longer wish to compete on the collegiate level." Crabtree, *supra* note 207.

210. S.B. 840, 59th Leg., 2023 Reg. Sess. § 820.23(E) (Okla. 2023). While beyond the scope of this article, valuable scholarship on the employment classifications of student-athletes may be found within this Symposium Issue.

211. See H.B. 76, 2022 Reg. Sess. (Ala. 2022) (repealing H.B. 404, 2021 Reg. Sess. (Ala. 2021)).

D. The Transformation Committee Report

The NCAA created the Transformation Committee²¹² (“Committee”) in reaction to the legal, political, and cultural environmental evolution surrounding student-athletes and the public’s perception of the NCAA.²¹³ Its purpose? “[T]o identify opportunities to modernize college sports and recommend forward-looking changes for consideration by the NCAA.”²¹⁴ However, achieving its mission of creating “transformative change” seems to have been less than successful after the Committee’s recently published report²¹⁵ received mixed reactions.²¹⁶ The Committee appears excited with its recommendation, and the report was successfully adopted by the NCAA earlier this year.²¹⁷ However, others argue that it was “overall . . . underwhelming and unclear” as the Committee’s recommendations “feel like starting points for more vigorous discussion” than clear directions for what that

212. *Division I Transformation Committee*, NCAA, <https://www.ncaa.org/sports/2021/11/3/division-i-transformation-committee.aspx> (last visited Mar. 31, 2023).

213. “‘Over the course of the last decade, the legal, political and cultural environment surrounding college sports has evolved faster than the rules, processes and structures we use to govern it,’ said Greg Sankey, commissioner of the Southeastern Conference, and Julie Cromer, director of athletics at Ohio University, who together co-chaired the Division I Transformation Committee.” Andy Berg, *NCAA D-I Board Approves Transformation Committee’s Modernization Recommendations*, ATHLETIC BUS. (Jan. 13, 2023), <https://www.athleticbusiness.com/operations/governing-bodies/article/15305485/ncaa-division-i-board-approves-transformation-committees-recommendations>.

214. *Division I Transformation Committee*, NCAA, <https://www.ncaa.org/sports/2021/11/3/division-i-transformation-committee.aspx> (last visited Mar. 31, 2023).

215. NCAA DIVISION I TRANSFORMATION COMMITTEE, FINAL REPORT (Jan. 3, 2023), https://ncaaorg.s3.amazonaws.com/committees/d1/transformation/Jan2023D1TC_FinalReport.pdf.

216. See Emily Caron, *It’s Transformation Time for the NCAA—But What Does That Actually Mean?*, SPORTICO (Jan. 4, 2023, 8:30 AM), <https://www.sportico.com/leagues/college-sports/2023/ncaa-transformation-update-1234700141/> (walking through some of the highlights from the Transformation Committee’s report).

217. Ralph D. Russo, *NCAA Board Approves Recommendations For Division I Reform*, AP (Jan. 12, 2023, 7:21 PM), <https://apnews.com/article/sports-massachusetts-georgia-college-2469e6b77addc708f81cb5303c192c94>.

transformation will look like in practice.²¹⁸ A main issue on the docket for the Committee was that of NIL regulation, for which it “largely punted responsibility . . . to the state and/or federal governments or agencies.”²¹⁹ Though it may be a first step in the right direction, it seems that the Committee failed to live up to the high expectations that the name of “Transformation” imbued upon it and “the future of the NCAA is still muddled at best.”²²⁰ While the reach of the required amateurism for NCAA eligibility has shrunk, the NCAA seems committed to continued regulation of non-education-related compensation to student-athletes. “The Court’s decision in *Alston*, however, means that pay-for-play is likely on the NCAA’s one-yard line.”²²¹

The key takeaways from the Transformation Committee Report may be placed into four buckets: The holistic student-athlete benefits model, membership expectations, championships, and governance.²²² The holistic focus on the student-athlete was embedded in key commitments to academic support and degree completion, medical coverage, best practices in physical and mental health care, financial support for degree completion and scholarship protection, and comprehensive educational programming (including career counseling and life skills modules on mental health; strength and conditioning; nutrition; NIL; financial literacy; transfer requirements; career preparation; diversity,

218. Matthew Dixon, *Thoughts on the Division I Transformation Committee Final Report*, SPORTS ENTHUSIASTS (Jan. 8, 2023), <https://sportsenthusiasts.net/2023/01/08/thoughts-on-the-division-1-transformation-committee-final-report/>; but see Russo, *supra* note 218 (“Keep in mind these are concepts at this point The board was very adamant its support of student-athletes and most of the transformation committee recommendations focused on how to enhance the experience for student-athletes.”).

219. Anna Bullock & Kyle Stroup, *NCAA Division I Transformation Committee Report Signals Greater Benefits for Athletes*, JDSUPRA (Mar. 30, 2023), <https://www.jdsupra.com/legalnews/ncaa-division-i-transformation-9233379/>.

220. Amanda Christovich, *NCAA Releases Recommendations to Modernize Division I*, FRONT OFFICE SPORTS (Jan. 3, 2023, 2:14 PM), <https://frontofficesports.com/ncaa-transformation-committee-recommendations/>.

221. *Sherman Act — Antitrust Law* — NCAA v. Alston, 135 HARV. L. REV. 471, 480 (2021). “The Court’s opinion in *NCAA v. Alston* opens the door to a different approach in the collegiate sports context.” *Id.* at 478

222. See NCAA DIVISION I TRANSFORMATION COMMITTEE, *supra* note 216. While all four areas of transformation impact the viability of collegiate sports moving into the future, only the holistic focus on the student-athlete bears directly upon the focus of this article.

equity, inclusion, and belonging; and campus sexual violence prevention).²²³

E. The Game Yet to Be Played

Legalized gambling may pose a threat to college athletics.²²⁴ In 2018, the Supreme Court “cleared the way for states to legalize sports betting” by holding that the Professional and Amateur Sports Protection Act, which prevented it, was inconsistent with the Constitution as it “‘regulate[d] state governments’ regulation’ of their citizens.”²²⁵ It remains to be seen what impact, likely negative, the legalization of sports related gambling will have on the intercollegiate athletics and their fans.²²⁶ However, problems for student-athletes and fans alike are predicted as “the introduction of legal wagering on college sports will have a detrimental impact on student-athletes and general student

223. *Id.* at 12–13.

224. Jason W. Osborne, *As March Madness Looms, Growth in Legalized Sports Betting May Pose a Threat to College Athletics*, THE CONVERSATION (Mar. 10, 2023, 8:39 AM), <https://theconversation.com/as-march-madness-looms-growth-in-legalized-sports-betting-may-pose-a-threat-to-college-athletes-200143>.

225. *Murphy v. NCAA*, 138 S. Ct. 1461, 1486 (2018) (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)); *A Whole New Ballgame: Implications of Legalized Sports Betting for College Athletics*, LEAD1 ASS’N [hereinafter *Sports Betting Implications*], <https://lead1association.com/a-whole-new-ballgame-implications-of-legalized-sports-betting-for-college-athletics/> (last visited Apr. 6, 2023). See also Ariane de Vogue & Maegan Vazquez, *Supreme Court Lets States Legalize Sports Gambling*, CNN: POLITICS (May 14, 2018, 3:45 PM), <https://www.cnn.com/2018/05/14/politics/sports-betting-ncaa-supreme-court/index.html> (statement of CNN Supreme Court Analyst Steve Vladeck) (“The question now is whether Congress will leave the states to make their own choices or will now try to enact some kind of federal regulation of sports betting . . .”).

226. See Paul Solman & Ryan Connelly Holmes, *College Partnerships Are Bringing Sports Betting to Campus. Are Students Safe?*, PBS: NEWS HOUR (Feb. 27, 2023, 6:35 PM), <https://www.pbs.org/newshour/show/rise-of-sports-betting-brings-concerns-some-colleges-are-too-involved-in-its-promotion> (“[N]ational surveys between 2018 and 2021 show a roughly 30 percent increase in risk for gambling problems nationwide.”); see also *U.S. Sports Betting: Here’s Where All 50 States Stand on Legalizing Sports Gambling, Gaming Sites*, CBS: CBS SPORTS (June 29, 2023, 7:16 AM), <https://www.cbssports.com/general/news/u-s-sports-betting-heres-where-all-50-states-stand-on-legalizing-sports-gambling-newer-site-mobile-bets/> (tracking the current state of legal sports betting throughout the states).

bodies.”²²⁷ Student-athletes face immense and intense community pressures, potentially exacerbated by the effects of gambling as it can “stimulate the brain’s reward system much like drugs or alcohol can, leading to addiction.”²²⁸ The risks associated with betting are yet to be seen, but “the responsibility to educate student-athletes should be on the institutions and betting industry to better inform student-athletes about some of the possible unintended effects.”²²⁹

Exactly how and the extent to which the current landscape of collegiate sports exacerbates the already mentally taxing role of student-athletes remains to be discovered. What we do know is that attention to the mental health of student-athletes is critically important. As student-athletes add NIL opportunities and the creation of their unique brand to an already full schedule of sport and academics, they may suffer from “role engulfment,”²³⁰ in which they sacrifice a broad range of identities for the singular identity of being an athlete.²³¹ With the lure of compensation, NIL likely adds to the “enormous pressures to see themselves as athletes first, or even athletes only. This can lead to numerous short- and long-term problems for these athletes in managing the competing time and energy demands from their multiple roles.”²³²

What does the post-*Alston* world of collegiate athletics look like? For many Division I institutions, it looks like big business for the athletic departments. With money talking more than academics and more than the college experience, greater time and energy will be focused on meeting the NIL demands of both prospective and current student-athletes. For Division I institutions outside the Power 5, the lack of television revenue will widen the gap with the Power 5 making recruitment and retention of top talent more challenging. For some schools, like St. Francis College, it might mean an end to all collegiate

227. *Sports Betting Implications*, *supra* note 226.

228. *Compulsive Gambling*, MAYO CLINIC (June 18, 2022), <https://www.mayoclinic.org/diseases-conditions/compulsive-gambling/symptoms-causes/syc-20355178>.

229. *Sports Betting Implications*, *supra* note 226.

230. Hailey Harris et al., *Hidden Consequences: Examining the Impact of NIL on Athlete Well-Being*, 13 J. Applied Sport Mgmt. 29, 30 (2021).

231. *Id.*

232. *Id.*

athletics.²³³ It is somewhat ironic that the decision by St. Francis to discontinue all athletic programs was made public only a week after Fairleigh Dickinson's historic defeat of number one seed Purdue in the NCAA men's basketball tournament.²³⁴ Whether St. Francis is terminating athletic programs solely on economic grounds or because the new model of college athletics just doesn't hold open the cinderella stories of old is impossible to tell. We can hope that the corrective measures taken by the NCAA will reduce rather than fuel additional litigation.²³⁵ Once the fight song dies, what we have lost is no longer just about the balance sheet of collegiate sports. We have lost the culture of collegiate athletics and the school spirit. While the NCAA principle of amateurism did restrict a student-athlete's ability to monetize his or her name, image, and likeness, it also served as a guardrail around an enterprise that was not just about the money.

VII. CONCLUSION

Against a changed societal backdrop sympathetic to the experience of the student-athlete, various plaintiffs challenging the reach of the NCAA's amateurism principle have experienced recent success. By focusing solely on the idea of amateurism as its protection, the NCAA missed that society's view of the NCAA's principle of amateurism was twisting into a view of exploitation rather than the intended ideology of opportunity. Instead of being proactive to address the cultural shift, the NCAA remained passively confident that the courts were on its side. While the NCAA regulated the athletic courts, the future of college sports was being determined in the judicial courts. While

233. See Christian D'Andrea, *D-1 St. Francis College Gave Its Student-Athletes 2 Months Public Notice Their Sports Were Being Cut*, USA TODAY SPORTS: FORTHEWIN (Mar. 20, 2023, 8:02 PM), <https://ftw.usatoday.com/2023/03/st-francis-college-brooklyn-dropping-all-sports-2-months-notice-2023>.

234. *Id.*

235. So far, however, this hope is unfounded. On April 4, 2023, another round of litigation against the NCAA began as a group of current and former student-athletes have sued the NCAA over *Alston* payments that were never paid. Alex Lawson, *College Athletes Hit NCAA with Suit over Absent Payouts*, LAW360 (Apr. 4, 2023, 7:33 PM), https://www.law360.com/sports-and-betting/articles/1593613?nl_pk=30f8cb74-608a-4471-acb4-cdf3d8c8ebc0&utm_source=news-letter&utm_medium=email&utm_campaign=sports-and-betting&utm_content=2023-04-05&read_more=1&nlsidx=0&nlaidx=0.

arguably keeping its eye on the proverbial ball of regulation pursuant to the collegiate model, the NCAA failed to address the elephant which had entered the room.²³⁶

Despite the NCAA's lack of foresight, concluding that the college sports market would be better off without the NCAA is simply unfounded. While some might rush to discard the NCAA in the wake of the recent losses suffered in court, doing so would jeopardize the still valuable pathway of the student-athlete. A regulatory body maintaining and enforcing clear rules is essential for any market including the market for intercollegiate athletics. The vilification of the NCAA is unnecessary and impedes the current momentum for positive change to the collegiate model.

Undoubtedly, the NCAA needs modification, and the organization itself now appears to recognize as positive transformations what critics long ago decried as abuses within the collegiate model. To check the longstanding power of the NCAA, the pendulum of external pressure needed to swing against it in order to find balance between the benign original purposes (like amateurism) and the changing reality of college sports. Perceived missteps by the NCAA which manifested in unwavering adherence to the collegiate model are actually missteps to be laid at the feet of the presidents and athletic directors of member institutions. Only with the leaders of the educational institutions can the reemergence of the collegiate model be achieved. Hopefully, student-athletes, coaches, athletic directors, and university presidents, can move forward in tandem with the NCAA to find a balance that both recognizes the need for a revised collegiate model while honoring the purpose of the principle of amateurism. This new balance may already be on the horizon as student-athletes are allowed the ability to benefit from their name, image, and likeness, but remain amateurs in their sport.

Since *Alston*, the pillars of the student-athlete experience have changed. However, it remains to be seen whether these changes are truly transformative to collegiate athletics or are only the swinging of

236. The selective attention test known as the Invisible Gorilla developed by Daniel Simons and Christopher Chacris serves as an appropriate metaphor. Daniel Simons, *Selective Attention Test*, YouTube (Mar. 10, 2010), <https://www.youtube.com/watch?v=vJG698U2Mvo>. While this fantastic video pre-dates the criticism of the NCAA's handling of NIL, it humorously demonstrates the NCAA's failure to spot the gorilla entering the game.

the pendulum needed to get the attention of the decision makers. Will Congress head the cries and adopt federal legislation regarding NIL, or will we continue to apply the patchwork of state statutes? Will future litigation challenge other restrictions which are part of the guardrails on athletics imposed by the NCAA, or has the litigation cycle been diffused? Only time will tell. But we must lose the cynicism and restore the value of the fight song by re-emphasizing amateur collegiate sports and the quintessential role of the student-athlete at the heart of the educational experience. Being an *amateur* student-athlete has enormous value.

A dollar figure cannot be put on the value of a decent education. Courts should take the opportunity to realize that paying student-athletes in cash, or in kind, comes at a greater cost. Sports will be cut and access to higher education will be restricted for many. Moreover, academic values will be subordinated to short term financial gain. Student-athlete gain in being compensated does not outweigh the resulting losses in educational values. “Basically, my position is that coaches and administrators and the NCAA and everybody else needs to do a better job in educating youngsters about the value of a degree, *the value of an education*.”²³⁷

There is inherent value in the preservation of amateurism as an intentional guardrail around the unique enterprise of collegiate athletics. Amateurism serves both a protective and an incentivizing purpose teaching student-athletes to value what is embedded in the word proceeding “athlete”: “student.”

When the dust from NIL settles (and it will), the intrinsic value of being a student-athlete must be reaffirmed by all those shaping the collegiate model. As succinctly stated by the Commissioner of The American Athletic Conference Mike Aresco when addressing a group of student-athletes, faculty athletics representatives, and other athletics administrators, for all student-athletes “the primary win should come at commencement.”²³⁸ The student-athlete will be the winner if we

237. McDavis, *supra* note 30, at 340 (quoting Ronald D. Mott, *Student-Athlete Voices Join Pay-for-Play Debate*, NCAA NEWS, Sept. 19, 1994, at 19, <https://ia801400.us.archive.org/31/items/NCAA-News-19940919/NCAA-News-19940919.pdf> (statement from former Baylor University Athletics Director and Head Coach Grant Teaff)) (emphasis added).

238. Mike Aresco, Comm’r, Am. Athletic. Conf., Speech at the American Athletic Conference Academic Symposium hosted by Tulane University (Apr. 14, 2023).

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prioritize education, the provision of life-skills training, the development of character, the wisdom of playing the long game of chess over the instant gratification of checkers,²³⁹ and the love of the fight song as a melodic symbol of the collegiate model.

239. *See Terry Interview, supra* note 151.