

Reimagining the Governance of College Sports After *Alston*

John T. Holden,* Marc Edelman,** Thomas A. Baker III*** & Andrew G. Shuman****

Abstract

The Summer of 2021 marked a major inflection point in the external governance of college sports. After nearly half a century of federal and state governments taking a hands-off approach with regard to the rights of college athletes, nearly all at once several states passed laws granting college athletes the right to endorse products. Next, in its first decision concerning the National Collegiate Athletic Association (NCAA) since 1985,¹ the United States Supreme Court unanimously ruled that the National Collegiate Athletic Association’s longstanding restraints on providing unlimited educational benefits to college athletes violated federal antitrust law. Additionally, Congress began discussing the lack of medical benefits afforded to college athletes, holding hearings in which current and former college athletes testified regarding necessary baseline standards for health and safety and increased mental health resources for student athletes.²

In light of these widespread *external* developments, questions now loom surrounding how collegiate athletics will function on an *internal* level. Building upon these recent state and federal developments to reform college sports and looking to the Supreme Court’s decision from last term, *National Collegiate Athletic Association v. Alston*, this Article offers a roadmap for reimagining the internal governance structure of college athletics in the 21st Century. In doing so, this Article proceeds in four main parts. First, Part I of this Article examines the history and rise of the NCAA as the premier governing body of intercollegiate sports in the United States. Next, Part II explores the evolving and widespread societal scrutiny of college athletics by looking to the five perspectives from which collegiate sports are most often criticized. Subsequently, Part III examines how recent Congressional developments, state law initiatives, and the *Alston* decision, require reimagining the internal governance structure currently in place in college athletics. Lastly, building upon the history of the NCAA model and its criticisms, and considering the recent regulatory and judicial developments that materialized in 2021, Part IV proposes a template for building a new governance model that, moving forward, will better protect and promote the rights of college athletes from an ethical, legal, and medical standpoint.

Introduction.....	2
I. The Rise of the NCAA.....	4
A. The Formation	4
B. The Years of Sanity	6
C. Detachment from the Educational Mission	8
II. Reviewing College Sports Through Five Critical Lenses	11

*Assistant Professor, Spears School of Business, Oklahoma State University. The authors would like to thank the moderators and participants at the “Ethical Leadership and Legal Strategies for Post-2020 Organizations Symposium,” which was graciously sponsored by the Tobias Leadership Center at Indiana University and the Center for Legal Studies and Business Ethics at Oklahoma State University.

**Professor of Law, Baruch College, Zicklin School of Business, City University of New York.

***Associate Professor, Sport Management Program, University of Georgia.

****Associate Professor, Chief of the Clinical Ethics Service in the Center for Bioethics and Social Sciences in Medicine, The University of Michigan Medical School.

¹ Dan Murphy, *Supreme Court unanimously sides with former college players in dispute with NCAA about compensation*, ESPN (Jun. 21, 2021), https://www.espn.com/college-sports/story/_/id/31679946/supreme-court-sides-former-players-dispute-ncaa-compensation.

² *Senate Hearings on Name, Image, and Likeness Rights for Student-Athletes Reveal Broad Support for Federal NIL Legislation, but Much Disagreement Remains on the Scope of that Legislation*, JD SUPRA (Jun. 25, 2021), <https://www.jdsupra.com/legalnews/senate-hearings-on-name-image-and-8436965/>.

A.	Educational Malfeasance	12
B.	Labor Exploitation	15
C.	Civil Rights Concerns.....	17
D.	Failure To Protect Health and Safety.....	18
E.	Administrative Unfairness	24
III.	The Summer Of 2021 And The Rise Of Calls For NCAA Reform	25
A.	State Name, Image, and Likeness Legislation	26
B.	Congressional Hearings about College Athlete Safety	28
C.	The Supreme Court Antitrust Decision: National Collegiate Athletic Association v. Alston	30
1.	Procedural History	31
2.	Supreme Court Decision	33
D.	After Alston	35
IV.	Building Better College Sports Governance	36
A.	The NCAA Should Leave the Business of Regulating Athletes’ Financial Ventures	36
B.	Improvement of Regime to Address College Athlete Health and Safety	37
C.	Improved System for College Athlete Reporting of Abuse.....	40
D.	New Model for Internal Dispute Resolution.....	43
E.	College Athlete Access to Representation.....	45
F.	Enhancing Autonomy of College Athletes’ Choice of School	46
G.	Improving Access to Education for Collegiate Athletes.....	48
	Conclusion	51

INTRODUCTION

For several decades, leading academics in the fields of law, economics, education, and medicine have called for massive reforms to the governance structure of intercollegiate sports.³ The goals of reforming college sports have primarily involved promoting a more equitable system for college athletes.⁴ Yet, until recently, these calls for reform have fallen on deaf ears.⁵

³ See Marc Edelman, Thomas A. Baker III, John T. Holden & Andrew Shuman, *Exploring College Sports in the Time of COVID-19: A Legal, Medical, and Ethical Analysis*, 2021 MICH. ST. L. REV. ____, ____ (2021) (describing the need for NCAA reform in the wake of the COVID-19 pandemic); see also Murray Sperber, *Why the NCAA Can’t Reform College Athletics*, 77 ACADEME 13, 19–20 (1991) (noting that the institutional structure of the NCAA reinforces the status quo in college athletics); Jim Peach, *College Athletics, Universities, and the NCAA*, 44 SOC. SCI. J. 11, 22 (2007) (noting that the NCAA no longer serves a purpose and that reform should come in the form of abolishing the NCAA); see also Jayma Meyer & Andrew Zimbalist, *Reforming College Sports: The Case for a Limited and Conditional Antitrust Exemption*, 62 ANTITRUST BULL. 31, 52–55 (2017) (discussing areas for congressional action to reform the NCAA); see also James Landry & Thomas A. Baker III, *Change or Be Changed: A Proposal for the NCAA to Combat Corruption and Unfairness by Proactively Reforming its Regulation of Athlete Publicity Rights*, 9 NYU J. INTELL. PROP. & ENT. L. 1, 12 (2019) (discussing academic scandals at North Carolina involving students taking “fake classes.”). See also Ted Tatos, *Abuse and Mistreatment of Athletes at U.S. Universities: Legal Implications*, 21 TEX. REV. ENT. & SPORTS L. 1, 5–15 (2020) (discussing various instances of abuse and mistreatment of collegiate athletes).

⁴ See generally, Ross Dellenger, *As Congressional Power Shifts, NCAA Reform and Athletes’ Rights Are Firmly in the Crosshairs*, Sports Illustrated (Jan. 20, 2021), <https://www.si.com/college/2021/01/20/ncaa-athlete-rights-compensation-congress-nil> (discussing congressional interest in reforming the NCAA).

⁵ Calls for NCAA reform date back decades. See e.g., Stephen Horn, *Intercollegiate Athletics: Waning Amateuism and Rising Professionalism*, 5 J. C. & U. L. 97, 101 (1977) (discussing a proposal for an athletes’ bill of rights at the 1975 NCAA convention).

The Summer of 2021, however, marked an inflection point in the regulatory environment of college sports.⁶ After nearly a half century of federal and state governments largely ignoring the educational, financial and medical fates of college athletes, seemingly all at once, the United States took notice.⁷ Throughout the Summer of 2021, several states passed new laws to grant college athletes the right to endorse products free from NCAA interference.⁸ Congress also held hearings to discuss the lack of medical benefits afforded to college athletes.⁹ And, perhaps most importantly, in *National Collegiate Athletic Association v. Alston*, the United States Supreme Court unanimously ruled that the NCAA's longstanding restraints on providing athletes with educational benefits violate federal antitrust law.¹⁰

Building upon these recent and significant developments, this Article presents a roadmap for reimagining the internal governance structure of intercollegiate sports in the 21st Century. Part I of this Article examines the rise of the NCAA as the premier United States governing body of intercollegiate sports. Part II then describes the evolving societal scrutiny of college sports through five different critical lenses. Next, Part III analyzes recent changes to reform the college sports regulatory environment, including the Supreme Court's recent decision in *National Collegiate Athletic Association v. Alston*. Lastly, Part IV proscribes a template for building a new

⁶ See Katie McInerney, *Beginning Today, NCAA Will Let Athletes Get Paid for Their 'NIL.' Here's What That Means*, Boston (Jul. 1, 2021) (noting that in the summer of 2021, state laws allowing athletes to monetize their name, image, and likenesses went into effect, as well as the Supreme Court decision in *Alston v. NCAA*, which ruled that NCAA limits on academic-related aid violated antitrust laws). These events were coupled with several congressional hearings centering on athletes' rights. Sally Jenkins, *The College Sports Debate Comes to Capitol Hill, Athletes Not Invited*, WASH. POST (Jun. 8, 2021), <https://www.washingtonpost.com/sports/2021/06/08/congress-ncaa-nil-senate-commerce-hearing/>.

⁷ See Dan Murphy, *Can Congress Help the NCAA Find NIL Consistency?*, ESPN (Jul. 1, 2021), https://www.espn.com/college-sports/story/_/id/29392144/congress-working-multiple-legislative-options-solve-ncaa-nil-issue (discussing the various reform proposals regarding NCAA NIL reform).

⁸ See Student athletes, may earn compensation for use of name, image, or likeness, conditions established, certain postsecondary educational institutions may not restrict, Alabama Collegiate Athletic Commission established to enforce. AL. H.B. 404 (2021); Student athlete compensation. AZ. S.B. 1296 (2021); To Establish the Arkansas Student-Athlete Publicity Rights Act. ARK. H.B. 1671 (2021); Postsecondary education; student athletes may receive compensation for use of name, image, or likeness. GA. H.B. 617 (2021); Student Athlete Endorsements. ILL. S.B. 2516 (2021); Permitting student athletes at postsecondary educational institutions to receive compensation for the use of their name, image, likeness rights or athletic reputation. KS. H.B. 2264 (2021); An Act Relating to Intercollegiate Athletics. KY. S.B. 249 (2021); Mississippi Intercollegiate Athletics Compensation Rights Act. MISS. S.B. 2313 (2021); Establish student-athlete rights and protections. MONT. S.B. 248 (2021); Student Athlete Endorsement Act. N.M. S.B. 94 (2021); An Act relating to student athletes. OKLA. S.B. 48 (2021); To Provide For the Compensation of Intercollegiate Athletes for the Use of Their Name, Image, or Likeness. S.C. S.B. 685 (2021); An Act to amend Tennessee Code Annotated, Title 49, relative to higher education. TENN. S.B. 1636 (2021); Relating to the compensation and professional representation of student athletes participating in intercollegiate athletic programs at certain institutions of higher education. TEX. S.B. 1385 (2021).

⁹ See e.g., *NCAA Student Athletes and NIL Rights: Hearing Before the Subcomm. On Commerce, Science, & Technology*. 117th Cong. __ (2021).

¹⁰ 594 U.S. __, __ (2021).

governance model that, moving forward, better protects college athletes from a variety of different perspectives.

I. THE RISE OF THE NCAA

The roots of modern collegiate sports can be traced back to the late 1840s when regattas first appeared on Ivy League campuses, and later, in 1869, when the College of New Jersey (now Princeton University) and Rutgers College met for the first official collegiate football game.¹¹ By the late 1800s, groups of colleges with advanced sporting programs had joined together into small, athletic conferences for purposes of better organizing their sporting competitions.¹² But, the modern world of intercollegiate sports, centered around an organization known as the NCAA, did not emerge until the early 1900s.¹³ Even then, for the first half of the 20th Century, the NCAA played only a limited role in the governance of intercollegiate sports.¹⁴

A. *The Formation*

The NCAA's emergence as a regulator of intercollegiate sports is historically inseparable from the rise of national attention paid to safety issues in college football.¹⁵ Specifically, in October 1905, during a practice between two freshmen football teams at Harvard, Teddy Roosevelt, Jr.—the son of America's sitting president—was left bleeding profusely from a cut above his eye.¹⁶ The injury to the sitting president's son, coupled with a rash of on-field head and neck injuries attributable to dangerous plays of that era like the “flying wedge,”¹⁷ gave credence

¹¹ See Guy Lewis, *The Beginning of Organized Collegiate Sport*, 22 AM. Q. 222, 223–24 (1970) (noting that ball games became popular in the 1840s, but organized collegiate sport really began in 1843, when Yale University formed a boat club which was followed by a boat club being formed at Harvard University a year later). The first collegiate football game was played on November 6, 1869. Rutgers College won the game by a score of 6-4. David W. Major, *The Birthplace of College Football*, RUTGERS (Nov. 6, 2019), <https://www.rutgers.edu/news/birthplace-college-football>.

¹² See Andrew Zimbalist, *Inequality in Intercollegiate Athletics: Origins, Trends and Policies*, 6 J. INTERCOLLEGIATE SPORT 5, 6 (2013) (describing early endeavors organizing collegiate sports).

¹³ See Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000) (noting that the NCAA was originally named the Intercollegiate Athletic Association, changing its name to the National Collegiate Athletic Association in 1910).

¹⁴ *Id.* at 13–14.

¹⁵ Edelman, Baker, Holden & Shuman, *supra* note 3.

¹⁶ *Teddy Roosevelt, Jr. Is Hurt on Football Field*, SALT LAKE HERALD (Oct. 15, 1905), <https://chroniclingamerica.loc.gov/lccn/sn85058130/1905-10-15/ed-1/seq-4/#words=TEDDY+ROOSEVEU+JR+Roosevelt+Jr>.

¹⁷ Edelman et al., *supra* note 3.

to an already emerging movement that college sports needed some form of broader, systematic regulation.¹⁸

At around the same time, the presidents of a number of New England colleges expressed a second concern—the fear that the growing social demands to win in intercollegiate sports were leading to some colleges hiring non-students to play in these events rather than staffing their teams with members from the *bona fide* student body.¹⁹ These fears of the commercialization of college sports through use of mercenary players, coupled with mounting deaths and injuries on the gridiron, led President Roosevelt to propose a White House conference in late 1905 to examine the rules governing college sports.²⁰ This conference laid the foundation for the formation of the NCAA—a collective governing body with joint oversight responsibilities that would oversee college athletics.²¹

After the NCAA was established in 1906,²² the organization’s early years were mainly inconsequential, with the association acting more as a working group than as an active regulator.²³ However, during the 1920s, the Carnegie Foundation for the Advancement of Teaching—an education and policy and research institution founded by Andrew Carnegie chartered in 1906 by an act of Congress²⁴—began actively calling for increased scrutiny of the commercialization of collegiate sports, and more specifically, college football.²⁵

In the 1930s, however, the inroads made by the establishment of the NCAA and the efforts of the Carnegie Foundation were thwarted with the introduction of the Graham Plan. The Graham Plan was formulated by the President of the University of North Carolina, Frank P. Graham, in 1935, and it sought to deemphasize the role of athletics in university life. Specifically, the plan called for a nationwide ban on financial aid based on athletic ability,²⁶ and

¹⁸ Smith *supra* note 13, at 10–12.

¹⁹ *Id.* at 12.

²⁰ *Id.*

²¹ Taylor O’Toole, *Equity and Amateurism: How the NCAA Self-Employment Guidelines are Justified and Do Not Violate Antitrust Law*, 123 PENN ST. L. REV. 247, 250–51 (2018).

²² Named the Intercollegiate Athletic Association until 1910. *See* Smith, *supra* note 13, at 12.

²³ Smith, *supra* note 13, at 13.

²⁴ *Foundation History*, THE CARNEGIE FOUND., <https://www.carnegiefoundation.org/about-us/foundation-history/> (last visited Aug. 9, 2021).

²⁵ *Id.* at 13–14.

²⁶ Ronald A. Smith, *History of Amateurism in Men’s Intercollegiate Athletics: The Continuance of a 19th-Century Anachronism in America*, 45 QUEST 430, 440 (1993).

placed athletics under the control of university faculty.²⁷ This plan, however, was ill-timed as it was introduced to the Southern Conference around the same time that the Southeastern Conference had voted in favor of grants-in-aid.²⁸ The split between the institutions in favor of offering full grants in aid to college athletes, and those who opposed it, threatened to divide the college sports world into two halves—the amateur half and the professional half.²⁹ This feared break would pave the way for the post-World War II era’s *Sanity Code*.³⁰

B. *The Years of Sanity*

The *Sanity Code*, which was adopted by the NCAA in 1948,³¹ sought to put an enforcement mechanism behind the NCAA’s principles that limited the compensation of college athletes. Although limitations on the compensation of college athletes had long existed in the NCAA’s charter, these restrictions were not always followed by member schools or enforced by the NCAA as a whole.³² Like the *Graham Plan* before it, the *Sanity Code* restricted schools from compensating their athletes based on athletic ability, while still allowing athletes to receive forms of financial aid that were available to the student body at large, such as need-based financial aid.³³ In effect, the *Sanity Code* sought to ban “pay for play.”³⁴

While the *Sanity Code* was designed to turn providing athletic scholarships or other forms of financial assistance into a strict liability offense, the code only lasted two years, with member schools soon recognizing that if colleges were expelled for a single instance of non-compliance, the NCAA would soon have no members remaining.³⁵ By the end of the *Sanity Code*, the prevailing sentiment toward financially compensating college athletes and their families had shifted diametrically in the opposite direction—with rumors of schools providing

²⁷ *The Graham Plan for Intercollegiate Athletics, 1935*, UNIV. N.C. LIBR. (Oct. 23, 2017), <https://blogs.lib.unc.edu/uarms/2017/10/23/the-graham-plan-for-intercollegiate-athletics-1935/>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 440–41.

³¹ Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism of Antitrust Recidivist*, 86 OR. L. REV. 329, 332 (2007).

³² *Id.* at 332–33.

³³ *Id.* at 333.

³⁴ See Andy Schwarz, *The NCAA Has Always Paid Players; Now It’s Just Harder to Pretend They Don’t*, DEADSPIN (Aug. 29, 2015, 12:25 PM), <https://deadspin.com/the-ncaa-has-always-paid-players-now-its-just-harder-t-1727419062>.

³⁵ See Alfred Yen, *Early Scholarship Offers and the NCAA*, 52 B.C. L. REV. 585, 596 (2011) (describing the short-lived existence of the *Sanity Code*).

athletes with free college tuition and schools providing broader financial inducements running rampant.³⁶ In the 1950s, for example, a Baylor University alumnus alerted the NCAA that an Oklahoma banker had deposited \$12,000 in an account to induce star recruit Jerry Tubbs to flip his commitment from Baylor to the University of Oklahoma.³⁷ Although no bank account was ever found, the NCAA determined that the University of “paid medical expenses for players’ wives; and, in the case of Tubbs, an enthusiastic alumnus had lent Tubbs his car for a trip back home over the weekend.”³⁸

Nevertheless, much like the *Sanity Code* ultimately gave way to the beginnings of an underground free market in the 1950s, the emerging free market of the 1950s gave way to systemic changes in yet a third direction in the 1960s.³⁹ For both the United States as a nation and the NCAA as a governance body, the 1960s saw the rise of the Civil Rights movement and the desegregation of various aspects of society, including higher education.⁴⁰ The 1960s also saw a growing vocalization of the demand for women’s athletics on college campuses.⁴¹ In 1966, the Commission on Intercollegiate Athletics for Women (CIAW) was founded to facilitate the offering of championships for women’s sports.⁴² The first women’s championships were held for gymnastics and track and field in 1969.⁴³ In 1975, when Title IX became effective law, the NCAA usurped the functions of the CIAW and set its sights on ensuring equal educational opportunity for male and female students in intercollegiate athletics.⁴⁴ Title IX’s legacy of expanding women’s opportunities in athletics is not, however, the NCAA’s legacy.⁴⁵

³⁶ Tex Maule, *A+\$+X+F+B=Invincibility*, SPORTS ILLUSTRATED (Nov. 18, 1957), <https://vault.si.com/vault/1957/11/18/axfb-invincibility>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Michael Oriard, *How the 60s Changed Big-Time College Football*, CHRONICLE (Oct. 25, 2009), <https://www.chronicle.com/article/how-the-60s-changed-big-time-college-football/>.

⁴⁰ *Id.*

⁴¹ Bonnie J. Hultstrand, *The Growth of Collegiate Women’s Sports: the 1960s*, 64 J. PHYSICAL EDUC., RECREATION & DANCE 41, 42 (1993).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 387 (2000).

⁴⁵ Title IX’s broad success is well documented. One area it is most visible is in the participation of women in sports, with a near “fourfold increase” in 25 years since the legislation was passed. Iram Valentin, *Title IX: A Brief History*, 2 HOLY CROSS J.L. & PUB. POL’Y 123, 130 (1997).

C. *Detachment from the Educational Mission*

After a brief period of pursuing social justice initiatives in the late 1960s, the NCAA, much like the United States overall, next began to focus its efforts on commercialism and wealth maximization.⁴⁶ As Professor Murray Sperber, Professor Emeritus of Cultural Studies of Sport in Education at Berkeley University, describes, the college sports landscape during the 1970s and '80s was a time of transition, during which athletics departments became “franchises in College Sports Inc”—franchises operating as “huge commercial enterprise[s] with operating methods and objectives frequently opposed to the educational missions of the host universities.”⁴⁷ During this period, the casual college sports fan began to notice that the marketing of collegiate sporting events looked increasingly similar to that of professional sports.⁴⁸ Likewise, colleges no longer had to expend resources inducing students to attend their schools based on rigorous educational offerings.⁴⁹ Rather, a sales pitch that focused solely on student comradery and the ability to watch big-time college sports was sufficient.⁵⁰

As some colleges began to deemphasize academic rigor in their marketing materials to students, the loss of an emphasis on education became especially pronounced for college students who played in the competitive sporting events.⁵¹ In earnest, perhaps the deemphasis of college athletes' academic pursuits dates back even earlier, as football player Gary Shaw chronicles how during his time at the University of Texas in the 1960s, the football coaches guided players into classes where they would pass instead of courses that interested the athletes—a disturbing trend that remains one of the strongest criticisms of big-time college sports to this day.⁵² Nonetheless, it was during the 1980s when the worst stories of academic malpractice emerged, such as the story involving football player Dexter Manley, who entered Oklahoma State University for college and ultimately left the school “functionally illiterate.”⁵³

⁴⁶ See Jeffrey J.R. Sundram, *Note: The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense*, 85 TULANE L. REV. 543, 547–50 (2010) (describing the influx of money flowing into college sports in the years after the *Sanity Code*).

⁴⁷ MURRAY SPERBER, *BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION* 33 (2000).

⁴⁸ Erik M. Jensen, *Taxation, the Student Athlete, and the Professionalization of College Athletics*, 1987 UTAH L. REV. 35, 42–44 (1987).

⁴⁹ *Id.* at 39–41.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² GARY SHAW, *MEAT ON THE HOOF: THE HIDDEN WORLD OF TEXAS FOOTBALL* 42–45 (1972).

⁵³ Roger Simon, *A Football Player Tackles Illiteracy*, L.A. TIMES (May 28, 1989), <https://www.latimes.com/archives/la-xpm-1989-05-28-vw-1247-story.html>. Years later, Manley found out that he suffered from learning disabilities, and, in his post-college life, he learned how to read in both English and Chinese. But that was all achieved on his own dime, with his own initiative, and not through his college experience. Tom

The 1970s and 80s also were an era of growth for the NCAA as an institution.⁵⁴ The organization expanded requirements for divisional memberships and pushed schools to expand athletic departments and facilities, often beyond their means.⁵⁵ As the NCAA was expanding the scope of its purported jurisdiction, the organization's power to govern also faced its first meaningful challenge in 1982, when two of the NCAA's most dominant college football schools, the University of Oklahoma and the University of Georgia, brought an antitrust lawsuit against the NCAA for its limiting of the number of games the association permitted them to play on broadcast television.⁵⁶ The case, *NCAA v. Board of Regents*, made its way to the United States Supreme Court, where, in 1984, the Court held that the collective actions of member colleges in the NCAA were not only subject to antitrust scrutiny, but also that limiting televised football broadcasts violated the law.⁵⁷

Despite the NCAA's loss at the Supreme Court in *Board of Regents*, in a rather puzzling way, NCAA leadership seemed to embrace the Court's decision by leaning even further into the commercialization of college sports.⁵⁸ For example, the NCAA began authorizing sponsorships to college football bowl games and allowing schools to sell advertisements on everything from scoreboards to game tickets.⁵⁹ The 1980s also saw the NCAA Men's Basketball Tournament become a nationwide television event, with CBS being the first network to host a half-hour show on Selection Sunday where the tournament participants were revealed.⁶⁰ In 1985, the NCAA Men's Basketball Tournament would expand to sixty-four teams.⁶¹ Although the new tournament structure generated exponential revenue for college basketball programs, athletic directors, and

Friend, *The Education of Dexter Manley*, WASH. POST (Jul. 2, 1989), <https://www.washingtonpost.com/archive/lifestyle/magazine/1989/07/02/the-education-of-dexter-manley/84ba83c2-cbf0-45f2-b636-d644c5224d4a/>.

⁵⁴ In 1973, the NCAA adopted a third Division, separating athletics into Division I, Division II, and Division III. See *40-in-40 Project*, NCAA, <https://www.ncaa.org/about/diii-40th-anniversary> (last visited Jul. 29, 2021).

⁵⁵ SPERBER, *supra* note 47, at 34.

⁵⁶ *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 88 (1984).

⁵⁷ 468 U.S. 85, 120A (1984) (“...consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role.”).

⁵⁸ One example of NCAA leadership leaning into the commercialization of college sports has been in a seemingly ever expanding number of college football bowl games. See Former Writers, *The History of Bowl Game Expansion*, TSJ101 (Dec. 7, 2018), <https://tsj101sports.com/2018/12/07/the-history-of-bowl-game-expansion/>.

⁵⁹ SPERBER, *supra* note 47, at 34–35.

⁶⁰ Jeff Hagggar, *Chronology of NCAA Tournament TV Coverage (1982-1990)*, CLASSIC TV SPORTS (Feb. 26, 2012), http://www.classictvsports.com/2012/02/chronology-of-ncaa-tournament-tv_26.html.

⁶¹ *Id.*

coaches,⁶² the extended length of the NCAA Men’s Basketball Tournament meant college basketball players spent less time in the classroom.⁶³ It was at this point that the dichotomy between the financial incentives of college athletics programs and the rights of the student athletes making these programs profitable, became even more apparent.⁶⁴

In the over three decades since the *Board of Regents* decision, colleges and universities have amassed millions profiting off of the successes of their star players. Unfortunately, college athletes just help power the “financial engine” of university athletic departments—seeing none of the benefits they help their colleges and universities accrue.⁶⁵ In 2019, for example, the University of Mississippi athletics department had a three-year average profit of \$43 million.⁶⁶ Yet, despite such monumental profits and the fact that Ole Miss’ football coach, Lane Kiffin, makes an annual salary of \$3.9 million,⁶⁷ Mississippi’s leading pass rusher, Sam Williams,⁶⁸ faced significant food insecurity when sent home from school during the COVID-19 pandemic. Referring to the meal plan at school he no longer had access to while at home, Williams tweeted, “[W]orked so hard to get out the hood but forced back to the hood . . . I can’t swipe my ID nowhere. Then if we get help it’s a ‘violation.’ I just don’t understand.”⁶⁹ Williams’ tweet was

⁶² See generally, Will Hobson, *Fund and Games*, WASH. POST (Mar. 18, 2014), <https://www.washingtonpost.com/graphics/sports/ncaa-money/> (describing revenue distributions for participating in the NCAA Men’s Basketball Tournament).

⁶³ The NCAA Men’s Basketball Tournament expanded from 32 teams to 64 teams in 1985. See Chuck Allen, *NCAA Expansion and the Selection of Worthy College Basketball Champions*, BLEACHER REP. (May 6, 2010), <https://bleacherreport.com/articles/388608-ncaa-expansion-and-the-selection-of-worthy-champions>. In 2011, the tournament would again expand, this time to 68 teams with eight teams competing for four seeds. Austin Anderson, *What Is the First Four in March Madness? Explaining the NCAA Tournament Play-In Games*, SPORTING NEWS (Mar. 18, 2021), <https://www.sportingnews.com/us/ncaa-basketball/news/first-four-march-madness-play-in-games-explained/1uet4xg69wa271qsi0u83gyny3>.

⁶⁴ Eric Dodds, *The ‘Death Penalty’ and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015), <https://time.com/3720498/ncaa-smu-death-penalty/>.

⁶⁵ See Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, THE ASPEN INST. (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/>.

⁶⁶ Chris Smith, *College Football’s Most Valuable Teams: Reigning Champion Clemson Tigers Claw Into Top 25*, FORBES (Sep. 12, 2019, 6:00 AM), <https://www.forbes.com/sites/chris-smith/2019/09/12/college-football-most-valuable-clemson-texas-am/?sh=5f8ec82a2e7e>.

⁶⁷ Chris Low, *Ole Miss Rebels give new contract to football coach Lane Kiffin*, ESPN (Jan. 2, 2021), https://www.espn.com/college-football/story/_/id/30637869/ole-miss-rebels-give-new-contract-football-coach-lane-kiffin.

⁶⁸ Keith Farner, *Ole Miss’ leading pass rusher Sam Williams announces plans for 2021*, SATURDAY DOWN SOUTH (Dec. 2021), <https://www.saturdaydownsouth.com/ole-miss-football/ole-miss-leading-pass-rusher-sam-williams-announces-plans-for-2021/>.

⁶⁹ Priya Desai, *Coronavirus Pandemic Magnifies an All-Too-Real Issue for Some NCAA Athletes*, SPORTS ILLUSTRATED (Apr. 21, 2020), <https://www.si.com/college/2020/04/21/ncaa-athletes-food-nutrition-study-coronavirus>.

reminiscent of remarks made by star college basketball player, Shabazz Napier of the University of Connecticut in 2014, after winning the March Madness Tournament. Napier explained: “[W]e’re definitely blessed to get a scholarship to our universities . . . But at the end of the day, that doesn’t cover everything. We do have hungry nights that we don’t have enough money to get food.”⁷⁰

In addition to evidence that college athletics programs often fail to supply their athletes with basic necessities like adequate access to food, stories like those from the 1980s, when Dexter Manley left Oklahoma State University “functionally illiterate,” have continued to materialize in recent years. In 2016, for example, an outside organization determined that the University of North Carolina offered approximately 200 fake classes for its athletes. Geared primarily to players on the men’s basketball and football teams, these classes did not require attendance, only assigned one paper for the semester,⁷¹ and were designed to help star athletes gain and maintain their NCAA eligibility.⁷² Overall, until judicial and congressional directives in 2020 and 2021, college athletes frequently did not receive the same level of education as their peers, and often were left struggling to pay for basic necessities while their institutions profited off of their names and athletic success.

II. REVIEWING COLLEGE SPORTS THROUGH FIVE CRITICAL LENSES

In the 37 years since the U.S. Supreme Court rendered its *Board of Regents* decision, the collegiate sports governance model has moved even further away from its initial mission of organizing games, ensuring education, and keeping athletes safe.⁷³ During this period, the governance model of college sports has undergone a wide range of criticism, with the behaviors and policies of the NCAA and its member colleges coming under scrutiny on a variety of different grounds.⁷⁴ Specifically, the NCAA and its member colleges have faced criticism with

⁷⁰ Soraya Nadia McDonald, *National champ U-Conn. ’s Napier says he goes to bed starving*, WASH. POST (Apr. 8, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/04/08/national-champ-uconns-napier-says-he-goes-to-bed-starving/>.

⁷¹ Marc Tracy, *N.C.A.A.: North Carolina Will Not Be Punished For Academic Scandal*, N.Y. TIMES (Oct. 13, 2017), <https://www.nytimes.com/2017/10/13/sports/unc-north-carolina-ncaa.html>.

⁷² Solomon, *supra* note 65.

⁷³ Eric T. Vanover & Michael M. DeBowes, *The Impact of Intercollegiate Athletics in Higher Education*, 1 HIGHER ED. POL. & ECON. 1, 3–4 (2013).

⁷⁴ See Richard B. McKenzie & E. Thomas Sullivan, *Does the NCAA Exploit College Athletes? An Economics and Legal Reinterpretation*, 32 ANTITRUST BULLETIN 373, 375 (1987) (noting one theme of criticism that the NCAA operates as a cartel); see also Akuoma C. Nwadike, Ashley R. Baker, Velina B. Brackebusch & Billy J. Hawkins, *Institutional Racism in the NCAA and the Racial Implications of the “2.3 or Take A Knee” Legislation*, 26 MARQ. SPORTS L. REV. 523, 527–38 (2016) (describing years of policy discrimination against Black college athletes).

regard to (1) quality of education provided to athletes; (2) exploitation of athletes as free labor; (3) civil rights; (4) athlete health and safety concerns; and (5) administrative unfairness. This Section will explore these five areas of criticism in turn.

A. *Educational Malfeasance*

One area in which the NCAA has faced meaningful criticism since the 1980s has been in terms of its lack of focus on the educational aspect of higher education.⁷⁵ In this vein, former Indiana University English and American Studies professor Murray Sperber was among the first to give the warning shots about how the NCAA coopts the educational mission of higher education when he authored the book *Beer and Circus* in the year 2001.⁷⁶ In *Beer and Circus*, Sperber describes many of the largest universities in the United States as operating “Potemkin Villages” of sorts, by selling prospective students on athletic prowess over academic prestige.⁷⁷ Sperber also coins the term “Beer and Circus” to describe the willingness of high-level university administrators, much like Roman Emperors of the post-Augustus Era, to use sporting events to distract from broader forms of leadership malfeasance.⁷⁸ In essence, Sperber argues that it has become easier for college presidents to offer their student body keg parties and spectacular sporting events than to get students to focus on learning and career development.⁷⁹ Thus, according to Sperber, many colleges adopted the “Beer and Circus” business plan, at least to some extent.⁸⁰

Sperber’s concerns about college presidents’ incentives to focus more on athletics than education was enhanced by evidence that the “Beer and Circus” approach to higher education

⁷⁵ Indeed, the creep of professionalism into collegiate athletics and the detraction from academic missions was present even in the 1950s. See Lloyd Frederick Sunderman, *Collegiate Athletics and Integrity in Higher Education*, 33 CHRISTIAN ED. 291, 294 (1950). See also Linda S. Greene, *The New NCAA Rules of the Game: Academic Integrity of Racism?*, 28 ST. LOUIS U. L.J. 101, 105–07 (1984) (discussing various allegations of academic misconduct and the attention of the American Council on Education on college athletics).

⁷⁶ SPERBER, *supra* note 47.

⁷⁷ *Id.* at 56. The term “Potemkin village” is used to describe a construction that is mostly a façade and exists to mislead others as to the status of present conditions or purpose for the façade. The term originates from fake constructs built to impress Catherine II by her former paramour Grigory Potemkin. Ishaan Tharoor, *Potemkin Villages*, TIME 6, (Aug. 2010), http://content.time.com/time/specials/packages/article/0,28804,2008962_2008964_2009010,00.html#:~:text=A%20%22Potemkin%20village%22%20signifies%20any,those%20peering%20in%20from%20outside.

⁷⁸ SPERBER, *supra* note 47.

⁷⁹ *Id.* at 151–65.

⁸⁰ See *id.* at 248–61 (describing the move towards beer and circus and away from the educational missions that universities were founded upon).

was actually boosting the bottom lines of certain colleges around the country.⁸¹ Also, as paradoxical as it may seem, some schools that adopted the “Beer and Circus” model experienced dramatic increases in their undergraduate student applications—thereby allowing these schools to be more selective in who they admitted, and thus improving their academic ratings in publications such as US News.⁸² At this time, the term “Flutie Factor” (also called the “Flutie Effect”) became popular within the vernacular of college admissions offices.⁸³ The term referred to how Boston College enjoyed a thirty percent increase in its number of undergraduate applicants within two years after quarterback Doug Flutie led them to a nationally televised victory over the University of Miami in 1984.⁸⁴ For a while, it seemed as if every college was looking for its own Flutie Factor.⁸⁵

Further, as the value of elite college athletes such as Doug Flutie became more apparent for marketing colleges to prospective undergraduate students, some schools became more interested in having their elite athletes focus on sports rather than their academics.⁸⁶ While the “Beer and Circus” model did not *per se* preclude college athletes from being serious students, the economic incentives generated by that model facilitated such ends.⁸⁷ Thus, it is not surprising that academic scandals ensued highlighting how certain university systems were far more concerned with college athletes practicing their sport (which, was a revenue generating opportunity for the schools under the *Beer and Circus* model) than obtaining a bona fide education.⁸⁸

⁸¹ *Id.* at 216–38 (discussing the idea of “College Sports MegaInc.” a type of sports business that happens to exist within a university structure, reliant on the unpaid labor of students).

⁸² SPERBER, *supra* note 47, at 60.

⁸³ Sean Silverthorne, *The Flutie Effect: How Athletic Success Boosts College Applications*, FORBES (Apr. 29, 2013), <https://www.forbes.com/sites/hbsworkingknowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications/?sh=640826066e96>.

⁸⁴ *Id.*

⁸⁵ Indeed, there is still an observable Flutie Effect for some schools. See Brittany Renee Mayes & Emily Giambalvo, *Does Sports Glory Create a Spike in College Applications? It's Not A Slam Dunk.*, WASH. POST (Dec. 6, 2018), <https://www.washingtonpost.com/graphics/2018/sports/ncaa-applicants/>.

⁸⁶ The NCAA has also long engaged in the practice of using college players to sell merchandise. See e.g., Joseph Zucker, *Johnny Manziel Calls NCAA 'Joke' for Not Paying Players: Reposts 2013 Time Cover*, BLEACHER REP. (Mar. 7, 2018), <https://bleacherreport.com/articles/2763142-johnny-manziel-calls-ncaa-joke-for-not-paying-players-reposts-2013-time-cover>.

⁸⁷ Indeed, former Ohio State University quarterback, Cardale Jones, tweeted his views on the requirements that athletes attend classes at all, stating: “Why should we have to go to class if we came here to play FOOTBALL. We ain't come to play SCHOOL classes are POINTLESS.” See Teddy Greenstein, *Ohio State's Cardale Jones is Getting Quite an Education*, CHI. TRIBUNE (Dec. 30, 2014), <https://www.chicagotribune.com/sports/college/ct-greenstein-ohio-state-cardale-jones-spt-1231-20141230-column.html>.

⁸⁸ See, e.g., Sara Ganim & Devon Sanders, *UNC Report Finds 18 Years of Academic Fraud to Keep Athletes Playing*, CNN (Oct. 23, 2014), <https://www.cnn.com/2014/10/22/us/unc-report-academic-fraud/index.html>

In this vein, perhaps no scandal better exemplifies certain NCAA member schools' questionable commitment to academic integrity than the "paper classes" scandal that has dogged the University of North Carolina over the past decade.⁸⁹ This scandal related specifically to a 2013 North Carolina State Bureau of Investigation into certain questionable courses offered to University of North Carolina college athletes.⁹⁰ A University of North Carolina commissioned private investigation revealed that the school had indeed operated a series of classes, taken primarily by athletes, where students were not required to attend, and there was virtually no faculty oversight; the only assignment was to complete a paper.⁹¹ These independent study classes frequently lacked the rigor of other college courses.⁹²

The NCAA ultimately investigated the University of North Carolina for purportedly violating association bylaws by operating classes of this nature.⁹³ But, the NCAA opted not to impose any punishment on the school over the *paper classes* because the classes were not *exclusively* open to college athletes, even though athletes predominantly took them.⁹⁴ Such an outcome was unsurprising as the NCAA is a bottom-up trade association governed by its own members.⁹⁵ As such, it is likely that it was not just the University of North Carolina that was involved in academic malfeasance of this nature, but other colleges as well.⁹⁶ Thus, the prospect of the NCAA collectively punishing the University of North Carolina for its academic misconduct would likely have subjected many other NCAA member schools to academic scrutiny as well.⁹⁷ Applying the Prisoner's Dilemma, the other NCAA member colleges might

(describing an independent report commissioned by the University of North Carolina that found at least 3,100 students took so-called "paper classes" that lacked the rigor of traditional college classes).

⁸⁹ Jeremy Bauer-Wolf, *NCAA: No Academic Violations at UNC*, INSIDE HIGHER ED. (Oct. 16, 2017), <https://www.insidehighered.com/news/2017/10/16/breaking-ncaa-finds-no-academic-fraud-unc>.

⁹⁰ Timothy Davis, *NCAA v. UNC: Challenging the NCAA's Jurisdiction*, 6 ARIZ. ST. SPORTS & ENT. L.J. 395, 397 (2017).

⁹¹ *Id.* at 404.

⁹² *Id.*

⁹³ *Id.* at 397.

⁹⁴ Mark Titus, *North Carolina Was Always Going to Get Off in the NCAA's "Paper Class" Investigation*, THE RINGER (Oct. 13, 2017), <https://www.theringer.com/2017/10/13/16471704/north-carolina-academic-fraud-ncaa-investigation-findings>.

⁹⁵ *Id.*

⁹⁶ SPERBER *supra* note 47.

⁹⁷ See Titus *supra* note 94 (quoting former UNLV basketball coach Jerry Tarkanian who once said, "The NCAA was so mad at Kentucky they gave Cleveland State two more years of probation." Tarkanian was highlighting the discrepancies on NCAA punishments).

have loved to sanction the University of North Carolina because doing so would make it easier for them to recruit athletes that otherwise may have chosen University of North Carolina, but they hated the idea of their own educational practices coming up next for scrutiny.⁹⁸

The deemphasis on education has likely been heightened as a result of the COVID-19 pandemic.⁹⁹ The rising revenues of major college sports continues to pull the industry towards professionalism and this has been exacerbated by isolating the players from the student-body at large.¹⁰⁰ Many athletes now not only live primarily with other athletes, the eat together and in some cases take only online classes, all while the NCAA purports that athletes are students first.¹⁰¹

B. Labor Exploitation

Whereas Murray Sperber and many other critics of the college sports system focus on the shortcomings of the NCAA business model through an education lens, other critics of the college sports governance model express their concern about the role of college athletes serving as “unpaid professionals” within the increasingly lucrative college sports enterprise.¹⁰² Indeed, college sports currently serves as a \$13 billion industry in the United States; more than 40 athletic programs bring in annual revenues that exceed \$100 million per year, and many college administrators, athletic directors and coaches earn multimillion-dollar salaries.¹⁰³ Meanwhile, a

⁹⁸ See Mike Kline, *College Football: NCAA Probe of UNC Is Just the Tip of the Iceberg*, BLEACHER REP. (Aug. 27, 2010), <https://bleacherreport.com/articles/444420-collegefootball-ncaa-probe-of-unc-is-just-the-tip-of-the-iceberg> (noting the improbability that the University of North Carolina is alone in providing less rigorous academic opportunities to athletes).

⁹⁹ For instance, during the men’s and women’s basketball championships athletes were sequestered in bubbles away from their college campuses for weeks at a time. Rick Maese, Emily Giambalvo & Artur Galocha, *How the NCAA Built Its ‘Bubble’ In Indianapolis*, WASH. POST (Mar 16, 2021), <https://www.washingtonpost.com/sports/interactive/2021/ncaa-tournament-bubble-covid-indianapolis/>.

¹⁰⁰ *Id.*

¹⁰¹ AP, *Online Classes Keep Football Players Out of Academic Fray*, USA TODAY (Dec. 23, 2019), <https://www.usatoday.com/story/sports/ncaaf/2019/12/23/online-classes-keep-football-players-out-of-academic-fray/40878105/>.

¹⁰² See Mary Grace Miller, *The NCAA and the Student-Athlete: Reform is on the Horizon*, 46 UNIV. RICH. L. REV. 1141, 1148 (2012) (noting “The system needs reform for a number of reasons, including the functionality of its bylaws as well as how the student-athletes are treated as an unpaid labor force.”). See also Marc Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why a Win for the Plaintiffs in the NCAA Student-Athlete Name & Likeness Litigation Will Not Lead to the Demise of College Sports*, 92 UNIV. OR. L. REV. 1019, 1049–51 (2013) (observing that college sports fans do not care that college athletes are unpaid).

¹⁰³ See *NCAA Finances*, USA TODAY, <https://sports.usatoday.com/ncaa/finances> (last visited Jul. 30, 2021) (listing college athletic department revenues and expenses).

study found that a significant majority of college athletes, due to NCAA restraints on their compensation, continue to live below the poverty line.¹⁰⁴

Although many scholars have written about the troubling labor dynamics in college sports, former UCLA football player Ramogi Huma has been the leader in trying to change the system through efforts to organize college sports in conjunction with a trade association he cofounded in 2013, called the College Athlete Players Association (CAPA).¹⁰⁵ Hoping to change the current labor dynamics in big-time college sports, CAPA worked with former Northwestern University college quarterback, Kain Colter, to try to unionize the grant-in-aid college football players at Northwestern.¹⁰⁶ However, both Northwestern University and the NCAA moved vigorously to derail these efforts, with former NCAA Chief Legal Officer Donald Remy publicly proclaiming that the “union-backed attempt to turn student-athletes into employees underlines the purpose of college: an education” and that “[s]tudent-athletes are not employees . . . [because] their participation in college sports is voluntary.”¹⁰⁷

While, in its seminal ruling, the National Labor Relations Board’s (NLRB) Region 13 recognized that the Northwestern University college football players indeed constituted “employees” and thus were legally capable of unionizing,¹⁰⁸ Huma’s organizing efforts were soon dashed by a subsequent ruling coming from the full NLRB.¹⁰⁹ Despite Region 13’s contention that Northwestern University football players were employees, in a unanimous opinion, the NLRB refused to assert jurisdiction over Northwestern University’s grant-in-aid college football players.¹¹⁰ Specifically, the NLRB contended that asserting jurisdiction over Northwestern’s grant-in-aid college football players would not support a “symbiotic relationship” or “promote stability in labor relations” within college sports.¹¹¹ Thus, while the

¹⁰⁴ Henry DeWitt, *NCAA Should Pay Its Athletes*, BUDGET ONLINE (Oct. 31, 2019), <https://lhsbudget.com/opinion/2019/10/31/ncaa-should-pay-its-athletes/> (noting that a study found that 86 percent of college athletes live below the federal poverty line).

¹⁰⁵ Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes’ Rights Movement*, 38 CARDOZO L. REV. 1627, 1633, 1635 (2017).

¹⁰⁶ *Id.* at 1635–36.

¹⁰⁷ *Id.* at 1633, 1636.

¹⁰⁸ *Id.* at 1633, 1638–39.

¹⁰⁹ *Id.* at 1633, 1640.

¹¹⁰ *Id.*

¹¹¹ *Id.*

concerns of labor exploitation of college athletes remain very real to this day, those seeking to affect change through the unionizing process have thus far failed to achieve their goals.¹¹²

C. Civil Rights Concerns

Closely tied with the labor market criticisms of college sports are a collection of civil rights advocates who criticize the current college sports model of college sports directly from a civil rights perspective.¹¹³ For example, as recently as 2014, sociology professor Dr. Harry Edwards of University of California, Berkeley, described the college athletes' rights movement as being the civil rights movement in sports of our time.¹¹⁴ While not every situation in which a particular class of labor is unpaid or underpaid would give rise to comparisons with the fight for civil rights by Black Americans in the 1960s, the college sports labor movement, to many, stands out in its similarities.¹¹⁵ For example, according to Taylor Branch, a Pulitzer Prize winning author who focuses his work on the Civil Rights Era, "to survey the scene—corporations and universities enriching themselves on the backs of uncompensated young men, whose status as "student-athletes" deprives them of the right to due process guaranteed by the Constitution—is to catch an unmistakable whiff of the plantation."¹¹⁶ Branch describes the college sports system as "colonialist" and believes that it is run by "well-meaning paternalists."¹¹⁷

The term "student-athlete"—the justification for the system that has kept athletes unpaid—was developed to help the organization fight off workers' compensation claims.¹¹⁸ The term was sufficiently vague that it made clear that college athletes were more than students, but still less than employees of the universities who may be entitled to compensation if injured while

¹¹² Some have speculated that unionization of college athletes may gain new momentum. See Marshall H. Tanick, *Could Unions Be Next for Gophers and Other College Sports Teams?*, MINN. POST (Jun. 28, 2021), <https://www.minnpost.com/community-voices/2021/06/could-unions-be-next-for-gophers-and-other-college-sports-teams/>.

¹¹³ Ttife, *Student Athlete Compensation is a Civil Rights and Racial Justice Issue*, HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. AMICUS (Nov. 1, 2019), <https://harvardcrcl.org/student-athlete-compensation-is-a-civil-rights-and-racial-justice-issue/>; see also Ben Pickman, *Legislation Introduced Seeking to Provide Collective Bargaining Rights to College Athletes*, SPORTS ILLUSTRATED (May 27, 2021), <https://www.si.com/college/2021/05/27/legislation-introduced-collective-bargaining-rights-college-athletes-bernie-sanders> (noting that Senator Chris Murphy, who introduced legislation that would allow athletes to unionize said: "Having the right to do so will help athletes get the pay and protections they deserve and forces the NCAA to treat them as equals rather than second-class citizens. It's a civil rights issue, and a matter of basic fairness.").

¹¹⁴ Edelman, *supra* note 105, at 1630.

¹¹⁵ Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

on the “job.”¹¹⁹ The entirety of the NCAA governance structure is built to protect the organization while the athletes are subject to the organization’s unitary governance.¹²⁰ Even where college athletes on prominent teams have called attention to the use of racial slurs by their white coaches, many have coaches have received only a slap on the wrist, with some receiving no visible punishment beyond making an apology.¹²¹

In addition to the lack of pay for college athletes, the traditional rules limiting player movement between colleges are equally concerning to those who have studied the history of African American rights in the United States.¹²² The NCAA imposes significant restrictions on athletes’ eligibility after they transfer to another school, while the organization has recently allowed for a one-time transfer for athletes without a loss of or period of ineligibility,¹²³ college athletes are still held to a different standard than other students.¹²⁴ The restrictions serve to keep athletes in schools that they no longer desire to attend, and the transfer rules even serve to keep some players subjected to racist coaches.¹²⁵ Despite changes that will foreseeably grant collegiate athletes greater rights in the future, the power remains held by the coaches and administrators of collegiate athletics.¹²⁶ As long as coaches and administrators retain all the power, athletes will remain subordinate and without a voice.

D. Failure To Protect Health and Safety

The fourth main critique of the college sports governance structure involves the failure of both individual colleges, and the NCAA, in keeping athletes physically and emotionally safe.¹²⁷

¹¹⁹ *Id.*

¹²⁰ See Bomani Jones, *College Football Players Are Unpaid Stars on the Field and Have No Power Off It*, Vanity Fair (Sep. 2020), <https://www.vanityfair.com/culture/2020/08/college-football-unpaid-stars-with-no-power> (noting the comments of retired North Carolina Supreme Court Justice Robert Orr, who after reading the NCAA’s 400-page book of regulations found that there was no mention of the rights of the athletes).

¹²¹ See *id.* (noting incidents involving racially hostile language at the University of Iowa, the University of Utah, and Clemson University).

¹²² Michael H. LeRoy, *Whitewashing Coaching Racism in NCAA Sports: Enforcing Civil Rights Through the Ku Klux Klan Act*, 10 AZ. ST. SPORTS & ENT. L.J. 53, 58 (2020).

¹²³ See Sara McClanahan & Katherine Shannon, *NCAA Ratifies New One-Time Transfer Rule*, DARTMOUTH (Apr. 30, 2021), <https://www.thedartmouth.com/article/2021/04/ncaa-ratifies-new-one-time-transfer-rule> (explaining that athletes would be allowed to transfer schools one-time without having to sit out a year).

¹²⁴ NAT’L COLLEGIATE ATHLETE ASS’N, 2020-2021 NCAA DIVISION I MANUAL rule 14.5.5 (2020).

¹²⁵ LeRoy, *supra* note 122, at 58–62.

¹²⁶ See generally, Jones *supra* note 120 (describing the power dynamics of college football).

¹²⁷ Alex Kirshner, *What We Know About Jordan McNair’s Death and Maryland Football’s Role In It*, SB NATION (Oct. 31, 2018), <https://www.sbnation.com/college-football/2018/8/11/17678652/jordan-mcnair-death-investigation-maryland>; Lindsay Dodgson, *Female College Athletes From Across the US Say They’re Been Bullied*,

Safety concerns pertaining to college athletes generally relate to six broad areas: (1) exposure of athletes to physical injury due to dangerous training practices that are ignored or downplayed by specific universities;¹²⁸ (2) failure to take meaningful precautions to prevent, diagnose and treat concussions;¹²⁹ (3) a pattern of overlooked, or at least unrecognized, sexual abuse of college athletes;¹³⁰ (4) failure to prioritize college athlete safety over revenue generation during the recent COVID-19 health crisis;¹³¹ (5) lack of concern for college athletes' mental health;¹³² and (6) failure to provide sufficient insurance coverage in the event of player injuries.¹³³

Exposure of athletes to physical injury has long been a risk of collegiate athletics.¹³⁴ However, in far too many cases of injury, coaches have negligently, or recklessly, disregarded the safety of college athletes putting them at unnecessary risk of injury, and even death.¹³⁵ The tragic death of Jordan McNair at the University of Maryland, who died as a result of heat stroke during a football practice, highlights the lack of repercussions that are associated with injuries related to abusive coaching.¹³⁶ In other situations, coaches have directly attacked students, such as former Rutgers University basketball coach, Mike Rice, who was caught on video hitting his

Manipulated, and Psychologically Abused By Their Coaches, INSIDER (Oct. 30, 2020), <https://www.insider.com/players-say-psychological-abuse-college-women-sports-coaches-2020-7>.

¹²⁸ Kirshner *supra* note 127.

¹²⁹ L. Adam Perry, *Dropping the Ball: The Failure of the NCAA to Address Concussions in College Football*, 89 NOTRE DAME L. REV. 2359, 2370–74 (2014).

¹³⁰ See e.g., Colin Dwyer, *Michigan State University to Pay \$4.5 Million Fine Over Larry Nassar Scandal*, NPR (Sep. 5, 2019) (providing an overview of Michigan State University's failures to protect athletes from sexual-predator Larry Nassar).

¹³¹ Josh Peter, *Are College Football Players the 'Guinea Pig' for COVID-19 Protocol Planning at Universities*, USA TODAY (Jul. 17, 2020), <https://www.usatoday.com/story/sports/ncaaf/2020/07/17/college-football-players-guinea-pigs-schools-covid-19-plans/5443267002/>.

¹³² Dodgson, *supra* note 127.

¹³³ Kristina Peterson, *College Athletes Stuck With the Bill After Injuries*, N.Y. TIMES (Jul. 15, 2009), <https://www.nytimes.com/2009/07/16/sports/16athletes.html>.

¹³⁴ See Branch, *supra* note 115 (noting the origin for the term student-athlete was to avoid having injured players qualifying for workman's compensation).

¹³⁵ See, e.g., Heather Dinich, *Sources: Maryland OL Jordan McNair Showed Signs of Extreme Exhaustion*, ESPN (Aug. 10, 2018), https://www.espn.com/college-football/story/_/id/24343021/jordan-mcnair-maryland-terrapins-died-heatstroke-team-workout citing sources that reported former University of Maryland offensive lineman Jordan McNair died of extreme exhaustion under the practice conditions put in place by coach D.J. Durkin).

¹³⁶ See Rae-Anna Sollestre, *Wrongful Death: Does the NCAA Have an Affirmative Duty to Protect Its Student-Athletes?*, 30 MARQ. SPORTS L. REV. 393, 394–96 (2020) (describing the factual circumstances around the death of Jordan McNair).

players.¹³⁷ While documented abuse can often lead to the termination of coach, these sanctions have tended to be temporary, as even D.J. Durkin, whose practice facilitated the conditions that resulted in the death of a player, found a new job as an assistant coach at the University of Mississippi just 14 months after being terminated by the University of Maryland after the passing of Jordan McNair.¹³⁸

While tragedies like that of the death of Jordan McNair thankfully remain rare in college sports, the NCAA, an organization created to protect the safety of athletes, has substantially failed to keep college athletes safe from head injuries.¹³⁹ Indeed, the NCAA's concussion management plan relies primarily on the member schools to administer procedures for managing concussions.¹⁴⁰ The NCAA's decision to not apply universal best practices, results in a variety of approaches to concussion management, and almost certainly results in some athlete's health being compromised.¹⁴¹ Current practices see many universities employing team doctors or athletic trainers with the responsibility for determining fitness to play.¹⁴² This presents a potential conflict of interest, as dual loyalties to both a school and an athlete may not be compatible.¹⁴³ In his 2014 *Notre Dame Law Review* article, L. Adam Perry notes: "Team doctors and trainers are inherently interested actors—such positions, particularly at big-time college football programs, are prestigious, often lucrative, and highly sought after within the sports medicine community."¹⁴⁴ This apparent conflict, combined with the desire to be perceived as tough, that exists in big time college sports, can lead to athletes not receiving the necessary treatment for head injuries.¹⁴⁵ While the NCAA has appeared more than willing to police other subjects, like "amateurism," Perry notes that player safety concerns seem secondary to the organization.¹⁴⁶

¹³⁷ Tom Canavan, *Rutgers Fires Basketball Coach Over Abuse, Taunts*, ASSOCIATED PRESS (Apr. 3, 2013), <https://apnews.com/article/aee9e01877184066b1007074c984cd45>.

¹³⁸ Emily Giambalvo, *DJ Durkin, Fired From Maryland After Jordan McNair Death, is Hired As Assistant at Mississippi*, WASH. POST (Jan. 2, 2020), <https://www.washingtonpost.com/sports/2020/01/02/dj-durkin-ole-miss-football-maryland/>. After his termination from Rutgers University Mike Rice continues to work as a basketball coach, now coaching high school and middle school players. See Adam Zagoria, *The Rehabilitation of a Coaching Outcast*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/sports/ncaabasketball/mike-rice-rutgers-basketball-coach.html>.

¹³⁹ Perry, *supra* note 129, at 2371.

¹⁴⁰ *Id.* at 2370–71.

¹⁴¹ *Id.* at 2371.

¹⁴² *Id.* at 2371–72.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 2372.

¹⁴⁵ *Id.* at 2372–73.

¹⁴⁶ *Id.* at 2373.

As the American public began to learn about the effects of repeated head injuries on brain function,¹⁴⁷ the country also learned about another dark side of collegiate athletics—the prevalence of sexual predators.¹⁴⁸ The first major story to break on this matter was the Jerry Sandusky scandal at Penn State in 2011.¹⁴⁹ The Sandusky scandal is significant because it illustrates how often, collegiate coaches remain employed even after their universities learn of their misconduct.¹⁵⁰ Since then, college sports have been gripped by multiple scandals involving sexual predators who allowed remained employed because no one acted on information that could have stopped these perpetrators.¹⁵¹ For example, the Department of Education found that Michigan State University was responsible for a “systemic failure to protect students from sexual abuse.”¹⁵² The known failures, however, likely reflect only a small number of the incidents that have taken place, but the lessons learned from the Jerry Sandusky and Larry Nassar scandals are that schools have failed to act when high-profile individuals are accused of sexual abuse.¹⁵³ Moreover, it is important to recognize that the protection of sexual offenders in college is two-fold, as not only have complaints against employees fallen on the deaf ears of administrators, but sexual assaults have also been perpetrated by the athletes themselves at many schools.¹⁵⁴

¹⁴⁷ See, e.g., A.J. Perez, *Analysis shows 147 college football programs had at least one player diagnosed with CTE*, USA TODAY (Nov. 2, 2018, 6:17 PM), <https://www.usatoday.com/story/sports/ncaaf/2018/11/02/analysis-shows-cte-cases-linked-147-colleges/1862271002/>.

¹⁴⁸ See, e.g., CNN Editorial Research, *Penn State Scandal Fast Facts*, CNN (May 2, 2021, 8:34 AM), <https://www.cnn.com/2013/10/28/us/penn-state-scandal-fast-facts/index.html>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (describing that Penn State officials failed to notify law enforcement after learning about instances where Jerry Sandusky sexually abused young boys).

¹⁵¹ For example, at least 14 Michigan State University officials were contacted over two decades about former-Dr. Larry Nassar’s sexual abuse, but nothing was done by the school until after he was arrested. See Kim Kozlowski, *What MSU Knew: 14 Were Warned of Nassar Probe*, DETROIT NEWS (Jan. 18, 2018), <https://www.detroitnews.com/story/tech/2018/01/18/msu-president-told-nassar-complaint-2014/1042071001/>.

¹⁵² Susan Svrluga & Moriah Balingit, *DeVos Imposes Record \$4.5 Million Fine on Michigan State For Systemic Failure to Address Sexual Abuse*, WASH. POST (Sep. 5, 2019), <https://www.washingtonpost.com/education/2019/09/05/devos-imposes-record-million-fine-michigan-state-systemic-failure-address-sexual-abuse-larry-nassar-case/>.

¹⁵³ Korva Coleman, *Paterno, Others Slammed In Report For Failing to Protect Sandusky’s Victims*, NPR (Jul. 12, 2012), <https://www.npr.org/sections/thetwo-way/2012/07/12/156654260/was-there-a-coverup-report-on-penn-state-scandal-may-tell-us>.

¹⁵⁴ The most prominent example of a school failing to protect students from athlete sexual predators is likely Baylor University that was accused of failing to take sufficient actions when 31 football players were alleged to have committed 52 rapes over a four-year period. See Sarah Mervosh, *New Baylor Lawsuit Alleges 52 Rapes by Football Players in 4 Years, ‘Show ‘Em A Good Time’ Culture*, DALLAS MORNING NEWS (Jan. 27, 2017), <https://www.dallasnews.com/news/2017/01/27/new-baylor-lawsuit-alleges-52-rapes-by-football-players-in-4-years-show-em-a-good-time-culture/>.

While sexual abuse scandals are perhaps the most horrific examples of schools prioritizing athletic success and prestige over athlete welfare, the COVID-19 pandemic provided yet another illustration of colleges prioritizing athletic revenues over player safety.¹⁵⁵ Notably, COVID-19 demonstrated just how willing some college coaches were to expose athletes to an illness with unknown long-term effects.¹⁵⁶ Following reports that 14 Clemson University football players had tested positive for the coronavirus in early June 2020, former NFL quarterback Boomer Esiason questioned whether college players were intentionally getting the virus in an effort for the team to reach herd immunity before the start of the season.¹⁵⁷ Although the idea that perhaps teams could potentially be better positioned if their players were infected prior to the season may seem like a bizarre science fiction plot, it was not just Esiason who wondered about the competitive advantage concept. Indeed, the question was asked anonymously to doctors during a Pac-12 meeting, at which leading infectious disease specialists and epidemiologists shared: “I can see why people are thinking about that,” and that the intentional herd immunity concept was “a strange way of putting it, but . . . probably correct.”¹⁵⁸ The willingness to even consider intentionally exposing athletes to a virus with unknown long-term effects is so dystopian in nature it is difficult to reconcile the discussion being had by those who are expected to safeguard and act in the best interests of college athletes while seemingly putting them in a situation with unknown long-term consequences.¹⁵⁹

In addition to a lack of care paid to athletes’ physical well-being, many college athletes fail to receive sufficient care and protection for their mental health.¹⁶⁰ Female athletes, in

¹⁵⁵ Indeed, Oklahoma State University football coach Mike Gundy stated that he wanted to bring his players back to campus, as they are young, they should be able to fight off the virus and “[b]ecause we need to continue to budget and run money through the state of Oklahoma.” Nick Bromberg, *Coronavirus: Mike Gundy Wants to Get Football Started to ‘Run Money Through the State of Oklahoma,’* YAHOO (Apr. 7, 2020), <https://sports.yahoo.com/coronavirus-mike-gundy-wants-to-get-football-started-because-we-need-to-run-money-through-the-state-of-oklahoma-223512073.html>.

¹⁵⁶ Peter, *supra* note 131.

¹⁵⁷ Mollie Walker, *Boomer Esiason Suggests College Football Players Are Getting Coronavirus on Purpose*, N.Y. POST (Jun. 30, 2020), <https://nypost.com/2020/06/30/boomer-esiason-suggests-college-football-players-are-getting-coronavirus-on-purpose/>.

¹⁵⁸ Henry Bushnell, *Should Teams Actively Seek Herd Immunity from the Coronavirus*, YAHOO (Jun. 3, 2020), <https://www.yahoo.com/now/should-teams-actively-seek-herd-immunity-from-the-coronavirus-234449908.html>.

¹⁵⁹ Elizabeth Weise, *Herd Immunity Strategy Endorsed By White House A ‘Ridiculous’ Way to Stop COVID-19, Scientists Say-It Will Just Kill People*, USA Today (Oct. 14, 2020), <https://www.usatoday.com/story/news/health/2020/10/14/herd-immunity-scientists-say-trump-endorsed-covid-strategy-deadly/3655134001/>.

¹⁶⁰ Dodgson, *supra* note 127.

particular, have reported significant mental and emotional abuse from college coaches.¹⁶¹ As discussions around mental health have become more common place, so too are stories of abusive coaches.¹⁶² Despite the increasing willingness to discuss emotional abuse, collegiate athletes are left with little remedy when coaches engage in abusive behavior.¹⁶³ A leading example stems from the University of Nebraska softball program, where coach Rhoda Revelle was suspended after the 2019 season following complaints of “systematic emotional abuse and a toxic culture on the team that include[d] fat-shaming, verbal abuse and erratic and harassing behavior.”¹⁶⁴ However, Revelle was reinstated before school reopened for the fall semester.¹⁶⁵ The decision to reinstate Revelle will likely have a chilling effect on Nebraska players coming forward about abuse in the future. Unfortunately, the Nebraska situation is far from unique, and there is little that college athletes can do about abusive coaches without risking their position on their teams.¹⁶⁶

Overall, while the NCAA and its member institutions have largely failed to protect the physical and mental wellbeing of collegiate athletes in many ways, these failures unfortunately last far beyond an athlete’s playing days.¹⁶⁷ While NCAA rules now require universities to ensure that athletes have insurance prior to competing, there is no requirement that the schools themselves provide athletes with coverage.¹⁶⁸ Despite the requirement that athletes carry insurance, not all athletes are in a position to appreciate the scope of insurance coverage, which can leave some athletes with tens of thousands of dollars of debt after their collegiate careers are over.¹⁶⁹ While the NCAA carries coverage, it is only for catastrophic injuries, and as of 2009, there was a \$90,000 deductible.¹⁷⁰ Many former athletes suffer injuries that while not catastrophic, are chronic as a result of their college athletic careers; but despite the college

¹⁶¹ *Id.*

¹⁶² Chase Williams, *College Athletes Beginning to Rebel Against Abusive Coaches*, GLOBAL SPORTS MATTERS (Oct. 8, 2019), <https://globalsportmatters.com/health/2019/10/08/college-athletes-beginning-to-rebel-against-abusive-coaches/>.

¹⁶³ Ben Strauss, *Complaints Against Nebraska Softball Coach Show College Athletes’ Limited Options*, WASH. POST (Aug. 30, 2019), <https://www.washingtonpost.com/sports/2019/08/30/complaints-against-nebraska-softball-coach-show-college-athletes-limited-options/>.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Peterson *supra* note 127.

¹⁶⁸ NAT’L COLLEGIATE ATHLETE ASS’N, 2020-2021 NCAA DIVISION I MANUAL rule 3.2.4.9 (2020).

¹⁶⁹ Peterson, *supra* note 133.

¹⁷⁰ *Id.*

athletic departments reaping millions in revenue, few schools if any provide for the type of long-term coverage required for post-college treatments.¹⁷¹ Even schools covering the costs of insurance for athletes while in school fall short of providing for athletes whose significant medical costs may not materialize until years after their playing careers end.¹⁷²

E. Administrative Unfairness

The fifth and final critical lens from which the governance model of college sports is viewed, is that of administrative unfairness. The NCAA and its member institutions' mistreatment of athletes is not the case of a few bad actors. Indeed, the disproportionate power afforded to the institutions is systemic—embedded within the NCAA's rules.¹⁷³ The determination that the NCAA is not a state actor has afforded the organization a great deal of leeway to proceed with sanctions in a seemingly inconsistent manner.¹⁷⁴ While the NCAA is not a state actor, and therefore is under no obligation to afford constitutionally fair proceedings, Congress has periodically questioned the NCAA's "arbitrariness, inequality, secrecy, and other abuses of excessive power."¹⁷⁵

A primary example of the NCAA's excessive power is the fact that under the law, the NCAA is not required to afford due process to Players who are sanctioned for violating NCAA rules. One such instance of this occurs in the case of the "Restitution Rule." Pursuant to the Restitution Rule, if a college athlete is deemed ineligible to play (for example, due to a suspension) and, after the athlete obtains an injunction allowing them to play, the injunction is subsequently reversed or vacated, the NCAA can impose harsh penalties on that athlete's institution (known as restitution), which include things like forfeiture of victories and needing to turn over television revenue.¹⁷⁶ The so-called Restitution Rule is meant to provide a mechanism in order to ensure that schools are not allowing ineligible players to participate.¹⁷⁷ However, the

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ The Supreme Court highlighted that although the NCAA acts in some ways like a state actor, it is not in fact a state actor, and therefore is not required to afford due process to those sanctioned. *NCAA v. Tarkanian*, 488 U.S. 179, 199 (1988).

¹⁷⁴ See Major Kelchner, *The NCAA: Where Inconsistency Reigns Supreme*, BLEACHER REP. (Nov. 5, 2009), <https://bleacherreport.com/articles/284973-the-ncaa-where-inconsistency-reigns-supreme> (describing the inconsistent enforcement of NCAA rules).

¹⁷⁵ Robin J. Green, *Note: Does The NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations*, 42 DUKE L.J. 99, 114 (1992).

¹⁷⁶ Steve Silver, *How A Little-Known NCAA Rule Shuts Athletes Out of the Legal System*, VICE (Dec. 20, 2016), <https://www.vice.com/en/article/8qy533/how-a-little-known-ncaa-rule-shuts-athletes-out-of-the-legal-system>; NAT'L COLLEGIATE ATHLETE ASS'N, 2020-2021 NCAA DIVISION I MANUAL rule 19.13.

¹⁷⁷ Stephen F. Ross, Richard T. Karcher & S. Baker Kensinger, *Judicial Review of NCAA Eligibility Decisions: Evaluation of the Restitution Rule and a Call for Arbitration*, 40 J.C. & U.L. 79, 86–88 (2014).

practical effect of the Restitution Rule is that it effectively keeps athletes from challenging NCAA eligibility decisions in court.¹⁷⁸ As one attorney who has litigated against the NCAA stated: “It [the Restitution Rule] is a form of extortion: If you follow the court order, we are going to ruin your coach and all the other kids on the team. So who is willing to risk the whole team and the coach’s record for one kid.”¹⁷⁹ The Restitution Rule acts as a formidable shield for the NCAA, and encourages schools to discourage athletes from challenging organizational decisions.¹⁸⁰ The Restitution Rule also serves as a meaningful deterrent against the development of potentially negative precedent, which could diminish the NCAA’s power to keep athletes out of the courts in the first place.¹⁸¹ Without a mandate to afford due process to college athletes, the NCAA has chosen to abdicate any commitment to fairness or predictability of outcome.

The NCAA has faced a number of criticisms; however, the most prominent can be categorized into five distinct groups. Firstly, has been the NCAA’s abdication of a commitment to academics.¹⁸² Secondly and thirdly, the NCAA continues to be the disproportionate beneficiary of a model that generates billions of dollars on largely uncompensated labor, while restricting the ability for athletes to have a say.¹⁸³ Fourthly, the NCAA’s has abandoned its initial mission of protecting athlete health in favor of increasing the bottom line, to the detriment of generations of college athletes.¹⁸⁴ Finally, the NCAA has done all this while limiting the ability for athletes to challenge their decisions.¹⁸⁵

III. THE SUMMER OF 2021 AND THE RISE OF CALLS FOR NCAA REFORM

While the college sports model has long faced criticism on these five different grounds, it was not until the summer of 2021 that changes in the college sports regulatory environment

¹⁷⁸ Silver, *supra* note 176.

¹⁷⁹ *Id.*

¹⁸⁰ Richard G. Johnson refers to the Restitution Rule as “submarining due process.” See Richard G. Johnson, *Submarining Due Process: How the NCAA Uses Its Restitution Rule to Deprive College Athletes of Their Right of Access to the Courts...Until Oliver v. NCAA*, 11 FLA. COASTAL L. REV. 459 (2010).

¹⁸¹ Silver, *supra* note 176.

¹⁸² Zocalo Public Square, *Why Student Athletes Continue to Fail*, TIME (Apr. 20, 2015), <https://time.com/3827196/why-student-athletes-fail/>.

¹⁸³ Brando Simeo Starkey, *College Sports Aren’t Like Slavery. They’re Like Jim Crow*, NEW REPUBLIC (Oct. 31, 2014), <https://newrepublic.com/article/120071/ncaa-college-sports-arent-slavery-theyre-jim-crow>

¹⁸⁴ Paula Lavigne, *Documents, Claims Bring NCAA Medical Care Issues into Question*, ESPN (Nov. 26, 2019), https://www.espn.com/espn/otl/story/_/id/28116817/documents-claims-bring-ncaa-medical-care-issues-question

¹⁸⁵ Branch *supra* note 115.

opened the gateways to far grander reform.¹⁸⁶ Specifically, three important regulatory events took place in the summer of 2021 to facilitate more meaningful changes to the internal governance structure of college sports.¹⁸⁷ First, a number of states passed new laws granting college athletes the right to endorse products free from NCAA interference.¹⁸⁸ Second, Congress, for the first time in a meaningful way, held hearings to discuss the lack of medical benefits and other safety precautions afforded to college athletes.¹⁸⁹ And finally, the Supreme Court ruled that several of the NCAA's longstanding restraints on college athlete compensation violated federal antitrust law.¹⁹⁰ These three events are significant, as, in keeping with the history and five main criticisms of the NCAA discussed earlier in this Article, they help set the stage for how the internal governance structure of college athletics in the 21st Century can be redesigned and reimagined.

A. *State Name, Image, and Likeness Legislation*

The goal of ending the NCAA's monopolist restraints on college athlete endorsement opportunities by passing state level name, image, and likeness (NIL) legislation, grew out of the work of two individuals—sports economist Andy Schwarz and California state senator Nancy Skinner.¹⁹¹ The two first met at an Oakland Rotary Club luncheon in 2015, where Schwarz led a discussion about the NCAA's anticompetitive, monopolist behavior.¹⁹² Skinner, who had studied under civil rights advocate Dr. Harry Edwards at the University of California, immediately took a liking to Schwarz's position, not only based on his reasonable understanding

¹⁸⁶ Zach Braziller, *NCAA Changes College Sports Forever: 'An Entirely New Landscape,'* N.Y. POST (Jun. 30, 2021), <https://nypost.com/2021/06/30/ncaas-new-nil-rule-changes-everything/>.

¹⁸⁷ Dennis Dodd, *NCAA Pushing to Adopt Name, Image and Likeness Rules Before July 1 After Supreme Court Decision Clears Way,* CBS SPORTS (Jun. 22, 2021), <https://www.cbssports.com/college-football/news/ncaa-pushing-to-adopt-name-image-and-likeness-rules-before-july-1-after-supreme-court-decision-clears-way/>.

¹⁸⁸ The Athletic College Football Staff, *Name, Image and Likeness (NIL): What It Means, Why It Matters and How It's Impacting the NCAA and College Sports,* ATHLETIC (Jul. 1, 2021), <https://theathletic.com/2580642/2021/07/01/name-image-and-likeness-nil-what-it-means-why-it-matters-and-how-it-will-impact-college-sports/>.

¹⁸⁹ Molly Hensley-Clancy, *Senators Hide NCAA for Not Solving Athlete-Pay Issue As Fast Federal Help Looks Unlikely,* WASH. POST (Jun. 9, 2021), <https://www.washingtonpost.com/sports/2021/06/09/ncaa-congress-nil-hearing/>.

¹⁹⁰ Andrew Brandt, *Business of Football: The Supreme Court Sends A Message to the NCAA,* SPORTS ILLUSTRATED (Jun. 29, 2021), <https://www.si.com/nfl/2021/06/29/business-of-football-supreme-court-unanimous-ruling>.

¹⁹¹ See *How California Started the NIL Revolution and Helped NCAA Athletes Get Paid Today,* UNITED NEWS POST, <https://unitednewspost.com/news/sports/how-california-started-the-nil-revolution-and-helped-ncaa-athletes-get-paid-today/> (last visited Jul. 20, 2021).

¹⁹² *Id.*

of antitrust law, but also based on his belief that depriving college athletes the opportunity to earn money presented a “civil rights” issue.¹⁹³ With the help of another California state senator, Steven Bradford, Schwarz and Skinner then set out to draft a bill that would force NCAA member colleges in California to allow their athletes to endorse products, even though the NCAA prohibited its members from engaging in this sort of activity.¹⁹⁴

Thereafter, in early 2019, California state senators Skinner and Bradford introduced State Bill 206, which became known as the “Fair Pay to Play Act.”¹⁹⁵ While the NCAA responded to this proposed bill by threatening to ban California member schools if the bill went into effect, testimony at a legislative hearing in July 2019, by one of this article’s authors, Marc Edelman, explained why the NCAA member schools could not, as a matter of antitrust law, legally do so.¹⁹⁶ Subsequently, the Fair Pay to Play Act was passed by unanimous vote and was signed into law by California governor Gavin Newsom on September 30, 2019¹⁹⁷—making California the first state to ensure college athletes the right to market their names, images and likenesses.¹⁹⁸ But, perhaps even more importantly, by mid-June 2021, at least eleven other states had passed similar bills to ensure college athletes in their states were not prevented from signing endorsement deals by their colleges.¹⁹⁹

As a result of the increase in state level NIL legislation, and the NCAA’s cartel-like control over college athletes unfolding on the world stage in the Supreme Court case from last term—*National Collegiate Athletic Association v. Alston*—the NCAA issued revised “temporary” guidance on college athletes’ rights to endorse products. The NCAA’s new policy, issued roughly a week after the *Alston* decision and just eight hours before state laws were to

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*; see also Sam Metz, *California Student-Athletes One Step Closer to Getting Paid, Despite NCAA Threat*, DESERT SUN (Jul. 10, 2019), <https://www.desertsun.com/story/news/politics/2019/07/10/california-advances-bill-allow-ncaa-athletes-profit-name-image-and-likeness/168895> (quoting Professor Marc Edelman’s testimony before the California state legislature on the antitrust issue); see generally Marc Edelman, *The NCAA, Fair Pay to Play, Antitrust Scrutiny, and the Need for Institutional Reform*, 20 WAKE FOREST J. OF BUS. & INTELL. PROP. L. 177 (2020) (further fleshing out Professor Edelman’s views on why the NCAA member schools cannot collectively ban colleges that allow their athletes to earn money from endorsing products in compliance with state law).

¹⁹⁷ Alaa Abdeldaiem, *California Governor Signs Fair Pay to Play Act*, SPORTS ILLUSTRATED (Sep. 30, 2019), <https://www.si.com/college/2019/09/30/california-governor-signs-fair-pay-to-play-act-lebron-james>.

¹⁹⁸ How California Started the NIL Revolution, *supra* note 191.

¹⁹⁹ *Id.*

begin taking effect,²⁰⁰ contained three main provisions. First, it states that athletes, for the time being, may “engage in NIL activities that are consistent with the law of the state where the school is located.”²⁰¹ Second, it allows athletes to retain “professional services provider[s]” in association with their NIL activities.²⁰² Third, it advises athletes that schools should develop processes for reporting NIL contracts to their institution or conference.²⁰³ At the same time, the NCAA’s new policy still allows for individual colleges and individual athletic conferences to adopt their own name, image and likeness rules to replace the nationwide rules that the NCAA had previously enforced.²⁰⁴

The NCAA’s interim policy is only temporary, the press release notes that the policy will be a place holder until either permanent rules are enacted or federal legislation is passed.²⁰⁵ The rules are a positive start for NCAA reform. However, the rules seem to set the stage for conferences to assume the power that the NCAA is abdicating.²⁰⁶

B. Congressional Hearings about College Athlete Safety

While the NCAA may desire that the federal government implements a nationwide solution, congressional hearings have highlighted skepticism of the NCAA’s governance.²⁰⁷ At around the same time as a number of U.S. states began drafting NIL laws, the U.S. Senate Committee on Commerce, Science and Transportation also began holding hearings on the future of college sports.²⁰⁸ Initially, these hearings seemed to serve as a precursor to drafting federal law to define a college athletes’ name, image and likeness rights and to curtail states like

²⁰⁰ Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (Jun. 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy>.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Kyle Boone, *Gundy Believes Realignment Could Create a New ‘Power Four’ Structure*, PISTOLS FIRING (Aug. 2, 2021), <https://pistolsfiringblog.com/gundy-believes-realignment-could-create-a-new-power-four-structure/>.

²⁰⁷ Alan Binder, *How Blowing Up College Sports Became A Rallying Cry for Some in Washington*, N.Y. TIMES (updated June 9, 2021), <https://www.nytimes.com/2021/03/30/sports/ncaabasketball/ncaa-college-sports-laws.html>.

²⁰⁸ Ross Dellenger, *Critical Senate Hearing NIL Hearing Set to Take Place With NCAA President Mark Emmert’s Revealing Testimony*, SPORTS ILLUSTRATED (Jun. 9, 2021), <https://www.si.com/college/2021/06/09/crucial-nil-hearing-mark-emmert-testimony>.

California from granting their athletes broader rights.²⁰⁹ But, eventually these hearings turned from being strictly about athletes' financial opportunities to focusing somewhat, if not more, on the long-disregarded NCAA purpose of promoting athlete safety.²¹⁰

At the first hearing, Roger Wicker (R-Miss.), who was at the time the ranking chairman of the Committee on Commerce, Science and Transportation, invited a number of NCAA advocates to Congress, including Keith Carter, the Vice Chancellor for Intercollegiate Athletics at the University of Mississippi, and Greg Sankey, the Commissioner of the Southeastern Conference, to, in essence, defend the financial restraints that were, at the time, in place in college sports.²¹¹ Maria Cantwell (D-Wash), who at the time, served as the minority chair of the Committee, received just one invite and selected Dionne Koller, a Professor of Law and the Director of the Center for Sport and the Law at the University of Baltimore, to present a very different reality about the current status of college sports—one in which the athletes themselves were asked to play through the COVID health crisis while most college campuses were closed, and yet still proclaimed by the NCAA to be no different from regular students.²¹² Koller also raised a number of important health and safety concerns involving the wellbeing of college athletes.²¹³

While these hearings began as an arguable form of pandering to the NCAA, Koller's testimony about the reality of college sports was well-received by several senators on both the left and right sides of the political spectrum.²¹⁴ In turn, these senators began to rethink their superficial acceptance of the NCAA's worldview of college sports.²¹⁵ Then, after the Democrats took control of the Senate based on the results of the November 2019 elections, Cantwell, who became the new majority leader of the Senate Committee on Commerce, Science and Transportation, began to shift the direction of these congressional hearings from being primarily about NIL to focusing more on the broader issues pertaining to college safety and wellbeing, as Koller suggested.²¹⁶ Perhaps the clearest evidence of this transition in the Congressional hearings

²⁰⁹ *Id.*

²¹⁰ Emily Giambalvo, *As the NCAA Asks Congress for Help on NIL Legislation, Lawmakers Want More Rights for College Athletes*, WASH. POST (Jul. 23, 2020), <https://www.washingtonpost.com/sports/2020/07/23/ncaa-asks-congress-help-nil-legislation-lawmakers-want-more-rights-college-athletes/>.

²¹¹ *See Exploring a Compensation Framework for Intercollegiate Athletes*. 116th Cong. 1 (2021).

²¹² *Exploring a Compensation Framework for Intercollegiate Athletes: Hearing Before the Subcomm. On Commerce, Science, & Technology*. 116th Cong. 1 (2021) (Statement of Professor Dionne Koller).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

came at the Senate hearing on June 17, 2021, when speaker Martin McNair—the father of late University of Maryland football player Jordan McNair, who died while engaging in a dangerous training drill required by his coach—spoke about how any federal NIL bill also needed to promote “the rights of students” including the protection of their physical on-field safety.²¹⁷

Martin McNair’s call for a college athletes’ bill of rights has since gained traction, both in Congress and in society at large.²¹⁸ For example, a bill currently awaiting Congressional review is a College Athlete Bill of Rights, drafted by U.S. Senators Cory Booker (D-NJ), Richard Blumenthal (D-CT), Kristen Gillibrand (D-NY), and Brian Schatz (D-HI), which addresses, among other things, an effort to improve the health and safety of college athletes.²¹⁹ While, at present, this bill does not have bipartisan sponsorship, the involvement of Cory Booker, a former college football player at Stanford University, in drafting this bill, helps push the conversation further in some respects.²²⁰ Whether a change in the way that the physical and mental health of college athletes is addressed ultimately comes from federal reform, voluntary association change, or yet a third different means, remains to be seen.

C. The Supreme Court Antitrust Decision: National Collegiate Athletic Association v. Alston

Finally, if state NIL legislation marked a tipping point for change in terms of college athletes’ financial interests and the Congressional hearings became substantially about athlete safety, the U.S. Supreme Court’s unanimous antitrust decision in favor of the athletes in *National Collegiate Athletic Association v. Alston* ended the NCAA’s longstanding, albeit dubious, claims that the association’s collective restraints on college athlete compensation were immune from antitrust law.²²¹ The case also placed the NCAA on warning that if the trade association

²¹⁷ NCAA Student Athletes and NIL Rights: Hearing Before the Subcomm. On Commerce, Science, & Technology. 117th Cong. __ (2021) (Statement of Mr. Martin McNair).

²¹⁸ See Senators Booker and Blumenthal Introduce College Athletes Bill of Rights, CORY BOOKER (Dec. 17, 2020), <https://www.booker.senate.gov/news/press/senators-booker-and-blumenthal-introduce-college-athletes-bill-of-rights>.

²¹⁹ College Athletes Bill of Rights. S. 5062. 116th Cong (Dec. 17, 2020). (The bill would be a substantial change to athlete rights. It affords athletes the right to engage in commercial activities even if they conflict with school agreements, as well as the ability to choose to wear any footwear they desire in spite of school sponsorship agreements. Additionally, athletes would have greater freedom over their academic majors and the ability to stay on scholarship after their athletic eligibility expires. Schools would also be required to distribute royalties from commercial deal to cover athletes).

²²⁰ See Richard Johnson, Alex Kirshner & Morgan Moriarty, *Yep, Cory Booker Was An Elite Football Recruit*, BANNER SOC’Y (Feb. 1, 2019), <https://www.bannersociety.com/2019/2/1/20707353/cory-booker-football-career> (noting that if Senator Booker were to be a present day high school football recruit he likely would have been rated as a four-star prospect).

²²¹ Darren Heitner, *The NCAA Is Not Above The Law*, ABOVE THE LAW (Jun. 21, 2021), <https://abovethelaw.com/2021/06/the-ncaa-is-not-above-the-law/>.

continued to restrain trade in the market to recruit college athletes, the trade association may ultimately find itself facing additional legal liability under antitrust law.²²²

While there have been a number of recent, high-profile antitrust cases challenging NCAA restraints in the lower courts, the *Alston* decision marked the first time that the Supreme Court reviewed the antitrust status of college sports since 1984, when it decided *National Collegiate Athletic Association v. Board of Regents*.²²³ In *Board of Regents*, the Court considered whether the NCAA's collective restraints on the number of games that any individual member college could broadcast on television was an unreasonable restraint on trade in violation of Section 1 of the Sherman Act, holding that it was.²²⁴ Importantly, Section 1 of the Sherman Act—a federal competition law passed in 1890—prohibits any “contract, combination or conspiracy in the restraint of trade.”²²⁵

Board of Regents is not only significant because it was the Supreme Court's last decision involving the antitrust status of college sports before *Alston*, but also because the NCAA has since relied on dicta from the decision to support its amateurism arguments. Specifically, after the *Board of Regents* decision, the NCAA relied on Justice Stevens' statement that the NCAA should be afforded “ample latitude” to uphold “the revered tradition of amateurism.”²²⁶ With this backdrop, in reaching its decision in *Alston* in 2021—nearly 40 years after *Board of Regents*—the Court unanimously rejected the NCAA's dubious argument that somehow the Supreme Court's earlier dicta in *Board of Regents* insulated NCAA rules about college athlete compensation from antitrust scrutiny. While this point was made in a number of different ways throughout the opinion, it was perhaps stated clearest in the final sentence of Justice Brett Kavanaugh's concurring opinion to *Alston*.²²⁷ Simply stated, “[t]he NCAA is not above the law.”²²⁸

1. Procedural History

The complaint in the *Alston* litigation, which led to the Supreme Court's seminal ruling, was initially filed on February 13, 2015, by a class of NCAA Division I football, and men's and

²²² *Id.*

²²³ See *NCAA v. Board of Regents*, 468 U.S. 85 (1984).

²²⁴ See 594 U.S. ___ (2021), at *1 (noting the NCAA's reliance on *Board of Regents*).

²²⁵ Marc Edelman, *supra* note 196, at 184–85.

²²⁶ Thomas A. Baker III & Natasha T. Brison, *From Board of Regents to O'Bannon: How Antitrust and Media Rights Have Influenced College Football*, 26 MARQ. SPORTS L. REV. 331, 346 (2016).

²²⁷ 594 U.S. ___ (2021), at *5 (Kavanaugh, J. concurring).

²²⁸ *Id.*

women’s basketball players.²²⁹ These college athletes alleged that NCAA member colleges had illegally “earned billions of dollars in revenues” through the maintenance of a “perpetual horizontal price-fixing agreement” that restrained trade among colleges seeking these athletes’ services.²³⁰ After several years of litigation, the matter eventually went for adjudication before Judge Claudia Wilken of the United States District Court for Northern District of California, under the caption *In re National Collegiate Athletic Association Grant-In-Aid Cap Antitrust Litigation*.²³¹

On March 8, 2019, the U.S. District Court for the District of California issued its ruling as a matter of both fact and law.²³² In the decision, Judge Wilken explained that the NCAA member schools’ agreement to curb the compensation of college athletes amounted to an agreement among the member colleges to restrain trade in a manner that affected interstate commerce (both necessary predicates to the finding of an antitrust violation),²³³ and that the underlying restraint was subject to a full economic review on its merits by applying a full Rule of Reason analysis.²³⁴ Applying the Ninth Circuit’s four-step Rule of Reason analysis—a burden-shifting test whereby courts determine whether Sherman 1 has been violated by looking at whether a restraint is significantly anticompetitive in purpose or effect—the court further held that: (1) the plaintiffs met their initial burden of showing that the NCAA’s rules restraining college athlete pay “impair competition significantly” in various sports-specific college labor markets;²³⁵ (2) the NCAA met its burden of showing that the NCAA’s no-pay rules “may have an effect on preserving consumer demand for college sports as distinct from professional sports to the extent that they prevent unlimited cash payments unrelated to education;”²³⁶ (3) a less restrictive alternative to the NCAA’s current rules exists in a rule that would only restrain NCAA member schools’ compensation to college athletes that is not tethered to education;²³⁷ and (4) on

²²⁹ Complaint, *NCAA Grant in Aid Cap Antitrust*, 2015 WL732448, Feb. 13, 2015, at ¶¶ 1, 119.

²³⁰ *Id.*

²³¹ *In re National Collegiate Athletic Association Grant-In-Aid Cap Antitrust Litigation*, 375 F.Supp. 3d 1058 (N.D. Cal. 2019).

²³² *Id.* at 1110.

²³³ *Id.* at 1092; see also Thomas A. Baker III, Marc Edelman & Nicholas M. Watanabe, *Debunking the NCAA’s Myth That Amateurism Conforms With Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661, 665–67 (2018) (describing the threshold requirements for an antitrust claim).

²³⁴ *In re National Collegiate Athletic Association Grant-In-Aid Cap Antitrust Litigation*, 375 F.Supp. 3d 1058, 1092 (N.D. Cal. 2019).

²³⁵ *Id.* at 1097–98.

²³⁶ *Id.* at 1101.

²³⁷ *Id.* at 1105.

balance, the courts should issue an injunction enjoining the NCAA from maintaining its rules restraining college athlete compensation that are untethered to education—or, stated otherwise, the court should enforce the proposed rule that amounts to the less restrictive alternative.²³⁸

Given that the district court’s decision in *Alston* seemed to split the proverbial baby by lifting the NCAA’s restraints on educational in-kind benefits yet not lifting the restraints on unlimited cash payments, both parties appealed the decision to the United States Court of Appeals for the Ninth Circuit.²³⁹ Nonetheless, on appeal, the entire three-judge panel to hear the case agreed that the district court properly applied its Rule of Reason analysis.²⁴⁰ The majority opinion, drafted by the Ninth Circuit Chief Judge Sidney R. Thomas and joined by Ronald Gould—both Bill Clinton appointees—simply affirmed the lower court decision in a rather straightforward manner.²⁴¹ Meanwhile, the concurring opinion, drafted by Judge Milan Smith, a G.W. Bush appointee, went even further in dicta—expressing concern that “the current state of our antitrust law reflects an unwitting expansion of the Rule of Reason inquiry in a way that deprives [college athletes] of the fundamental protections that our antitrust laws were meant to provide them.”²⁴² Pointing out that the NCAA, in its economic sense is a “cartel,” Judge Smith proceeded to imply that, if it were not for binding Ninth Circuit precedent, he would likely have lifted the NCAA’s restraints on college athlete compensation in their entirety.²⁴³ This rebuke coming from any judge—and especially coming from a very senior judge and a Republican appointee—should have put the NCAA on due notice of what potentially could follow if they sought to petition the U.S. Supreme Court for certiorari.²⁴⁴ And yet, it did not.

2. Supreme Court Decision

After the U.S. Court of Appeals for the Ninth Circuit affirmed the district court’s decision in *Alston*, one could have reasonably expected that the NCAA member schools would have allowed this antitrust matter to end—understanding that, while it was highly unlikely the Supreme Court would reverse the lower court ruling, the Supreme Court, in theory, might draft

²³⁸ *Id.* at 1108–09.

²³⁹ See *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239 (9th Cir. 2019).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 1266 (Smith, J. concurring).

²⁴³ *Id.* at 1267.

²⁴⁴ Indeed, Judge Smith’s statements may have foreshadowed Justice Kavanaugh’s Supreme Court concurrence. 594 U.S. __ (2021) (Kavanaugh, J. concurring), at *5.

an opinion in line with Judge Smith’s Ninth Circuit concurrence, if not worse.²⁴⁵ Yet, refusing to accept the views of leading antitrust scholars as to the association’s infinitely small chances of prevailing on the merits at the Supreme Court level, the NCAA instead petitioned for certiorari to the U.S. Supreme Court, which was granted on December 16, 2020, to consider the specific question of “[w]hether the Ninth Circuit erroneously held, in conflict with decisions of other circuits and general antitrust principles, that the National Collegiate Athletic Association eligibility rules regarding compensation of student-athletes violate federal antitrust law.”²⁴⁶ Ultimately, the Supreme Court concluded that the Ninth Circuit decision had not decided the *Alston* case erroneously at all, and it thus upheld the decision unanimously, 9-0, with Justice Neil Gorsuch writing the majority opinion of behalf of eight of the justices, and Justice Brett Kavanaugh drafting his own standalone concurrence.²⁴⁷

The majority opinion was a clear and decisive ruling for the college athletes, as it delivered a striking blow to the NCAA’s long-held argument that *Board of Regents* had created an implicit antitrust exemption for “amateurism” that shielded the NCAA’s rules limiting college athlete compensation from traditional scrutiny.²⁴⁸ Indeed, the Supreme Court seemed to make work of each of the NCAA’s three core arguments in rather short order. As to the NCAA’s claim that “amateurism” was somehow to be treated specially under federal antitrust laws, the Court called into doubt whether the term “amateurism” had any meaning whatsoever, given the shifting ways in which the NCAA had interpreted this term over the years, and how the NCAA had historically allowed for certain forms of college athlete financial compensation, but not others.²⁴⁹ Second, the Court also clarified that the comments about the NCAA’s amateurism rules having potential virtue in its 1984 *Board of Regents* decision were not intended to address the legality of the NCAA’s amateurism rules on their substantive merit, but rather were mere dicta, given that “[s]tudent-athlete compensation rules were not even at issue” in *the Board of Regents* case.²⁵⁰ Finally, as to the NCAA’s claims that the district court injunction set up a system that would subject the NCAA to judicial micromanagement, the high court rejected this point too—explaining that the district court’s decision injunction was limited to the case before it, and does

²⁴⁵ *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1266–67 (9th Cir. 2019) (Smith, J., concurring).

²⁴⁶ *Question Presented*, SUPREME COURT OF THE U.S., <https://www.supremecourt.gov/qp/20-00512qp.pdf> (last visited Jun. 13, 2021).

²⁴⁷ *NCAA v. Alston*, 594 U.S. ____ (2021).

²⁴⁸ *See id.* at 19 (noting that the Court declined to endorse the NCAA’s argument that Board of Regents’ “expressly approved its limits on student-athlete compensation—and this approval forecloses any meaningful review of those limits today”).

²⁴⁹ *Id.* at 6.

²⁵⁰ *Id.*

not create the NCAA nightmare of a free market hellscape where every college athlete is given a Lamborghini to commute to class.²⁵¹

Yet, as damaging as the Supreme Court’s majority decision in *Alston* was for the NCAA, Justice Kavanaugh’s concurring opinion seemed to put a dagger into the trade association’s longstanding claims of purported preferential treatment under antitrust law.²⁵² Despite being confined to the narrow question presented about academic-related aid, Justice Kavanaugh’s concurring opinion made sure to repeatedly emphasize that the “decades-old ‘stray comments’ (in *Board of Regents*) about college sports and amateurism,” were merely dicta, and of no consequence to an antitrust analysis of compensation rules.²⁵³ Justice Kavanaugh further questioned the legality of the NCAA’s remaining compensation restrictions noting the growing sums of money flowing into the industry that is going to many different people, just not the athletes.²⁵⁴ And, Justice Kavanaugh concluded his concurring opinion by rejecting the idea that the NCAA should be allowed to continue to evade antitrust scrutiny as a matter of tradition, confirming, in explicit terms, that the NCAA member schools must follow the exact same antitrust laws as all other businesses.²⁵⁵

D. After *Alston*

The *Alston* decision represented one of the NCAA’s most significant defeats since the association’s founding, and it provided a foreboding that more court-ordered antitrust reform could be coming to college sports if the NCAA does not change its ways.²⁵⁶ Even before any new laws took effect, Judge Claudia Wilken, the same district court judge who oversaw the *O’Bannon* and *Alston* litigation, denied an NCAA motion to dismiss a case filed by Arizona State University swimmer, Grant House, and University of Oregon basketball player, Sedona Prince, challenging the NCAA’s exclusion of compensation for athletes from lucrative television contracts, which could potentially allow for those athletes to receive compensation as though the athletes had NIL rights at the time of past televised competitions.²⁵⁷ The decision also seemed to

²⁵¹ *Id.* at 34.

²⁵² 594 U.S. ____ (2021) (Kavanaugh, J. concurring), at *5.

²⁵³ *Id.*

²⁵⁴ *Id.* at 4.

²⁵⁵ *Id.* at 5.

²⁵⁶ James Dalor, *NCAA Obliterated 9-0 by Supreme Court of the United States*, SB NATION (Jun. 21, 2021), <https://www.sbnation.com/2021/6/21/22543821/ncaa-supreme-court-ruling>.

²⁵⁷ See Michael McCann, *NCAA to Face More Collusion Claims In Wake of Alston NIL Defeats*, SPORTICO (Jun. 28, 2021), <https://www.sportico.com/law/analysis/2021/house-v-ncaa-legal-primer-1234632887/> (noting that the House and Prince lawsuit is accompanied by another lawsuit filed by former University of Illinois football player Tymir Oliver, who makes related allegations).

clarify that the NCAA could not ban a member college for granting greater financial rights, including NIL rights, to its athletes than permitted by NCAA governance documents.²⁵⁸

The summer of 2021 witnessed the passage of new state laws granting college athletes the right to endorse products free from NCAA interference, experienced Congressional attention afforded to the health and safety of college athletes and saw the *Alston* decision issued by a unanimous court against the NCAA. These three events illustrate how now, more than ever, it is imperative to enact lasting changes to the internal governance structure of college sports. Moreover, with the history of the NCAA and five main criticisms of the Association in mind, these three events provide a foundation from which college sports governance can be reimaged to create a model best-suited to promote the rights of student athletes in the 21st Century and beyond.

IV. BUILDING BETTER COLLEGE SPORTS GOVERNANCE

The three important regulatory events involving college sports in the Summer of 2021, culminating with the U.S. Supreme Court's decision in *Alston*, invite meaningful discourse about how to build a better college sports governance structure moving forward.²⁵⁹ If and when the NCAA is reconstituted or replaced, there will be an opportunity for the college sports industry to emerge from the fractures with an organization that protects college athletes' interests. As such, this Section offers seven proposals for changes to the governance of college sports for the 21st Century. In doing so, it builds upon the Supreme Court's recent holding in *Alston*, the state-law name, image and likeness movement, and far broader calls for massive institutional change. Specifically, this Section highlights the following proposals: (1) ending all restrictions on athlete compensation; (2) improving the medical care afforded to athletes; (3) creating a functioning system for athletes to report abuse; (4) crafting a new dispute resolution model; (5) allowing athletes full access to professional representation; (6) enhancing autonomy for athletes to transfer schools; and, improving access the educational program chosen by athletes.

A. *The NCAA Should Leave the Business of Regulating Athletes' Financial Ventures*

First, as a direct consequence of the *Alston* decision, the NCAA should permanently get out of the business of regulating college athletes' economic endeavors.²⁶⁰ Recent state NIL

²⁵⁸ See Adam Liptak & Alan Blinder, *Supreme Court Backs Payments to Student-Athletes in N.C.A.A. Case*, N.Y. TIMES (Jun. 28, 2021), <https://www.nytimes.com/2021/06/21/us/supreme-court-ncaa-student-athletes.html> (describing impact of the *Alston* decision)

²⁵⁹ Braziller, *supra* note 186.

²⁶⁰ While the *Alston* decision was confined to academic-related aid, Justice Kavanaugh expressed that he may be willing to entertain future challenges to NCAA restraints. 594 U.S. ____ (2021) (Kavanaugh J. concurring) at *1-5.

legislation shows the NCAA's efforts to regulate athletes' third-party compensation has become unpopular with much of society.²⁶¹ Meanwhile, the U.S. Supreme Court decision in *Alston* at least intimates that when the more than 1200 NCAA member colleges get together to limit college athletes' compensation, such conduct reasonably violates antitrust law.²⁶²

The NCAA made a surprise, voluntary exit from regulating athlete compensation from third parties when, on July 1, 2021, the trade association announced its "temporary" repeal of rules limiting third-party compensation to college athletes.²⁶³ Nevertheless, there is a reasonable concern that the NCAA member schools will at some point attempt to reinstitute certain restraints as the scrutiny the association faces in the immediate aftermath of *Alston* begins to wane.²⁶⁴ In addition, the NCAA continues to interfere with college athlete compensation in a host of different ways, such as by strictly regulating and disallowing most direct pay from colleges to their athletes.²⁶⁵ At a minimum, such continued interference with college athletes' economic opportunities invites renewed antitrust scrutiny.²⁶⁶

Of course, none of this is to suggest that no single college or small group of colleges may pass rules limiting athlete financial opportunities. However, these restraints, if any, should occur on the individual college level, or on the small conference level where the members involved lack "market power." Thereby, collective rules to restrain the compensation of college athletes should not continue to be implemented on the NCAA level where the member schools collectively have extremely high market power, and, very likely, monopsony power.²⁶⁷

B. Improvement of Regime to Address College Athlete Health and Safety

²⁶¹ The Athletic College Football Staff, *supra* note 188.

²⁶² 594 U.S. ____ (2021) (Kavanaugh J. concurring) at *1–5.

²⁶³ Interim Name, Image, and Likeness Rules, *supra* note 200.

²⁶⁴ There are disparities between the states on what exactly college athletes can do with their name, image, and likeness. For example, a number of states outlaw students from endorsing vice products. See John Holden, *Opinion: How NCAA Concession on NIL Rules Could Affect US Sports Betting Industry*, LEGAL SPORTS REP. (Jul. 29, 2021), <https://www.legalsportsreport.com/author/john-holden/>.

²⁶⁵ Abigail Johnson Hess, *Here's How College Athletes Can Now Make Money, According to the NCAA's New Policy*, CNBC (Jul. 1, 2021), <https://www.cnbc.com/2021/07/01/how-college-athletes-can-make-money-according-to-new-ncaa-nil-policy.html>.

²⁶⁶ Marcia Coyle, *'The NCAA Is Not Above the Law': Justice Kavanaugh Invites More Student-Athlete Pay Challenges*, NAT'L L. J. (Jun. 21, 2021), <https://www.law.com/nationallawjournal/2021/06/21/the-ncaa-is-not-above-the-law-justice-kavanaugh-invites-more-student-athlete-pay-challenges/?sreturn=20210631163751>.

²⁶⁷ Roger D. Blair & Joseph Whitman, *The NCAA Cartel, Monopsonistic Restrictions, and Antitrust Policy*, 62 ANTITRUST BULLETIN 3, 3–4 (2017).

A second area in which the college sports system needs to reform is with regard to the management and oversight of collegiate athletes' health and safety protocols.²⁶⁸ In many ways, these health and safety concerns represent the core of the NCAA's purported mission at the time of its inception.²⁶⁹ While progress has ensued in the past century, much work remains, and the litmus test for adequately protecting student athletes' lives remains a moving target. The COVID-19 pandemic has only underscored the fragility of our collective health, as well as of the pillars of protection for college athletes who are vulnerable and underrepresented.²⁷⁰

A logical first step is to ensure that member colleges and administrative structures are committed to instituting evidence-based and consistent medical protocols for those engaging in intercollegiate athletics. The NCAA created a COVID-19 advisory panel that included its own staff and independent experts with backgrounds in medicine, public health, and epidemiology.²⁷¹ Ensuring that an independent advisory body continues to provide explicit guidance, even in the aftermath of the pandemic, will be critical in establishing that medical evidence dictates such decisions, rather than politics and revenue streams.²⁷² As this author team has expressed in a previous law review article:

The NCAA has created a formal set of Action Plan Considerations, which dovetails with its published Core Principles of Resocialization of Collegiate Sport. This clear, cogent document reflects the input of a multidisciplinary advisory panel. It addresses many of the issues and concerns discussed in the prior paragraph. However, it is framed as a set of "resources," with many recommendations that are framed only as recommendations. Given the critical need for consistent and clear messaging and protocols, we stipulate that the recommendations within this Action Plan—which of course may evolve along with knowledge of the disease and the epidemiology trajectory—should be mandatory to enact and uphold in order for member colleges to resume athletics. If and when a member college cannot meet these criteria, they should be obviated from NCAA athletic activities.²⁷³

²⁶⁸ B. David Ridpath, *A Path Forward for Reforming College Sports*, JAMES G. MARTIN CTR. FOR ACADEMIC RENEWAL (Jan. 15, 2020), <https://www.jamesgmartin.center/2020/01/a-path-forward-for-reforming-college-sports/>.

²⁶⁹ Smith, *supra* note 13.

²⁷⁰ Isaac Chotiner, *The Interwoven Threads of Inequality and Health*, NEW YORKER (Apr. 14, 2020), <https://www.newyorker.com/news/q-and-a/the-coronavirus-and-the-interwoven-threads-of-inequality-and-health>.

²⁷¹ NCAA, *Core Principles of Resocialization of Collegiate Sport*, NCAA, <http://www.ncaa.org/sport-science-institute/core-principles-resocialization-collegiate-sport> (last visited May 19, 2020).

²⁷² Edelman et al., *supra* note 3.

²⁷³ *Id.*

Another venue in which proactive, centralized, and consistent policies are critical involves preventing and managing closed head injuries. Entire centers dedicated to studying sports-related head injuries testify to the prevalence and severity of the issue and how necessary further research will be in this arena.²⁷⁴ Legal arguments for more proactive approaches to NCAA concussion management have existed for some time.²⁷⁵ In some ways, the National Hockey League (“NHL”) concussion paradigm is instructive as well, with regard to a straightforward approach in which medical decisions are separate from coaching or administrative action coloring these judgments.²⁷⁶ The NCAA has indeed taken this issue on and is becoming more proactive.²⁷⁷ Their guidelines on this topic are also explicit and clear.²⁷⁸ However, ensuring that such procedures are consistently followed, and are obligatory, is a critical next step.

Meanwhile, another key principle for protecting the health and safety of athletes involves disparate treatment of athletes and those participating in different sports and conferences. The revenue-generating potential of specific sports, conferences, and schools cannot influence broad policy-level decisions regarding the appropriateness of safety precautions. Clemson’s decision, early in the pandemic, to allow their football team to return to practice before any other students or student-athletes were permitted on campus is a cautionary example, especially given how many of Clemson’s football team members contracted COVID-19.²⁷⁹ One logical guideline might stipulate that college athletes should not incur a higher risk of non-sports-related injury or illness than the rest of the student body.²⁸⁰ Of course, a closed head injury is to some degree an inherent risk of some contact sports, but others, such as communicable disease exposure, may not be. The fact that athletes, in many cases, returned to otherwise-closed campuses in the summer and fall of 2020 is a vivid example of this disparity.²⁸¹ This is further reinforced by

²⁷⁴ See, e.g., Concussion Center, U. MICH., <https://concussion.umich.edu/> (last visited Mar. 5, 2021).

²⁷⁵ See Rodney K. Smith, *Head Injuries, Student Welfare, and Saving College Football: A Game Plan for the NCAA*, 41 PEPP. L. REV. 268, 273–82 (2014) (describing the prevalence and practices surrounding head injuries in college football).

²⁷⁶ See David Schoen, *Here’s How the NHL Concussion Protocol Works*, LAS VEGAS REV. J. (Feb. 7, 2020), <https://www.reviewjournal.com/sports/nhl/heres-how-the-nhl-concussion-protocol-works-1953072/> (describing the concussion protocol used in the NHL).

²⁷⁷ Concussion, NCAA, <https://www.ncaa.org/sport-science-institute/concussion> (last visited Mar. 5, 2021).

²⁷⁸ See, e.g., NCAA, 2014-2015 NCAA SPORTS MEDICINE HANDBOOK (2014), <http://www.ncaapublications.com/productdownloads/MD15.pdf>.

²⁷⁹ Michael David Smith, *37 Clemson Football Players Have Tested Positive*, NBC SPORTS (Jun. 26, 2020, 6:28 PM), <https://profootballtalk.nbcsports.com/2020/06/26/37-clemson-football-players-have-tested-positive/>.

²⁸⁰ Edelman et al., *supra* note 3.

²⁸¹ *Id.*

establishing that athletes in revenue-generating sports should not incur incremental risks to collegiate athletes who do not fund their universities.

C. *Improved System for College Athlete Reporting of Abuse*

A third and related area where the college sports' governance has substantial room to improve is via the mechanisms available for college athletes to report abuse.²⁸² Such abuse of college athletes may occur in several different forms, including physical abuse, mental abuse, and sexual abuse.²⁸³ At present, many U.S. colleges are “notoriously bad at implementing whistleblower protection systems to detect systematic abuse of athletes, and at taking proactive approaches toward restorative justice once such abuse is uncovered.”²⁸⁴ Meanwhile, the NCAA, as the purported central oversight body, lacks any mechanism, whatsoever, for reporting abuse—purporting instead that the association “does not owe student-athletes protection from sexual abuse and harassment.”²⁸⁵

As a result of the NCAA's failure to implement meaningful mechanisms for reporting abuse, sexual predators like Michigan State University sports medicine doctor, Larry Nassar, were able to abuse hundreds of college athletes for twenty years before facing federal prosecution.²⁸⁶ Meanwhile, at the University of Maryland, the college's head football coach, D.J. Durkin, remained employed by the school and in charge of a team of approximately 85 young men despite “a coaching environment based on fear and intimidation,” “[t]he belittling, humiliation and embarrassment of players,” making players eat unhealthy amounts of food as punishment, and placing players at risk of physical injury.²⁸⁷ Durkin's extraordinary mistreatment of his players did not come to the forefront until one of his players, Jordan McNair, died after being forced to run 110-yard sprints in extreme heat.²⁸⁸ And, even after Durkin's

²⁸² See *supra* Section II.D.

²⁸³ *Id.*

²⁸⁴ Marc Edelman, *10 Ways the NCAA Violates Core Values of Higher Education*, FORBES (Feb. 9, 2020), <https://www.forbes.com/sites/marcedelman/2021/02/09/10-ways-the-ncaa-violates-core-values-of-higher-education/?sh=3d7175d15d11>.

²⁸⁵ *NCAA Continues to Claim it Has No Legal Responsibility to Protect College Athletes from Abuse*, LIEFF CABRASER: BLOG (Sep. 23, 2020), <https://www.lieffcabraser.com/2020/09/ncaa-continues-to-claim-it-has-no-legal-responsibility-to-protect-student-athletes-from-sexual-abuse>; see also Scott M. Reid, *NCAA Argues in Sex Abuse Case that it has No Legal Duty to Protect Athletes*, ORANGE CNTY. REG. (Jun. 2, 2020), <https://www.ocregister.com/2020/06/02/ncaa-argues-in-sex-abuse-case-it-has-no-legal-duty-to-protect-athletes>.

²⁸⁶ See Marc Edelman & Jennifer Pacella, *Vaulted into Victims: Preventing Further Sexual Abuse in U.S. Olympic Sports through Unionization and Improved Governance*, 61 ARIZONA L. REV. 463, 464 (2019).

²⁸⁷ *The Story Inside the Toxic Culture of Maryland Football*, ESPN (Aug. 10, 2018), https://www.espn.com/college-football/story/_/id/24342005/maryland-terrapins-football-culture-toxic-coach-dj-durkin.

²⁸⁸ *Id.*

wrongdoing came to light, the University of Maryland Board of Regents still tried to reinstate him as the team's head coach until the players themselves vociferously objected.²⁸⁹ Since then, another school, the University of Mississippi, has decided to give Durkin another chance to coach college students.²⁹⁰ There is no evidence the NCAA objected to this decision.

It is nothing short of disturbing that the NCAA, which was founded in 1905 primarily to ensure college athlete safety, today seems to devote unlimited resources to detecting college athlete compensation and has instituted the “show-cause penalty,” which is the “equivalent to a modern-day scarlet letter” against coaches that allow athletes to receive pay.²⁹¹ While at the same time devoting almost no resources to detecting or sanctioning coaches that mentally, physically, or sexually may abuse their players.²⁹² While one can reasonably question whether the NCAA has the power under antitrust law to ban an individual from altogether coaching college sports, an industry-wide ban on an abusive coach comes closer to passing legal and ethical muster than a ban of a coach who permits his athletes to earn money.²⁹³

One of the ways the college sports system can improve in detecting and preventing the abuse of college athletes is by “implement[ing] a robust whistleblowing policy, along with adequate assurances as to its effectiveness and utilization.”²⁹⁴ This whistleblowing policy would need to be adequately advertised and disseminated to all constituents of the college sports enterprise, ranging from players and coaches to athletic trainers, fans, the media, and other individuals who have exposure to the happenings of collegiate sports.²⁹⁵ Moreover, “[t]he best facilitator of encouraging whistleblowers to come forward is the development of a culture that embraces such individuals and makes them feel as though their report will be valued and not used against them.”²⁹⁶ Thus, a situation such as the one at the University of Maryland, where

²⁸⁹ See David Ginsberg, *Maryland Fires Coach Durkin Day after Reinstatement*, ASSOCIATED PRESS (Oct. 31, 2018), <https://apnews.com/article/4445cd69c46143118738e28d75c36de3>.

²⁹⁰ See Heather Dinich, *Ole Miss Hires Former Maryland Coach D.J. Durkin as Assistant*, ESPN (Jan. 2, 2020), https://www.espn.com/college-football/story/_/id/28409982/ole-miss-hires-former-maryland-coach-dj-durkin-assistant.

²⁹¹ Zach Barnett, *Understanding the True Meaning of an NCAA Show-Cause Penalty*, FOOTBALL SCOOP (Mar. 28, 2014), <https://footballscoop.com/news/understanding-the-true-meaning-of-an-ncaa-show-cause-penalty>.

²⁹² See generally Scott M. Reid, *NCAA Argues in Sex Abuse Case that it has No Legal Duty to Protect Athletes*, ORANGE CNTY. REG (Jun. 2, 2020), <https://www.ocregister.com/2020/06/02/ncaa-argues-in-sex-abuse-case-it-has-no-legal-duty-to-protect-athletes> (discussing the NCAA's unwillingness to accept legal or moral responsibility for protecting athletes against abuse).

²⁹³ Edelman et al., *supra* note 3.

²⁹⁴ Edelman & Pacella, *supra* note 286, at 483.

²⁹⁵ *Id.* at 484.

²⁹⁶ *Id.*

football players came forward to discuss D.J. Durkin’s abusive culture and the Board of Regents’ response was to ultimately send Durkin right back into the locker room, arguably does less to promote future whistleblowing than not hearing the college football players’ complaints in the first instance.²⁹⁷

In this same vein, a proper system for reporting abuse in college sports must include appropriate antiretaliation provisions to protect both internal and external reporters of abuse.²⁹⁸ Without such protections, whistleblowers in any environment may fear not only physical retaliation but also “ostracism, exclusion from social events, silent treatment, loss of friendships, or heightened scrutiny.”²⁹⁹ However, in the context of highly commercialized college sports, where fans wish to see their teams win at all costs, blowing the whistle against a successful coach or player on a given sports team becomes especially risky if such protections are not in place.³⁰⁰ Indeed, even the most popular, famous, and well-respected individuals associated with college sports have faced severe ostracism for blowing the whistle on the abuse of college athletes.³⁰¹ For example, former National Basketball Association point guard Eric Murdock, who blew the whistle on the abusive coaching practices of head coach Mike Rice while working as a team assistant, was terminated from his position as an assistant coach and treated as a *persona non grata* in the aftermath of his reporting.³⁰² This backlash transpired against Murdock even despite the fact he played for nine years in the National Basketball Association, including one season for the New Jersey Nets, which played its home games relatively near the Rutgers University campus.³⁰³

As the examples involving Larry Nassar and D.J. Durkin illustrate, there must be an effective mechanism in place for collegiate athletes to report abuse. Likewise, and in keeping with the need for an effective and transparent structure for college athletes to report abuse, there must also be a system of anti-retaliation protections in place to shield the whistleblowers who speak out against such abuse. Together, this reporting structure and subsequent protective shield

²⁹⁷ Ginsberg, *supra* note 289.

²⁹⁸ Edelman & Pacella, *supra* note 286, at 487–88.

²⁹⁹ *Id.* at 488.

³⁰⁰ See Strauss, *supra* note 163 (describing the disappointment of Nebraska softball players after they came forward with allegations of abusive behavior only to see the perpetrator reinstated a few months later).

³⁰¹ Lester Munson, *Rutgers’ Tangled Legal Mess*, ESPN (Apr. 8, 2013), https://www.espn.com/espn/otl/story/_/id/9148105/rutgers-whistleblower-eric-murdock-tough-road-wrongful-termination-lawsuit-likely-face-extortion-charges.

³⁰² *Id.*

³⁰³ See *Eric Murdock Player Statistics*, BASKETBALL REFERENCE, <https://www.basketball-reference.com/players/m/murdoer01.html> (last visited Feb. 22, 2021).

will likely mitigate the possibility that college athletes will suffer from physical, mental, and sexual abuse in future years.

D. New Model for Internal Dispute Resolution

Fourth, college sports would also benefit from a new and better system for resolving internal disputes because the NCAA's current dispute resolution process is fractured.³⁰⁴ As it now stands the NCAA's dispute resolution process is problematic because athletes do not have a voice.³⁰⁵ As a result of NCAA rules, schools face serious financial and competitive consequences if an athlete challenges NCAA decisions.³⁰⁶ Overall, the absence of a uniform approach is problematic, and the lack of agency afforded to some college athletes to initiate their own appeals is undemocratic and oppressive.³⁰⁷

One such oppressive rule at the center of the NCAA's dispute resolution policy is rule 19.13 (formerly rule 19.7), under which the NCAA discourages appeals outside of its pro-organization viewpoint.³⁰⁸ As a result of rule 19.13, schools are liable to the NCAA for financial penalties if a collegiate athlete chooses to seek judicial review of an NCAA appeal and an injunction is "voluntarily vacated stayed or reversed or it is finally determined by the courts that injunctive relief is not or was not justified."³⁰⁹ Rules like these not only chill a school's desire to challenge an NCAA decision, but also strip agency away from collegiate athletes themselves, as often, the NCAA requires schools to serve as appellants in lieu of an athlete—thereby giving an athlete no control over his or her career.³¹⁰

To challenge the NCAA rules that provide college athletes with little agency to challenge organizational decisions, there have been calls to establish a system aligned with that of the professional sports leagues—notably, a system that complies with the Federal Arbitration Act.³¹¹

³⁰⁴ See *Remaining Eligible: Student-Athlete Reinstatement*, NCAA, <https://www.ncaa.org/compliance/reinstatement/remaining-eligible-student-athlete-reinstatement> (last visited Feb. 12, 2021) (noting that appeals regarding athlete reinstatement are processed through the "NCAA Committee on Student-Athlete Reinstatement for the applicable division."). Cf. *Drug-Testing Appeals Process*, NCAA (Jun. 23, 2020), <https://www.ncaa.org/sport-science-institute/drug-testing-appeals-process> (noting only an institution can initiate an appeal of a positive drug test and that the appeal is heard by "at least three members of the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports drug-test appeal subcommittee panel.").

³⁰⁵ See, e.g., *Drug-Testing Appeals Process*, *supra* note 304.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ See *id.* (describing the impact of rule 19.7—now rule 19.13).

³⁰⁹ *Id.*

³¹⁰ See, e.g., *Drug-Testing Appeals Process*, NCAA (Jun. 23, 2020), <https://www.ncaa.org/sport-science-institute/drug-testing-appeals-process> (noting that schools must initiate student-athlete drug testing appeals).

³¹¹ Ross, Karcher & Kensinger, *supra* note 177, at 106.

Professor Stephen Ross of Penn State University and other scholars advocate for an independent and impartial binding arbitration system to handle NCAA eligibility disputes.³¹² The proposed plan would, in many ways, mirror the system that provides quick hearings and resolutions to Olympic athletes.³¹³ As Ross notes, however, it is not as simple as establishing an arbitration system; there must be a process that allows for fairness for all parties.³¹⁴

While an arbitration system has long been viewed as the standard in professional sports, there has been a push amongst some professional leagues towards mediation as a first step.³¹⁵ A system that provides college athletes with a chance to first mediate with the NCAA, or a successor organization, would provide a confidential and private forum to resolve disputes, whereas arbitration matters could play out in public.³¹⁶ Unlike the arbitration system suggested by Ross and others, the authors of this article believe that a mediation program with a neutral mediator would enable the NCAA and athletes to reach creative solutions leading to a greater chance of a “win-win” outcome than the winner-take-all result of binding arbitration.³¹⁷

Should mediation fail, it would be advisable that an arbitration system loosely modeling what Ross advocated—an arbitration system that promotes fairness for all parties—be implemented.³¹⁸ In terms of fairness, the NCAA should not compel college athletes to sign arbitration agreements by making their involvement in intercollegiate athletics dependent upon signing. In the absence of collective bargaining with a labor unit that represents the interests of college athletes, any agreement to arbitrate should be voluntarily assumed by each college athlete. Those who elect to opt-out of arbitration should still retain their eligibility to participate in NCAA-sanctioned sports. While an opt-out provision would make the administration of an arbitral process for college athletes more challenging to manage, the NCAA should prioritize fundamental fairness for its athletes. Additionally, there would be nothing prohibiting the NCAA from educating its athletes on the benefits of electing grievance arbitration before being presented with the option.

³¹² *Id.* at 109.

³¹³ *Id.* at 109–11.

³¹⁴ *Id.* at 112–13.

³¹⁵ Katie Shonk, *How Mediation Can Help Resolve Pro Sports Disputes*, HARV. L. SCH. PROGRAM ON NEGOTIATION: DAILEY BLOG (Sep. 29, 2020), <https://www.pon.harvard.edu/daily/mediation/how-meditation-can-help-resolve-pro-sports-disputes/#:~:text=Unlike%20arbitration%2C%20the%20dispute%20resolution,compared%20to%20arbitration%20or%20litigation.&text=More%20productive%20relationships>.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ Ross, Karcher & Kensinger, *supra* note 177, at 112–13.

Any arbitration system that replaces the current system which does not provide for meaningful dispute resolution should be capable of quickly adjudicating eligibility disputes in a manner like that used by the Court of Arbitration for Sport at the Olympics or other multinational sporting events.³¹⁹ However, unlike the Court of Arbitration for Sport, a collegiate sports arbitration panel should allow current college athletes, or true advocates for their interest, to serve as arbitrators in order to provide a unique perspective not available to professional jurists. Presently, college athletes are often an afterthought when discussing governance reform, however, the future should be built with athletes front and center. Like other forms of arbitration, the panel's decision would be binding on the athletes; however, decisions would be public and precedential. Among the positives for developing a dispute resolution system that empowers college athletes to be a part of the process is that it creates the foundation for building relationships with the governing body collaboratively, instead of being subjected to authoritarian rule.³²⁰

E. College Athlete Access to Representation

Each of the four above proposals for reforming college sports would benefit, to a significant extent, by the additional reform of allowing college athletes access to representation—both in the form of a union body and through the use of individual player agents. In particular, allowing college athletes to unionize would mark an important step toward procedural fairness for college athletes because it would ensure their opportunity to bargain over the mandatory terms and conditions of employment that include hours, wages, working conditions, and measures for resolving grievances in the form of disciplinary appeals.³²¹ While collective bargaining with a union that represents athlete interests might not necessarily change the substantive outcomes concerning each of these topics, at least the NCAA would not be able to maintain the *status quo* without some form of consent from a body with the legal obligation to protect the athletes' interests, and at least some minimal form of *quid pro quo*.

While, to date, the National Labor Relations Board has failed to assert jurisdiction over any proposed bargaining unit of college athletes, there is no reason why the NLRB should *per se* fail to allow revenue-generating college athletes to unionize.³²² For example, the NLRB recently recognized a bargaining unit that encompassed undergraduate students, including Columbia

³¹⁹ Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515, 520 (2001) (describing the existence of ad hoc panels that are part of the Court of Arbitration for Sport).

³²⁰ Shonk, *supra* note 315.

³²¹ See Edelman, *supra* note 105, at 1630.

³²² See *id.* at 1639–42 (discussing the National Labor Relations Board's decision to decline jurisdiction over the Northwestern University grant-in-aid college football players is the only meaningful attempt to date by college athletes to obtain NLRB recognition).

University teaching assistants and research assistants.³²³ Meanwhile, other potential bargaining units of elite college athletes, including perhaps a potential unit that includes multiple private colleges or one that includes many public and private colleges with the NCAA treated as a joint employer, would overcome concerns about labor market stability that led the National Labor Relations Board to discretionarily decline jurisdiction over the Northwestern University grant-in-aid football players.³²⁴ Further, it is worth noting that Peter Sung Ohr, who President Joe Biden has appointed as the Acting General Counsel of the National Labor Relations Board, previously served on Region 13 of the NLRB where he recognized the Northwestern University grant-in-aid college football players as employees, and would have granted them employee status had his decision not been later overturned by the full NLRB.³²⁵

Additionally, beyond simply allowing college athletes to unionize, the college sports governance structure should also allow collegiate athletes to freely choose player agents to represent them in negotiations with both their schools and third parties. This would help ensure that college athletes are adequately advised about their financial opportunities. Again, this procedural safeguard would not necessarily guarantee that any college or third party would pay the players for their services, but it would create a process in which athletes are better informed of their legal rights (rather than just of NCAA policy) and the financial alternatives to which they are legally entitled.

F. Enhancing Autonomy of College Athletes' Choice of School

Sixth, the college sports system also needs reform to allow college athletes more freedom to transfer between schools for academic, athletic, and personal reasons.³²⁶ A change to college sports' transfer rules can theoretically take place in several different ways, including federal legislative mandate, antitrust litigation, voluntary internal reform, or a collective bargaining process (presuming college athletes are allowed to unionize).

Until recently, the NCAA enforced a “year-in-residence rule” that, absent exceptional circumstances, required college athletes for men’s and women’s basketball, ice hockey, football,

³²³ Danielle Douglas-Gabriel, *Are They Students? Or Are They Employees? NLRB Rules That Graduate Students Are Employees*, WASH. POST (Aug. 23, 2016, 2:48 PM), <https://www.washingtonpost.com/news/grade-point/wp/2016/08/23/are-they-students-or-are-they-employees-nlr-rules-that-graduate-students-are-employees/>.

³²⁴ See Edelman, *supra* note 105, at 1642–53.

³²⁵ See Michael McCann, *Biden Picks College Athlete Advocate as Acting General Counsel of NLRB*, SPORTICO (Feb. 21, 2021), <https://www.sportico.com/law/analysis/2021/biden-nlr-college-athletes-1234621654/#:~:text=President%20Joe%20Biden%20has%20selected,the%20National%20Labor%20Relations%20Board.&text=While%20his%20tenure%20might%20prove,how%20the%20Board%20should%20rule.>

³²⁶ This does not mean to imply that there cannot be reasonable requirements centered around the academic calendar and competition seasons.

and baseball who wish to transfer between schools, to sit out a year of playing their sport.³²⁷ In April 2021, under pressure from both Congress and the Department of Justice, the NCAA somewhat reformed this rule by granting college athletes one free transfer between schools without needing to sit out for a season.³²⁸ The restraint, however, still has a significant chilling effect on college athlete transfers because it requires any college athlete seeking to transfer for a second time to wait a year before returning to their sport—impeding an athlete’s physical development.³²⁹ At the same time, an athlete may be reluctant to transfer even a first time, knowing that once the athlete takes his or her one free transfer, they will have used up an important right.³³⁰ For this reason, the NCAA transfer restraints are likely to continue to lead to many situations where athletes that otherwise would seek to transfer do not ultimately end up doing so. And, in a few unfortunate cases, certain athletes might continue to play for physically or emotionally abusive coaches, or even miss out on a transfer opportunity that would grant them more playing time, and in turn, a possibility to be drafted into a professional sports league, simply because of the NCAA’s rules that limit player transfers.³³¹

In addition to the chilling effects of the “year in residence rule,” even in its modified form, the rule presents several other problems. Among them, the rule creates a wedge between college athletes and the rest of the student body by placing additional restrictions on college athlete movement. Indeed, outside of the realm of college athletics, there are no systematic rules to limit the opportunities for transfer students to compete in extracurricular activities, and many college transfer students immediately join glee clubs and acapella groups, their school newspaper, and quiz bowl teams.³³² Meanwhile, college athletes are kept isolated and distant from their preferred extracurricular activity in the year following their transfer.

Moreover, despite some claims to the contrary, the NCAA’s “year-in-residence rule” was not reasonably necessary to maintain the sanctity of the composition of a college sports team.

³²⁷ See *Transfer Terms*, NCAA, <http://www.ncaa.org/student-athletes/current/transfer-terms> (last visited Feb. 20, 2021) (explaining that pursuant to NCAA rules, “if you transfer from a four-year college to an NCAA school, you must complete one academic year in residence at the new school before you can play for or receive travel expenses from the new school, unless you qualify for a transfer exception or waiver”).

³²⁸ Associated Press, *NCAA Division I Council Panel Formally Approves New Transfer Rules*, ESPN (Apr. 15, 2021), https://www.espn.com/college-sports/story/_/id/31265350/ncaa-division-council-panel-formally-approves-new-transfer-rules.

³²⁹ See, e.g., Michael Carrier & Marc Edelman, *College Athletics: The Chink in the Seventh Circuit’s “Law and Economics” Armor*, 117 MICH. L. REV. ONLINE 90, 98 (2019) (explaining the example of a college football kicker who desired to transfer to a different school that was more willing to award him a scholarship).

³³⁰ See LeRoy, *supra* note 122, at 58 (describing racial abuse from coaches).

³³¹ *Id.*

³³² Connor O’Gara, *The NCAA’s 1-time Transfer Rule Has A Legitimate Hiccup, But Here’s How You Fix It*, Saturday Down South (2020), <https://www.saturdaydownsouth.com/sec-football/ncaa-1-time-transfer-rule-hiccup-obvious-fix-2020/>.

With academic requirements consistently leading at the margins to changes in college athlete eligibility, every intercollegiate sports team reasonably sees some faces entering and leaving the roster during the course of their collegiate careers. Coupled with injuries and other status changes, Judge Richard Posner’s famous words about organized sports teams indeed prove true: they are very much “like Heraclitus’s river: always changing, yet always the same.”³³³

While there may be some reasonable concerns that no restraints whatsoever on college athlete movement and eligibility could negate the true purpose of collegiate sports, there are far less restrictive measures that the college sports system could adopt to ensure that players in intercollegiate sporting events are *bona fide* students at the school they are attending.³³⁴ For example, one such less restrictive alternative could entail replacing rules that make players sit out a season after transferring between schools with a rule preventing player movement “only during the middle of an ongoing season or academic semester.”³³⁵ Alternatively, the NCAA could implement a rule limiting sports team eligibility to “student-athletes enrolled in classes on the first day of the sports season or academic semester,”³³⁶ or restrict immediate eligibility of transfer students to those who have maintained a certain grade point average over a predetermined time at their previous school.³³⁷ These alternatives would achieve the same goals as the more benevolent aspects of the NCAA rules limiting player movement, while still affording college athletes the opportunity to transfer schools without a penalty for doing so.

G. Improving Access to Education for Collegiate Athletes

Finally, and arguably most importantly, a seventh change that is needed to the college sports governance structure is one to restore college athletes’ autonomy over their educational path. Collegiate athletics is not without its benefits; for instance, one study found that college athletes have better academic outcomes than their peers.³³⁸ Despite these positive findings of the benefits of collegiate athletics, there are several instances where negatives are found as well, including situations where some college athletes receive virtually no actual instruction, athletes are funneled into bogus classes, and athletes receive what amount to essentially fake grades.³³⁹

³³³ *Indianapolis Colts v. Metropolitan Baltimore Football Club*, 34 F.3d 410, 413 (7th Cir. 1994).

³³⁴ See Carrier & Edelman, *supra* note 329, at 98–99 (discussing less restrictive alternatives to the NCAA’s “year-in-residence rule”).

³³⁵ *Id.* at 98.

³³⁶ *Id.* at 98–99.

³³⁷ *Id.* at 99.

³³⁸ Greta Anderson, *Study: College Athletes Have Better Academic, Life Outcomes*, INSIDE HIGHER ED (Jun. 24, 2020), <https://www.insidehighered.com/news/2020/06/24/gallup-study-shows-positive-life-outcomes-college-athletes>.

³³⁹ See Steve Delsohn, *UNC’s McCants: ‘Just Show Up, Play,’* ESPN (Jun. 5, 2014), https://www.espn.com/espn/otl/story/_/id/11036924/former-north-carolina-basketball-star-rashad-mccants-says-

Academic scandals do not appear as an isolated bug of the NCAA system. Indeed, they may be a feature, as between 1990 and 2015, there were 40 cases of academic fraud that the NCAA investigated.³⁴⁰ Academic fraud is hardly an isolated incident. While events like those at the University of North Carolina, where fraud allegedly spanned eighteen years and impacted thousands of college athletes, seem extreme, college athletics has long appeared to incentivize eligibility to participate over rigorous academics.³⁴¹ In addition to schools depriving athletes of a legitimate education, schools have also been accused of steering athletes towards degree programs that may be less rigorous than others.³⁴² For example, studies have found that athletes tend to be clustered into specific majors,³⁴³ with a *USA Today* article determining that 83 percent of schools had at least one major where twenty-five percent or more team members were enrolled.³⁴⁴ While not problematic in itself, the question that arises is whether college athletes have a say in their own academic pursuits, or whether are they being pressured into specific majors to benefit their team.³⁴⁵

While college athletes at some institutions are almost certainly deprived of the degree of their choosing by barriers placed on them by their athletic commitments, others struggle to complete college degrees while staying within their eligibility window, and thus, face issues remaining on scholarship.³⁴⁶ Graduation rates of college athletes have been creeping up in recent years, although certain demographic groups of athletes are progressing towards graduation at much lower rates than others.³⁴⁷ Notably, the graduation rates for white students have increased, yet black male students are graduating far less frequently than their white teammates.³⁴⁸ These

[took-sham-classes](#) (quoting former North Carolina basketball star Rashad McCants as saying that he made the dean's list in classes that he did not attend).

³⁴⁰ Bradley David Ridpath, Gerald Gurney & Eric Snyder, *NCAA Academic Fraud Cases and Historical Consistency: A Comparative Content Analysis*, 25 J. LEGAL ASPECTS OF SPORT 75, 84–85 (2015).

³⁴¹ See *id.* at 76 (describing the scope of the University of North Carolina scandal).

³⁴² Kevin Trahan, *Athletes Are Getting Degrees, But Does That Actually Mean Anything*, SB NATION (Jul. 9, 2014), <https://www.sbnation.com/college-football/2014/7/9/5885433/ncaa-trial-student-athletes-education>.

³⁴³ Jodi Upton & Kristen Novak, *College Athletes Cluster Majors at Most Schools*, USA TODAY (Nov. 18, 2008), http://usatoday30.usatoday.com/sports/college/2008-11-18-majors-graphic_N.htm.

³⁴⁴ *Id.*

³⁴⁵ Trahan, *supra* note 342.

³⁴⁶ Jake New, *More Athletes Get to Finish Line*, INSIDE HIGHER ED (Oct. 29, 2014), <https://www.insidehighered.com/news/2014/10/29/graduation-rates-athletes-hit-record-high>.

³⁴⁷ *Id.*

³⁴⁸ Derrick Z. Jackson, *NCAA Needs a Reality Check When It Comes To Grad Rates For Black Athletes*, UNDEFEATED (Dec. 26, 2018), <https://theundefeated.com/features/grad-rates-for-black-athletes-ncaa-needs-a-reality-check/>.

racial disparities raise fundamental questions about the fairness of NCAA regulations and their disparate impact on different demographics.³⁴⁹ The commitment of schools towards athlete education and getting athletes to graduation is even more attenuated when one considers that an athlete's scholarship need not be guaranteed for the full-length of a degree, and despite being allowed to offer guaranteed scholarships, many schools continue to rely on scholarships that renew on an annual basis.³⁵⁰

In sum, the current policies of the NCAA do not allow for many college athletes to reach their full potential as students.³⁵¹ A revised system must put the students back in charge of their own academic destiny. Under an ameliorated system, college athletes should be given full autonomy to choose their educational path. No longer should athletes be influenced into clustered academic majors.³⁵² While athletes may naturally group with others on their teams, academic major clusters with more than twenty-five percent of the members on any team with more than ten athletes should trigger an investigation into whether the athletes self-selected the major or the university or its agents pressured the athlete to pursue that major. Undue influence on course selection should be codified alongside other academic violations in a governing organization's rulebook. Further, on top of providing athletes with complete autonomy over their degree path, athletes should receive athletic scholarships that guarantee tuition until *completion* of a degree. The reality is that even four-year guaranteed scholarships are unlikely to be sufficient for the average college student, and college athletes face many more demands on their time than the average student.³⁵³

Overall, the Summer of 2021 marked a major inflection point in the external governance of college sports, as, nearly all at once, several states passed laws granting college athletes the right to endorse products, the Supreme Court ruled that the NCAA's longstanding restraints on providing unlimited educational benefits to college athletes violated federal antitrust law, and Congress began focusing on the lack of medical benefits afforded to college athletes. On account of these widespread external developments, the time is now to reimagine the internal governance structure of collegiate athletics. Through (1) forcing the NCAA to take a hands-off approach

³⁴⁹ *Id.*

³⁵⁰ Kyle Winters, *NCSA: Are Athletic Scholarships Guaranteed for Four Years*, USA TODAY (Jul. 23, 2019), <https://usatodayhss.com/2019/ncaa-are-athletic-scholarships-guaranteed-for-four-years>.

³⁵¹ Shane Battier, *Let Athletes Be Students*, THE PLAYERS' TRIBUNE (Oct. 25, 2016), <https://www.theplayertribune.com/articles/shane-battier-ncaa-let-athletes-be-students>.

³⁵² Doug Lederman, *Concerns About Clustering*, INSIDE HIGHER ED (Nov. 20, 2008), <https://www.insidehighered.com/news/2008/11/20/concerns-about-clustering> (describing the practice of clustering).

³⁵³ See *Graduation Rates*, NAT'L CTR. FOR ED. STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=40> (last visited Feb. 24, 2021) (noting that the six-year graduation rate for female college students was sixty-five percent, and for male college students it was fifty-nine percent in 2018).

when it comes to athlete's business ventures; (2) overhauling and improving the health and safety protocol for college athletes; (3) creating new systems via which collegiate athletes can report abuse; (4) crafting a new model for internal dispute resolution; (5) offering athletes better access to representation; (6) enhancing collegiate athletes' transfer autonomy; and (7) improving access to quality education, this Article presents a framework that will allow college athletes to succeed on and off the field, and into the future. In the post-*Alston* world, championing the rights of collegiate athletes is paramount, and the seven proposals this Article highlights are the first steps in building a new governance model to protect and promote the rights of college athletes from an ethical, legal, and medical standpoint.

CONCLUSION

The NCAA was founded to protect student athletes' welfare.³⁵⁴ But its consistent focus on financial endpoints strains its legitimacy as well as its viability.³⁵⁵ The organization's current power structure appears unsustainable as the organization faces opposition from all three branches of the federal government and various state legislatures.³⁵⁶ This opposition is in addition to internal threats from the NCAA's own most powerful members, who have, on at least some level, contemplated breaking off from the organization.³⁵⁷ The *Alston* decision presents a meaningful opportunity to reform an archaic and punitive institution.³⁵⁸

The exact shape of how collegiate athletics governance will emerge from the Supreme Court's *Alston* decision is to be determined. However, the lessons learned have highlighted the

³⁵⁴ Edelman et al. *supra* note 3.

³⁵⁵ See generally, Mark Schlabach, *NCAA: Where Does The Money Go?*, ESPN (Jul. 12, 2011), https://www.espn.com/college-sports/story/_/id/6756472/following-ncaa-money (providing an overview of where the NCAA spends its revenue).

³⁵⁶ See Dean Barker, *Biden VP Pick Kamala Harris Favors College Athletes Getting Paid*, CAMPUS REFORM (Aug. 18, 2020), <https://www.campusreform.org/?ID=15466> (noting support of then Vice-Presidential candidate Kamala Harris for compensating collegiate athletes); see also Alicia Jessop, *The Supreme Court Set the NCAA on New Ground in 1984. Will It Again In Alston?*, ATHLETIC (Dec. 18, 2020), <https://theathletic.com/2267535/2020/12/18/supreme-court-alston-ncaa/> (noting the possibility of a Supreme Court decision that fundamentally changes how the NCAA governs college athletics); see also Darren Heitner, *Jerry Moran Introduces Another NIL Bill For Congress To Possibly Consider*, ABOVE THE L. (Feb. 26, 2021), <https://abovethelaw.com/2021/02/jerry-moran-introduces-another-nil-bill-for-congress-to-possibly-consider/> (noting the existence of multiple bills in Congress that would allow athletes to monetize their name, image, and likeness rights to varying degrees); Ross Dellenger, *Iowa Becomes Latest State to Introduce Athlete NIL Bill; Targeting July 1 Effective Date*, SPORTS ILLUSTRATED (Feb. 3, 2021), <https://www.si.com/college/2021/02/03/iowa-name-image-likeness-bill-ncaa> (listing states with name, image, likeness laws).

³⁵⁷ Andy Staples, *How Major College Football Teams Could (and Should) Break From the NCAA*, ATHLETIC (Jan. 19, 2021), <https://theathletic.com/2322152/2021/01/19/college-football-realignment-reboot-ncaa/>.

³⁵⁸ 594 U.S. ____ (2021).

need for a system that better protects athlete needs.³⁵⁹ Moving forward, measures must be positioned to protect athletes' economic interests and allow them the opportunity during their collegiate years to monetize, what for some, will be the most valuable earning years of their lives.³⁶⁰ Given the historical exploitation of college athletes, the opportunity to build a system where students can monetize their athletic ability has the potential to generate life-changing income for some, and allow others to at least be compensated for their labor.³⁶¹ But, the economic restraints are far from the only ones that should be lifted from college athletes, as we, as a society, move forward with standards of acceptable behavior and treatment. From the poor handling of concussions and dubious response to COVID-19, to the lack of preservation of athletes' educational opportunities, the NCAA has failed to protect its students' health and the sanctity of their education—two of their most important responsibilities.³⁶² The primacy of college athletes' rights, safety, well-being, and self-advocacy should guide the reshaping of the administration of college sports, and the proposals set forth in this Article will help guide the way.

³⁵⁹ See Jenn Hatfield, *Even Students Who Aren't Athletes Think the NCAA Is A Problem*, FIVETHIRTYEIGHT (Jul. 12, 2021), <https://fivethirtyeight.com/features/college-students-dont-like-how-the-ncaa-treats-student-athletes/> (discussing the unpopularity of the NCAA on various high-profile subjects including gender equity and athlete compensation).

³⁶⁰ Molly Hensley-Clancy, *College Athletes Can Finally Profit Off Their Celebrity. These Five Are Ready.*, WASH. POST (Jun. 29, 2021), <https://www.washingtonpost.com/sports/2021/06/29/college-athletes-nil-rights/>.

³⁶¹ See Derek Van Rheenen, *Exploitation in College Sports: Race, Revenue, and Educational Reward*, 48 INT'L REV. SOC. OF SPORT 550 (2013) (discussing the exploitation of some athletes in college sports).

³⁶² See Bennett Conlin, *How Does COVID-19 Immunity Affect College Athletic Programs and Their Safety Protocols?*, DAILY PROGRESS (Jul. 25, 2020), https://dailyprogress.com/sports/how-does-covid-19-immunity-affect-college-athletic-programs-and-their-safety-protocols/article_496ee3d7-e9d7-592b-ab7b-0195c58d69c7.html (describing how some college athletics programs may receive a competitive advantage if they are infected with the coronavirus before the start of a season and recover before play starts).