

REIMAGINING THE GOVERNANCE OF COLLEGE SPORTS AFTER *ALSTON*

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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 regarding the rights of college athletes. First, nearly all at once several states passed laws granting college athletes the right to endorse products. Next, in its first antitrust decision concerning the National Collegiate Athletic Association (NCAA) since 1984, the United States Supreme Court unanimously ruled that the NCAA's longstanding restraints on providing unlimited educational benefits to college athletes violated federal antitrust law.¹ 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 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 recent decision in *NCAA v. Alston*, this Article offers a roadmap for reimagining the internal governance structure of college athletics in the twenty-first 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. Part III examines how recent congressional developments, state law initiatives, and the *Alston* decision require reimagining the internal governance

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1. Dan Murphy, *Supreme Court Unanimously Sides with Former College Players in Dispute with NCAA About Compensation*, ESPN (June 21, 2021), https://www.espn.com/college-sports/story/_id/31679946/supreme-court-sides-former-players-dispute-ncaa-compensation [<https://perma.cc/6VFH-98ZR>].

2. Andrea P. Rockaway et al., *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 (June 25, 2021), <https://www.jdsupra.com/legalnews/senate-hearings-on-name-image-and-8436965/> [<https://perma.cc/CX4F-3WHB>].

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.

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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 these proposed reforms 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

The summer of 2021, however, marked an inflection point in the regulatory environment of college sports.⁶ After nearly half a 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

3. See 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); see also 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); 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); 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 *N.Y.U. J. INTELL. PROP. & ENT. L.* 1, 12 (2019) (discussing academic scandals at North Carolina involving student athletes taking “fake classes”); Ted Tatos, *Abuse and Mistreatment of Athletes at U.S. Universities: Legal Implications for Institutional Duty-to-Protect*, 21 *TEX. REV. ENT. & SPORTS L.* 1, 5–14 (2020) (discussing various instances of abuse and mistreatment of collegiate athletes). See generally Marc Edelman et al., *Exploring College Sports in the Time of COVID-19: A Legal, Medical, and Ethical Analysis*, 2021 *MICH. ST. L. REV.* 469 (describing the need for NCAA reform in the wake of the COVID-19 pandemic).

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> [<https://perma.cc/Q7DM-ASRS>] (discussing congressional interest in reforming the NCAA).

5. Calls for NCAA reform date back decades. See, e.g., Stephen Horn, *Intercollegiate Athletics: Waning Amateurism and Rising Professionalism*, 5 *J. COLL. & U.L.* 97, 100–01 (1978) (discussing a proposal for a “bill of rights” for student athletes at the 1975 NCAA convention).

6. Katie McInerney, *Beginning Today, NCAA Will Let Athletes Get Paid for Their “NIL.” Here's What That Means*, *BOSTON.COM* (July 1, 2021), <https://www.boston.com/sports/college-sports/2021/07/01/ncaa-paying-athletes-rules/> [<https://perma.cc/4MZD-GSCQ>] (noting that in the summer of 2021, state laws allowing athletes to monetize their name, image, and likenesses went into effect, and also noting the Supreme Court decision in *NCAA v. Alston*, 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* (June 8, 2021, 1:12 PM), <https://www.washingtonpost.com/sports/2021/06/08/congress-ncaa-nil-senate-commerce-hearing/> [<https://perma.cc/R75U-B46H>].

7. See Dan Murphy, *Can Congress Help the NCAA Find NIL Consistency?*, *ESPN* (July 1, 2021), https://www.espn.com/college-sports/story/_/id/29392144/congress-working-multiple

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 *NCAA v. Alston*,¹⁰ the United States Supreme Court unanimously ruled that the NCAA's longstanding restraints on providing athletes with educational benefits violate federal antitrust law.¹¹

Building upon these recent and significant developments, this Article presents a roadmap for reimagining the internal governance structure of intercollegiate sports in the twenty-first 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 that reformed the college sports regulatory environment, including the Supreme Court's recent decision in *NCAA v. Alston*. Lastly, Part IV prescribes a template for building a new 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

legislative-options-solve-ncaa-nil-issue [<https://perma.cc/9LVP-TEB9>] (discussing the various reform proposals regarding NCAA NIL reform).

8. Student athletes may earn compensation for use of their name, image, or likeness, with conditions established that certain postsecondary educational institutions may not restrict. *See Tracker: Name, Image and Likeness Legislation by State*, BUS. COLL. SPORTS, <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> [<https://perma.cc/B3HE-ZDRL>] (discussing the status of NIL legislations in various states); *see, e.g.*, S.B. 1296, 55th Leg., Reg. Sess. (Ariz. 2021) (enacted); H.B. 1671, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021) (enacted); 2021 Ga. Laws 500; S.B. 2338, 102nd Gen. Assemb., Reg. Sess. (Ill. 2021) (enacted); S.B. 2313, 2021 Leg., Reg. Sess. (Miss. 2021) (enacted); An Act Establishing Student-Athlete Rights and Protections, 2021 Mont. Laws 1436; Student Athlete Endorsement Act, 2021 N.M. Laws 1894; S.B. 48, 58th Leg., Reg. Sess. (Okla. 2021) (enacted); Intercollegiate Athletes' Compensation for Name, Image, or Likeness, 2021 S.C. Acts 128; H.B. 1351, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021) (enacted); S.B. 1385, 88th Leg., Reg. Sess. (Tex. 2021) (enacted).

9. *See, e.g., NCAA Student Athletes and NIL Rights: Hearing Before the S. Comm. on Com., Sci. & Transp.*, 117th Cong. (2021) [hereinafter *2021 NIL Hearing*], <https://www.commerce.senate.gov/2021/6/ncaa-student-athletes-and-nil-rights> [<https://perma.cc/CF2F-9L56>]; *NCAA Athlete NIL Rights: Hearing Before the S. Comm. on Com., Sci. & Transp.*, 117th Cong. (2021), <https://www.commerce.senate.gov/2021/6/ncaa-athlete-nil-rights> [<https://perma.cc/CF86-RJHA>].

10. 141 S. Ct. 2141 (2021).

11. *Id.* at 2166.

Rutgers College met for the first official collegiate football game.¹² By the late 1800s, groups of colleges with advanced sporting programs had joined together into small athletic conferences to better organize their sporting competitions.¹³ But the modern world of intercollegiate sports, which is centered around the NCAA, did not emerge until the early 1900s.¹⁴ Even then, for the first half of the twentieth century, the NCAA played only a limited role in governing intercollegiate sports.¹⁵

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.¹⁶ Specifically, in October of 1905, during a practice between two freshmen football teams at Harvard, Teddy Roosevelt, Jr.—the son of America's then-sitting president—was left bleeding profusely from a cut above his eye.¹⁷ 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”¹⁸—gave credence to an already emerging movement for broader, systematic regulation of college sports.¹⁹

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 some colleges to hire non-students to play in these events, rather than staff their respective teams with members of the bona fide student body.²⁰ These fears of the commercialization of college sports through use of mercenary players, coupled with mounting deaths and injuries on the gridiron, led President

12. Guy Lewis, *The Beginning of Organized Collegiate Sport*, 22 AM. Q. 222, 223–24 (1970). The first collegiate football game was played on November 6, 1869. David W. Major, *The Birthplace of College Football*, RUTGERS TODAY (Nov. 6, 2019), <https://www.rutgers.edu/news/birthplace-college-football> [<https://perma.cc/867J-Y98G>]. Rutgers College won the game by a score of 6-4. *Id.*

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

14. See Rodney K. Smith, Essay, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 10, 12 (2000) (noting that the NCAA was originally named the “Intercollegiate Athletic Association,” changing its name to the “National Collegiate Athletic Association” in 1910).

15. *Id.* at 13–14.

16. See Edelman et al., *supra* note 3, at 495–97, 505.

17. *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> [<https://perma.cc/G524-4K4Q>].

18. Edelman et al., *supra* note 3, at 496, 497 n.180.

19. See Smith, *supra* note 14, at 10–12.

20. See *id.* at 11–12.

Roosevelt to hold a White House conference in late 1905 to examine the rules governing college sports.²¹ This conference laid the foundation for the formation of the NCAA—a collective governing body with joint oversight responsibilities that would oversee college athletics.²²

After the NCAA was established in 1906,²³ the organization's early years were mainly inconsequential, with the Association acting more as a working group than as an active regulator.²⁴ However, during the 1920s, the Carnegie Foundation for the Advancement of Teaching—an education, policy, and research institution founded by Andrew Carnegie and chartered by an act of Congress in 1906²⁵—began actively calling for increased scrutiny of the commercialization of collegiate sports, and college football more specifically.²⁶

In the 1930s, however, the inroads made by the creation of the NCAA and the efforts of the Carnegie Foundation were thwarted by 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 de-emphasize the role of athletics in university life.²⁷ Specifically, the plan called for a nationwide ban on financial aid based on athletic ability,²⁸ and placed athletics under the control of university faculty.²⁹ This plan, however, was ill-timed because it was introduced to the Southern Conference around the same time that the Southeastern Conference had voted in favor of grants-in-aid.³⁰ The split between the institutions in favor of offering full grants-in-aid to college athletes and those opposing it threatened to divide the college sports world into two halves—the amateur half and the professional half.³¹ Fear

21. *Id.*

22. Taylor O'Toole, Comment, *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).

23. See Smith, *supra* note 14, at 12 (noting that the NCAA was named the Intercollegiate Athletic Association until 1910).

24. *Id.* at 13.

25. *Foundation History*, CARNEGIE FOUND., <https://www.carnegiefoundation.org/about-us/foundation-history/> [<https://perma.cc/SY9F-EKFB>].

26. Smith, *supra* note 14, at 13.

27. See Angela Lumpkin, *The Graham Plan—An Early Attempt to Achieve Sanctity in Sport*, Plan for Intercollegiate Athletics 1–2 (Mar. 30, 1984) (unpublished manuscript), <https://blogs.lib.unc.edu/uarms/2017/10/23/the-graham-plan-for-intercollegiate-athletics-1935/> [<https://perma.cc/MD4T-F2RZ>].

28. 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).

29. *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/> [<https://perma.cc/MD4T-F2RZ>].

30. Smith, *supra* note 28, at 440.

31. *Id.*

of this break paved the way for the post–World War II era’s Sanity Code.³²

B. *The Years of Sanity*

The *Sanity Code*, which was adopted by the NCAA in 1948, sought to put an enforcement mechanism behind the NCAA’s principles that limited the compensation of college athletes.³³ Although the NCAA’s charter had restricted compensation of college athletes for a long time, these restrictions were not always followed by member schools or enforced by the NCAA as a whole.³⁴ 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.³⁵ In effect, the *Sanity Code* sought to ban “pay for play.”³⁶

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 recognizing that if colleges were expelled for a single instance of noncompliance, the NCAA would soon have no members remaining.³⁷ By the end of the *Sanity Code*’s reign, the prevailing sentiment toward financially compensating college athletes and their families had shifted diametrically in the opposite direction, with rumors of schools providing athletes with free college tuition and broader financial inducements running rampant.³⁸ 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.³⁹ Although no bank account was ever found, the NCAA determined that the University of Oklahoma “paid medical

32. *See id.* at 440–41.

33. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism of Antitrust Recidivist*, 86 OR. L. REV. 329, 332–33 (2007).

34. *See id.* at 332 (explaining that the growth in the popularity of college football made “NCAA amateur code [regulations] . . . difficult” to enforce).

35. *Id.* at 333.

36. 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> [<https://perma.cc/J7GL-LS5W>].

37. *See* Alfred C. Yen, *Early Scholarship Offers and the NCAA*, 52 B.C. L. REV. 585, 596 (2011) (describing the short-lived existence of the *Sanity Code*); *see also* Lazaroff, *supra* note 33, at 333 (“The Sanity Code did not enjoy a long life; in fact, within two years the Code was dead.”).

38. *See, e.g.*, Tex Maule, *A+\$+X+F+B = Invincibility*, SPORTS ILLUSTRATED (Nov. 18, 1957), <https://vault.si.com/vault/1957/11/18/axfb-invincibility> [<https://perma.cc/6NVR-NZXB>].

39. *Id.*

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."⁴⁰

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.⁴¹ The 1960s saw the rise of the Civil Rights movement and the desegregation of many aspects of society, including higher education.⁴² The 1960s also saw a growing vocalization of the demand for women's athletics on college campuses.⁴³ In 1966, the Commission on Intercollegiate Athletics for Women (CIAW) was founded to facilitate the offering of championships for women's sports.⁴⁴ The first women's championships were held for gymnastics and track and field in 1969.⁴⁵ 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.⁴⁶ Title IX's legacy of expanding women's opportunities in athletics is not, however, the NCAA's legacy.⁴⁷

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, began to focus its efforts on commercialism and wealth maximization.⁴⁸ As described by Professor Murray Sperber, Professor Emeritus of Cultural Studies of Sport in Education at Berkeley University, the college sports landscape during the 1970s and 1980s was a time of transition, during which athletic departments became "franchises in College Sports Inc"—franchises operating as "huge commercial entertainment enterprise[s] with operating methods and objectives frequently opposed to the educational

40. *Id.*

41. 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/> [<https://perma.cc/Y4V2-V2DR>].

42. *Id.*

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

44. *Id.*

45. *Id.*

46. *Id.* at 43.

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

48. See Jeffrey J.R. Sundram, Comment, *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*).

missions of the host universities.”⁴⁹ 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.⁵⁰ Likewise, colleges no longer had to expend resources inducing students to attend their schools based on rigorous educational offerings.⁵¹ Rather, a sales pitch that focused solely on student comradery and the ability to watch big-time college sports was sufficient.⁵²

As some colleges began to deemphasize academic rigor in their marketing materials, the loss of an emphasis on education became especially pronounced for college students who played competitive sports.⁵³ The deemphasis of college athletes’ academic pursuits, however, may date back even earlier, as football player Gary Shaw chronicled how, during his time at the University of Texas in the 1960s, the football coaches guided players into classes that the players would pass instead of courses that interested the athletes⁵⁴—a disturbing trend that remains one of the strongest criticisms of big-time college sports to this day. 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 still reading below a second-grade reading level.⁵⁵

The 1970s and 1980s were also an era of growth for the NCAA as an institution.⁵⁶ The organization expanded requirements for divisional memberships and pushed schools to expand athletic departments and facilities, often beyond their means.⁵⁷ As the NCAA was expanding the

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

50. Erik M. Jensen, *Taxation, the Student Athlete, and the Professionalization of College Athletics*, 1987 UTAH L. REV. 35, 42 nn.33–34.

51. SPERBER, *supra* note 49, at 56–57.

52. *Id.*

53. Jensen, *supra* note 50, at 39–41.

54. GARY SHAW, MEAT ON THE HOOFF: THE HIDDEN WORLD OF TEXAS FOOTBALL 44–47 (1972).

55. 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> [<https://perma.cc/NN8X-NR4K>]. Years later, Manley found out that he suffered from learning disabilities, and, in his post-college life, he learned how to read. But that was all achieved on his own dime, with his own initiative, and not through his college experience. See Tom Friend, *The Education of Dexter Manley*, WASH. POST (July 2, 1989), <https://www.washingtonpost.com/archive/lifestyle/magazine/1989/07/02/the-education-of-dexter-manley/84ba83c2-cbf0-45f2-b636-d644c5224d4a/> [<https://perma.cc/A9M6-9BTX>].

56. In 1973, the NCAA adopted a third Division, separating athletics into Division I, Division II, and Division III. See *DII 40th Anniversary*, NCAA, <https://www.ncaa.org/about/diii-40th-anniversary> [<https://perma.cc/R38J-5ANP>].

57. SPERBER, *supra* note 49, at 34.

scope of its purported jurisdiction, the organization's power to govern also faced its first meaningful challenge in 1981, 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 the universities to play on broadcast television.⁵⁸ The case, *NCAA v. Board of Regents*,⁵⁹ made its way to the Supreme Court in 1984, and 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.⁶⁰

Despite the NCAA's loss at the Supreme Court in *Board of Regents*, the NCAA leadership puzzlingly seemed to embrace the Court's decision by leaning even further into the commercialization of college sports.⁶¹ 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.⁶² 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, during which the tournament participants were revealed.⁶³ In 1985, the NCAA Men's Basketball Tournament would expand to sixty-four teams.⁶⁴ Although the new tournament structure generated exponential revenue for college basketball programs, athletic directors, and coaches,⁶⁵ the extended length of the NCAA Men's Basketball Tournament meant college basketball players spent less time in the classroom.⁶⁶ It was at this point that the dichotomy between the

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

59. 468 U.S. 85 (1984).

60. *See id.* at 120 (“[C]onsistent 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.” (emphasis omitted)).

61. One example of NCAA leadership leaning into the commercialization of college sports has been the seemingly ever-expanding number of college football bowl games. *See The History of Bowl Game Expansion*, TSJ101 SPORTS (Dec. 7, 2018), <https://tsj101sports.com/2018/12/07/the-history-of-bowl-game-expansion/> [<https://perma.cc/GY79-2KTP>].

62. SPERBER, *supra* note 49, at 34–35.

63. Jeff Haggart, *Chronology of NCAA Tournament TV Coverage (1982-1990)*, CLASSIC TV SPORTS (Feb. 26, 2012, 9:36 AM), http://www.classictvsports.com/2012/02/chronology-of-ncaa-tournament-tv_26.html [<https://perma.cc/TS3D-CHRW>].

64. *Id.*

65. *See generally* Will Hobson, *Fund and Games*, WASH. POST (Mar. 18, 2014), <https://www.washingtonpost.com/graphics/sports/ncaa-money/> [<https://perma.cc/5764-9P8B>] (describing revenue distributions for participating in the NCAA Men's Basketball Tournament).

66. *Cf.* 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> [<https://perma.cc/UG8M-U27J>] (explaining the 2011 tournament expansion to 68 teams, which keeps more student athletes away from the classroom).

financial incentives of college athletics programs and the rights of the student athletes making them profitable became even more apparent.⁶⁷

In the over three decades since the *Board of Regents* decision, colleges and universities have amassed millions profiting from the successes of their star players. Unfortunately, college athletes just help power the “financial engine” of university athletic departments but see none of the benefits they help their colleges and universities accrue.⁶⁸ In 2019, for example, the University of Mississippi athletics department reported a three-year average profit of \$43 million for the 2015, 2016, and 2017 seasons.⁶⁹ Yet, despite such monumental profits and the fact that Ole Miss’s football coach, Lane Kiffin, makes an annual salary of \$3.9 million,⁷⁰ Mississippi’s leading pass rusher, Sam Williams, faced significant food insecurity when sent home from school during the COVID-19 pandemic.⁷¹ 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 in Alabama. Then if we get help it’s a ‘violation[.]’ I just don’t understand.”⁷² Williams’s tweet was reminiscent of remarks made in 2014 by star college basketball player Shabazz Napier of the University of Connecticut after winning the March Madness Tournament.⁷³ 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.

67. In 1987, just two years after the NCAA expanded the Men’s Basketball Tournament, the NCAA sanctioned Southern Methodist University’s football program after discovering that it was secretly paying its players. See Eric Dodds, *The “Death Penalty” and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015, 6:00 AM), <https://time.com/3720498/ncaa-smu-death-penalty/> [https://perma.cc/UUM5-68A4].

68. See Jon Solomon, *The History Behind the Debate over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/> [https://perma.cc/BL78-PZP2].

69. Chris Smith, *College Football’s Most Valuable Teams: Reigning Champion Clemson Tigers Claw into Top 25*, FORBES (Sept. 12, 2019, 6:00 AM), <https://www.forbes.com/sites/chris-smith/2019/09/12/college-football-most-valuable-clemson-texas-am/?sh=5f8ec82a2e7e> [https://perma.cc/V28T-PGYZ].

70. 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 [https://perma.cc/79SZ-QT42].

71. See 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> [https://perma.cc/KT66-DDQR].

72. *Id.* (quoting Sam Williams Sr. (@DegarrickSamuel), TWITTER (Mar. 24, 2020, 10:39 AM), <https://twitter.com/DegarrickSamuel/status/1242461106066673669?ext=HHwWisC-peHyjb4iAAAA> [https://perma.cc/J97W-C3C2]).

73. 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/> [https://perma.cc/4FA9-MAAU].

We do have hungry nights that we don't have enough money to get food in.”⁷⁴

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 with minimal reading ability⁷⁵—have continued to materialize in recent years. In 2016, for example, an outside organization determined that the University of North Carolina offered approximately 200 bogus classes for its athletes.⁷⁶ 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,⁷⁷ and were designed to help star athletes gain and maintain their NCAA eligibility.⁷⁸ Overall, until judicial and congressional directives were issued in 2020 and 2021, college athletes frequently did not receive the same level of education as their peers and were often left struggling to pay for basic necessities while their institutions profited from their names and athletic success.

II. REVIEWING COLLEGE SPORTS THROUGH FIVE CRITICAL LENSES

In the thirty-seven years since the Supreme Court decided *Board of Regents*, the collegiate sports governance model has moved even further away from its initial mission of organizing games, ensuring education, and keeping athletes safe.⁷⁹ 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 grounds.⁸⁰ Specifically, the NCAA and its member colleges have faced criticism with 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.

74. *Id.*

75. See Diana Nyad, *Views of Sport; How Illiteracy Makes Athletes Run*, N.Y. TIMES (May 28, 1989), <https://www.nytimes.com/1989/05/28/sports/views-of-sport-how-illiteracy-makes-athletes-run.html> [https://perma.cc/W2Y9-9T6N].

76. 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> [https://perma.cc/9TGL-M9RC].

77. *Id.*

78. See Solomon, *supra* note 68.

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

80. See, e.g., Richard B. McKenzie & E. Thomas Sullivan, *Does the NCAA Exploit College Athletes? An Economics and Legal Reinterpretation*, 32 ANTITRUST BULL. 373, 375 (1987) (noting one theme of criticism that the NCAA operates as a cartel); see also Akuoma C. Nwadike et al., *Institutional Racism in the NCAA and the Racial Implications of the “2.3 or Take a Knee” Legislation*, 26 MARQ. SPORTS L. REV. 523, 528–38 (2016) (describing years of policy discrimination against Black college athletes).

A. Educational Malfeasance

One area in which the NCAA has faced meaningful criticism since the 1980s has been its lack of focus on the educational purpose of higher education.⁸¹ In this vein, Professor Sperber was among the first to fire warning shots about how the NCAA co-opts the educational mission of higher education when he authored the book *Beer and Circus* in 2001.⁸² In *Beer and Circus*, Professor Sperber described 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.⁸³ Professor Sperber also coined 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.⁸⁴ In essence, Professor Sperber argued 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.⁸⁵ Thus, according to Professor Sperber, many colleges adopted the “Beer and Circus” business plan, at least to some extent.⁸⁶

Professor Sperber’s concerns about college presidents’ incentives to focus more on athletics than education was enhanced by evidence that the “Beer and Circus” approach was actually boosting the bottom lines of certain colleges around the country.⁸⁷ 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 respective academic ratings in

81. 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 EDUC. 291, 294 (1950); see also Linda S. Greene, *The New NCAA Rules of the Game: Academic Integrity or 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).

82. SPERBER, *supra* note 49, at 33.

83. *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. See Ishaan Tharoor, *Potemkin Villages*, TIME (Aug. 6, 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 [https://perma.cc/MH9Q-D233].

84. SPERBER, *supra* note 49, at 33.

85. *Id.* at 151–60.

86. *See id.* at 248–61 (describing the move towards “Beer and Circus” and away from the educational missions that universities were founded upon).

87. *Id.* at 216–29 (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).

publications such as U.S. News.⁸⁸ At this time, the term “Flutie Factor” (also called the “Flutie Effect”) became popular within the vernacular of college admissions offices.⁸⁹ The term referred to how Boston College enjoyed a 30% increase in its number of undergraduate applicants within two years after quarterback Doug Flutie led the school to a nationally televised victory over the University of Miami in 1984.⁹⁰ For a while, it seemed as if every college was looking for its own Flutie Factor.⁹¹

Further, as the value of elite college athletes like Flutie became more apparent for marketing colleges to prospective students, some schools became more interested in having their elite athletes focus on sports rather than their academics.⁹² While the “Beer and Circus” model did not preclude college athletes from being serious students per se, the economic incentives generated by that model facilitated such ends.⁹³ 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.⁹⁴

88. *Id.* at 60.

89. Sean Silverthorne, *The Flutie Effect: How Athletic Success Boosts College Applications*, FORBES (Apr. 29, 2013, 9:48 AM), <https://www.forbes.com/sites/hbsworkingknowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications/?sh=640826066e96> [<https://perma.cc/M7RG-NCCH>].

90. *Id.*

91. 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/> [<https://perma.cc/5KTM-DYX8>].

92. See, e.g., Daniel Oppenheimer, *Why Student Athletes Continue to Fail*, TIME (Apr. 20, 2015, 10:34 AM), <https://time.com/3827196/why-student-athletes-fail/> [<https://perma.cc/A8N9-QRCS>]. The NCAA has also often 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> [<https://perma.cc/U7JT-FLNN>].

93. See, e.g., Teddy Greenstein, *Ohio State's Cardale Jones Is Getting Quite an Education*, CHI. TRIB. (Dec. 30, 2014, 8:55 PM), <https://www.chicagotribune.com/sports/college/ct-greenstein-ohio-state-cardale-jones-spt-1231-20141230-column.html> [<https://perma.cc/QD8U-HC42>]. Indeed, former Ohio State University quarterback Cardale Jones tweeted his views on the requirement 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.” *Id.*

94. See, e.g., Sara Ganim & Devon Sayers, *UNC Report Finds 18 Years of Academic Fraud to Keep Athletes Playing*, CNN (Oct. 23, 2014, 10:28 AM), <https://www.cnn.com/2014/10/22/us/unc-report-academic-fraud/index.html> [<https://perma.cc/3CVH-TF3V>] (describing an independent report commissioned by the University of North Carolina that found that at least 3,100 students took so-called “paper classes” that lacked the rigor of traditional college classes).

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.⁹⁵ This scandal derived from a 2013 North Carolina State Bureau of Investigation probe into certain questionable courses offered primarily to University of North Carolina college athletes.⁹⁶ A university-commissioned private investigation revealed that the school had indeed operated a series of classes, disproportionately enrolled in by athletes, in which students were not required to attend and had virtually no faculty oversight; the only assignment was to complete a paper.⁹⁷ These independent study classes frequently lacked the rigor of other college courses.⁹⁸

The NCAA ultimately investigated the University of North Carolina for purportedly violating association bylaws by operating classes of this nature.⁹⁹ 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 disproportionately enrolled in them.¹⁰⁰ Such an outcome was unsurprising, as the NCAA is a bottom-up trade association governed by its own members.¹⁰¹ It is likely that the University of North Carolina was not alone in academic malfeasance of this nature, but that other colleges engaged in similar behavior.¹⁰² 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.¹⁰³ Applying the prisoner's dilemma, the other NCAA member colleges might have loved to sanction the University of North Carolina to make it easier to recruit athletes that otherwise may have chosen the University of North

95. See Jeremy Bauer-Wolf, *Breaking: NCAA Finds No Academic Violations By UNC*, INSIDE HIGHER ED. (Oct. 16, 2017, 3:00 AM), <https://www.insidehighered.com/news/2017/10/16/breaking-ncaa-finds-no-academic-fraud-unc> [<https://perma.cc/P8TJ-BSXW>].

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

97. *Id.* at 398–400.

98. *Id.* at 399.

99. *Id.* at 397–98.

100. Mark Titus, *North Carolina Was Always Going to Get Off in the NCAA's "Paper Class" Investigation*, RINGER (Oct. 13, 2017, 1:04 PM), <https://www.theringer.com/2017/10/13/16471704/north-carolina-academic-fraud-ncaa-investigation-findings> [<https://perma.cc/UA49-8VZS>].

101. See SPERBER, *supra* note 49, at 33.

102. 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> [<https://perma.cc/UVZ9-J2LP>] (noting the improbability that the University of North Carolina is alone in providing less rigorous academic opportunities to athletes).

103. See *id.*

Carolina, but might have hated the idea of their own educational practices receiving the same scrutiny.¹⁰⁴

Schools' deemphasis on education has likely been heightened as a result of the COVID-19 pandemic.¹⁰⁵ The rising revenues of major college sports continue to pull the industry towards professionalism, and this trend has been exacerbated by the increased isolation of the players from the student body at large.¹⁰⁶ Many athletes now not only live primarily with other athletes, but also eat together and, in some cases, take only online classes—all while the NCAA purports that athletes are students first.¹⁰⁷

B. Labor Exploitation

Whereas Professor Sperber and many other critics of the college sports system focus on the educational shortcomings of the NCAA business model, other critics express their concern about the role of college athletes serving as “unpaid professionals” within the increasingly lucrative college sports enterprise.¹⁰⁸ Indeed, college sports currently serve as a \$13 billion industry in the United States;¹⁰⁹ nearly forty athletic programs bring in annual revenues that exceed \$100 million per year, and many college administrators, athletic directors, and coaches earn

104. *See id.*

105. *See, e.g.*, Rick Maese et al., *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/> [<https://perma.cc/L5ZW-S7JA>] (discussing the 2021 men’s and women’s basketball championship athletes being sequestered in bubbles away from their college campuses for weeks at a time).

106. *See, e.g., id.*

107. *See, e.g.*, Eric Olson et al., Associated Press, *Online Classes Keep Football Players out of Academic Fray*, USA TODAY (Dec. 23, 2019, 10:49 AM), <https://www.usatoday.com/story/sports/ncaaf/2019/12/23/online-classes-keep-football-players-out-of-academic-fray/40878105/> [<https://perma.cc/S2NG-X4KP>].

108. *See* Mary Grace Miller, Comment, *The NCAA and the Student-Athlete: Reform Is on the Horizon*, 46 U. RICH. L. REV. 1141, 1148 (2012) (“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 Licensing Litigation Will Not Lead to the Demise of College Sports*, 92 OR. L. REV. 1019, 1049–51 (2014) (observing that college sports fans do not care that college athletes are unpaid).

109. Eben Novy-Williams, *Quick Take: College Sports*, BLOOMBERG (Sept. 27, 2017, 11:11 AM), <https://www.bloomberg.com/quicktake/college-sports-ncaa> [<https://perma.cc/5KKX-8VGU>].

multimillion-dollar salaries.¹¹⁰ Meanwhile, a study found that a significant majority of college athletes to live below the poverty line.¹¹¹

While 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 his efforts to organize college sports in conjunction with the College Athlete Players Association (CAPA), a trade association he cofounded in 2013.¹¹² 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 football players at Northwestern University.¹¹³ 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 undermines the purpose of college: an education” and that “[s]tudent-athletes are not employees . . . [because] their participation in college sports is voluntary.”¹¹⁴

While the National Labor Relations Board’s (NLRB) Region 13 recognized in its initial ruling that the Northwestern University college football players indeed constituted “employees” and thus were legally capable of unionizing,¹¹⁵ Huma’s organizing efforts were soon dashed by a subsequent ruling from the full NLRB.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ Thus, while concerns of labor exploitation of college athletes remain very real to this day, those seeking

110. See *NCAA Finances*, USA TODAY, <https://sports.usatoday.com/ncaa/finances> [<https://perma.cc/HL7G-P8KS>] (listing college athletic department revenues and expenses).

111. Henry DeWitt, Opinion, *NCAA Should Pay Its Athletes*, BUDGET ONLINE (Oct. 31, 2019), <https://lhsbudget.com/opinion/2019/10/31/ncaa-should-pay-its-athletes/> [<https://perma.cc/Q3R9-CMQF>] (noting that a study found that 86 percent of college athletes live below the federal poverty line).

112. 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).

113. *Id.* at 1635.

114. *Id.* at 1636 (alterations in original).

115. *Id.* at 1637–38.

116. See *id.* at 1639–40.

117. *Id.* at 1639.

118. *Id.* at 1639–40 (quoting *Nw. Univ.*, 362 N.L.R.B. 1350, 1353–54 (2015)).

to effect change through unionization have thus far failed to achieve their goals.¹¹⁹

C. *Civil Rights Concerns*

Closely tied with the labor market criticisms of college sports is a collection of civil rights advocates who criticize the current model of college sports directly from a civil rights perspective.¹²⁰ For example, as recently as 2014, sociology professor Dr. Harry Edwards of University of California, Berkeley, described the college athletes' rights movement as "the civil rights movement in sports of our time."¹²¹ While not every situation in which a particular class of labor is unpaid or underpaid would invite 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.¹²² 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."¹²³ Branch describes the college sports system as colonialist and believes that it is run by "well-meaning paternalists."¹²⁴

The term "student athlete" was developed to help the organization fight off workers' compensation claims.¹²⁵ The term was sufficiently

119. 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 (June 28, 2021), <https://www.minnpost.com/community-voices/2021/06/could-unions-be-next-for-gophers-and-other-college-sports-teams/> [<https://perma.cc/P2WW-5L3D>].

120. See ttfife, *Student Athlete Compensation Is a Civil Rights and Racial Justice Issue*, HARV. C.R.-C.L. L. REV.: AMICUS BLOG (Nov. 1, 2019), <https://harvardcrl.org/student-athlete-compensation-is-a-civil-rights-and-racial-justice-issue/> [<https://perma.cc/X83Y-JDSK>]; 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> [<https://perma.cc/PPP2-MKPZ>] (noting that Senator Chris Murphy, who introduced legislation that would allow athletes to unionize, said: "[h]aving 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.").

121. Edelman, *supra* note 112, at 1630 (quoting Dave Zirin, *It's the Racism, Stupid: Meet the Press's Epic NCAA Fail*, NATION (Mar. 24, 2014), <https://www.thenation.com/article/archive/its-racism-stupid-meet-presss-epic-ncaa-fail/> [<https://perma.cc/RZ52-A84J>]).

122. See Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/P5P9-CFHD>].

123. *Id.*

124. *Id.*

125. *See id.*

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 on the “job.”¹²⁶ The entirety of the NCAA governance structure is built to protect the organization, while the athletes are subject to the organization’s unitary governance.¹²⁷ Even where college athletes on prominent teams have called attention to the use of racial slurs by their white coaches, many of these coaches have received only a slap on the wrist, with some receiving no visible punishment beyond making an apology.¹²⁸

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 Black Americans’ rights in the United States.¹²⁹ The NCAA imposes significant restrictions on athletes’ eligibility after they transfer to another school, and though the organization has recently allowed for a one-time transfer for athletes without a loss of or period of ineligibility,¹³⁰ college athletes are still held to a different standard than other students.¹³¹ 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.¹³² Despite changes that will foreseeably grant collegiate athletes greater rights in the future, the power remains held by the coaches and administrators of college athletics.¹³³ As long as coaches and administrators retain all the power, athletes will remain subordinate and without a voice.

126. *See id.*

127. *See* Bomani Jones, *College Football Players Are Unpaid Stars on the Field and Have No Power off It*, VANITY FAIR (Sept. 2020), <https://www.vanityfair.com/culture/2020/08/college-football-unpaid-stars-with-no-power> [<https://perma.cc/ZRW7-NW6U>] (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 athletes’ rights).

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

129. *See* Michael H. LeRoy, *Whitewashing Coaching Racism in NCAA Sports: Enforcing Civil Rights Through the Ku Klux Klan Act*, 10 ARIZ. ST. SPORTS & ENT. L.J. 53, 58–60 (2020).

130. *See* Sara McClanahan & Katherine Shannon, *NCAA Ratifies New One-Time Transfer Rule*, DARTMOUTH (Apr. 30, 2021, 2:00 AM), <https://www.thedartmouth.com/article/2021/04/ncaa-ratifies-new-one-time-transfer-rule> [<https://perma.cc/C556-66JY>] (explaining that athletes would be allowed to transfer schools one time without having to sit out a year).

131. NCAA, DIVISION I MANUAL 193–94 (2020), <https://www.ncaapublications.com/productdownloads/D121.pdf> [<https://perma.cc/HQP4-FCUH>].

132. LeRoy, *supra* note 129, at 5860.

133. *See generally* Jones, *supra* note 127 (describing the power dynamics of college football).

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.¹³⁴ 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;¹³⁵ (2) failure to take meaningful precautions to prevent, diagnose, and treat concussions;¹³⁶ (3) a pattern of overlooked, or at least unrecognized, sexual abuse of college athletes;¹³⁷ (4) failure to prioritize college athlete safety over revenue generation during the recent COVID-19 health crisis;¹³⁸ (5) lack of concern for college athletes' mental health;¹³⁹ and (6) failure to provide sufficient insurance coverage for player injuries.¹⁴⁰

Exposure of athletes to physical injury has long been a risk of college athletics.¹⁴¹ However, in far too many cases of injury, coaches have negligently or recklessly disregarded the safety of college athletes,

134. See, e.g., Alex Kirshner, *What We Know About Jordan McNair's Death and Maryland Football's Role in It*, SB NATION (Oct. 31, 2018, 8:15 PM), <https://www.sbnation.com/college-football/2018/8/11/17678652/jordan-mcnair-death-investigation-maryland> [https://perma.cc/K3EU-S5SW] (describing the circumstances surrounding the death of a student athlete at the University of Maryland); Lindsay Dodgson, *Female College Athletes from Across the US Say They've Been Bullied, Manipulated, and Psychologically Abused by Their Coaches*, INSIDER (Oct. 30, 2020, 12:38 PM), <https://www.insider.com/players-say-psychological-abuse-college-women-sports-coaches-2020-7> [https://perma.cc/LDP7-646H] (discussing the widespread struggles of female student athletes).

135. Kirshner, *supra* note 134.

136. K. Adam Pretty, Note, *Dropping the Ball: The Failure of the NCAA to Address Concussions in College Football*, 89 NOTRE DAME L. REV. 2359, 2370–71 (2014).

137. See, e.g., Colin Dwyer, *Michigan State University to Pay \$4.5 Million Fine Over Larry Nassar Scandal*, NPR (Sept. 5, 2019, 12:03 PM), <https://www.npr.org/2019/09/05/757909245/michigan-state-university-to-pay-4-5-million-fine-over-larry-nassar-scandal#:~:text=The%20U.S.%20Department%20of%20Education,assaulting%20his%20patients%20for%20decades> [https://perma.cc/DQ8C-C9E4] (providing an overview of Michigan State University's failures to protect athletes from sexual predator Larry Nassar).

138. Josh Peter, *Are College Football Players the "Guinea Pig" for COVID-19 Protocol Planning at Universities?*, USA TODAY (July 17, 2020, 7:24 PM), <https://www.usatoday.com/story/sports/ncaaf/2020/07/17/college-football-players-guinea-pigs-schools-covid-19-plans/5443267002/> [https://perma.cc/D2GL-5EYN].

139. Dodgson, *supra* note 134.

140. Kristina Peterson, *College Athletes Stuck with the Bill After Injuries*, N.Y. TIMES (July 15, 2009), <https://www.nytimes.com/2009/07/16/sports/16athletes.html> [https://perma.cc/W58Q-KEQF].

141. See Branch, *supra* note 122 (noting that the origin of the term "student athlete" was to prevent injured players from qualifying for workman's compensation).

unnecessarily putting them at risk of injury—and even death.¹⁴² The tragic death of Jordan McNair at the University of Maryland, who died of heat stroke during a football practice, highlights the lack of repercussions associated with injuries related to abusive coaching.¹⁴³ In other situations, coaches have directly attacked students, as did former Rutgers University basketball coach Mike Rice, who was caught on video hitting his players.¹⁴⁴ While documented abuse can often lead to the termination of coaches, these sanctions tend to be temporary: 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 fourteen months after being terminated by the University of Maryland following Jordan McNair's death.¹⁴⁵

While tragedies like 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.¹⁴⁶ Indeed, the NCAA's concussion management plan relies primarily on the member schools to administer procedures for managing concussions.¹⁴⁷ The NCAA's decision to not apply universal best practices results in widespread variation in concussion management, and almost certainly results in some athletes' health being compromised.¹⁴⁸ Many universities currently vest team doctors or athletic trainers with the responsibility of determining athletes' fitness to play.¹⁴⁹ This dynamic presents a potential conflict of interest, as dual loyalties to

142. 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 [<https://perma.cc/Y7D9-JJTS>] (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).

143. See Rae-Anna Sollestre, *Wrongful Death: Does the NCAA Have an Affirmative Duty to Protect Its Student-Athletes?*, 30 MARQ. SPORTS L. REV. 393, 395–96 (2020) (describing the factual circumstances around the death of Jordan McNair).

144. Tom Canavan, *Rutgers Fires Basketball Coach over Abuse, Taunts*, ASSOCIATED PRESS (Apr. 3, 2013), <https://apnews.com/article/aee9e01877184066b1007074c984cd45> [<https://perma.cc/V7T4-ABUU>].

145. 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/> [<https://perma.cc/5ZMD-X4KV>]. Similarly, 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> [<https://perma.cc/4H89-FGH4>].

146. See Pretty, *supra* note 136, at 2371.

147. See *id.* at 2370–71.

148. See *id.* at 2371.

149. *Id.*

both a school and an athlete may not be compatible.¹⁵⁰ In his 2014 *Notre Dame Law Review* note, K. Adam Pretty observed: “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.”¹⁵¹ This apparent conflict, combined with college athletes’ desire to be perceived as tough, can lead to athletes not receiving the necessary treatment for head injuries.¹⁵² While the NCAA has appeared more than willing to police other subjects like “amateurism,” critics like Pretty have noted that player safety concerns seem secondary to the organization.¹⁵³

As America began to learn about the effects of repeated head injuries on brain function,¹⁵⁴ the country also learned about another dark side of collegiate athletics—the prevalence of sexual predators.¹⁵⁵ The first major story to break on this matter was the Jerry Sandusky scandal at Penn State in 2011.¹⁵⁶ The Sandusky scandal is significant because it illustrates how common it is for collegiate coaches to remain employed even after their universities learn of their misconduct.¹⁵⁷ Since the Sandusky scandal, college sports have been gripped by many other scandals involving sexual predators who remained employed because no one acted on information that could have stopped these perpetrators.¹⁵⁸ For example, the Department of Education found that Michigan State University was responsible for a “systemic failure to protect students from sexual abuse.”¹⁵⁹ The known failures, however, likely reflect only a

150. *Id.* at 2371–72.

151. *Id.* at 2372.

152. *See id.* at 2372–73.

153. *Id.* at 2373.

154. *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/> [<https://perma.cc/RC7H-5X5K>] (discussing the prevalence of CTE among college football players due to repeated head injuries).

155. *See, e.g.,* *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> [<https://perma.cc/K34U-YV36>] (discussing the Penn State sexual abuse scandal).

156. *Id.*

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

158. For example, at least fourteen Michigan State University officials were contacted over two decades about former-doctor Larry Nassar’s sexual abuse, but the school took no action until after he was arrested. *See* Kim Kozlowski, *What MSU Knew: 14 Were Warned of Nassar Probe*, DETROIT NEWS (Jan. 19, 2018, 4:58 PM), <https://www.detroitnews.com/story/tech/2018/01/18/msu-president-told-nassar-complaint-2014/1042071001/> [<https://perma.cc/GQA9-DH3T>].

159. Susan Svrluga & Moriah Balingit, *DeVos Imposes Record \$4.5 Million Fine on Michigan State for Systemic Failure to Address Sexual Abuse*, WASH. POST (Sept. 5, 2019), <https://www.washingtonpost.com/education/2019/09/05/devos-imposes-record-million-fine->

small number of the incidents that have taken place, but the Sandusky and Larry Nassar scandals demonstrate that schools have failed to act when high-profile individuals are accused of sexual abuse.¹⁶⁰ Moreover, it is important to recognize that the protection of sexual offenders in college sports is twofold: 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.¹⁶¹

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 schools prioritizing athletic revenues over player safety.¹⁶² Notably, COVID-19 demonstrated just how willing some college coaches were to expose athletes to an illness with unknown long-term effects.¹⁶³ Following reports that fourteen Clemson University football players had tested positive for the COVID-19 in early June 2020, former NFL quarterback Boomer Esiason questioned whether college players were intentionally getting the virus in an effort to make the team reach herd immunity before the start of the season.¹⁶⁴ Although the idea that 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

michigan-state-systemic-failure-address-sexual-abuse-larry-nassar-case/ [https://perma.cc/9AQZ-WJC7].

160. Korva Coleman et al., *Paterno, Others Slammed in Report for Failing to Protect Sandusky's Victims*, NPR (July 12, 2012, 7:25 AM), <https://www.npr.org/sections/thetwo-way/2012/07/12/156654260/was-there-a-coverup-report-on-penn-state-scandal-may-tell-us> [https://perma.cc/3MKW-7EJ8].

161. The most prominent example of a school failing to protect students from athlete sexual predators is likely that of Baylor University, which was accused of failing to take sufficient actions when thirty-one football players were alleged to have committed fifty-two 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, 3:36 PM), <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/> [https://perma.cc/4L39-AHDJ].

162. 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> [https://perma.cc/UDR6-7PFJ].

163. Peter, *supra* note 138.

164. Mollie Walker, *Boomer Esiason Suggests College Football Players Are Getting Coronavirus on Purpose*, N.Y. POST (June 30, 2020, 10:09 AM), <https://nypost.com/2020/06/30/boomer-esiason-suggests-college-football-players-are-getting-coronavirus-on-purpose/> [https://perma.cc/EY55-2KEU].

leading infectious disease specialists and epidemiologists shared: “I can see why people are thinking about that,” noting that the intentional herd immunity concept was “a strange way of putting it, but . . . probably correct.”¹⁶⁵ The willingness to even consider intentionally exposing athletes to a virus with unknown long-term effects is so dystopian that it is difficult to reconcile with the fact that the discussion was held by doctors who are expected to safeguard and act in the best interests of college athletes.¹⁶⁶

In addition to a lack of care paid to athletes’ physical well-being, many college athletes do not receive sufficient care and protection for their mental health.¹⁶⁷ Female athletes, in particular, have reported significant mental and emotional abuse from college coaches.¹⁶⁸ As discussions around mental health have become more common, so too have stories of abusive coaches.¹⁶⁹ Despite an increasing willingness to discuss emotional abuse, collegiate athletes are left with little remedy when coaches engage in abusive behavior.¹⁷⁰ A leading example stems from the University of Nebraska softball program, where coach Rhonda Revelle was suspended after the 2019 season following complaints of “systematic emotional abuse and a toxic culture on the team that included fat-shaming, verbal abuse and erratic and harassing behavior.”¹⁷¹ However, Revelle was reinstated before school reopened for the fall semester.¹⁷² 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.¹⁷³

165. Henry Bushnell, *Should Teams Actively Seek Herd Immunity from the Coronavirus?*, YAHOO (June 3, 2020), <https://www.yahoo.com/now/should-teams-actively-seek-herd-immunity-from-the-coronavirus-234449908.html> [https://perma.cc/QR9N-CTK7].

166. 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, 6:56 PM), <https://www.usatoday.com/story/news/health/2020/10/14/herd-immunity-scientists-say-trump-endorsed-covid-strategy-deadly/3655134001/> [https://perma.cc/4VP6-GJTZ].

167. Dodgson, *supra* note 134.

168. *Id.*

169. Chase Williams, *College Athletes Beginning to Rebel Against Abusive Coaches*, GLOB. SPORTS MATTERS (Oct. 8, 2019), <https://globalsportmatters.com/health/2019/10/08/college-athletes-beginning-to-rebel-against-abusive-coaches/> [https://perma.cc/2XZB-XRJZ].

170. 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/> [https://perma.cc/6NEA-KWNV].

171. *Id.*

172. *Id.*

173. *See id.*

Overall, the NCAA and its member institutions have largely failed to protect the physical and mental wellbeing of college athletes in many ways, and these failures unfortunately last far beyond an athlete's playing days.¹⁷⁴ 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.¹⁷⁵ 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 medical debt after their college careers are over.¹⁷⁶ While the NCAA carries coverage, it is available only for catastrophic injuries, and as of 2022, there was a \$90,000 deductible.¹⁷⁷ As a result of their college athletic careers, many former athletes suffer injuries that, while not catastrophic, are chronic, but despite the reaping millions in sports revenue, few schools (if any) provide for the type of long-term coverage required for post-college treatments.¹⁷⁸ Even schools that cover 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.¹⁷⁹

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 a case of a few bad actors. Indeed, the disproportionate power afforded to the institutions is systemic, embedded within the NCAA's rules.¹⁸⁰ The determination that the NCAA is not a state actor has afforded the organization a great deal of leeway to apply sanctions in a seemingly

174. See e.g., Peterson, *supra* note 140 (noting that a former college athlete discovered unpaid medical bills six years after his university refused to cover them following a sports-related injury).

175. NCAA, *supra* note 131, at 8–9.

176. Peterson, *supra* note 140.

177. *Id.*; see also *NCAA Catastrophic Injury Insurance Program Benefit Summary for the Period 8/1/21 Through 7/31/23*, NCAA (2021), https://ncaaorg.s3.amazonaws.com/ncaa/insurance/INS_NCAACatastrophicBenefitSummary.pdf [<https://perma.cc/GPJ8-TPQG>] (listing that the current deductible for catastrophic injuries is still \$90,000 for the current policy period).

178. Peterson, *supra* note 140.

179. *Id.*

180. 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).

inconsistent manner.¹⁸¹ While the NCAA is not a state actor, and is therefore under no obligation to afford constitutionally fair proceedings, Congress has periodically questioned the NCAA's "arbitrariness, inequality, secrecy, and other abuses of excessive power."¹⁸²

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 example of this is the Restitution Rule. Pursuant to the Restitution Rule, if a college athlete is deemed ineligible to play (for example, due to a suspension), obtains an injunction allowing them to play, and the injunction is subsequently reversed or vacated, the NCAA can impose harsh penalties on that athlete's school (known as restitution). These penalties include things like forfeiture of victories and disgorgement of television revenue.¹⁸³ The so-called Restitution Rule is meant to ensure that schools are not allowing ineligible players to participate.¹⁸⁴ However, the practical effect of the Restitution Rule is that it effectively keeps athletes from challenging NCAA eligibility decisions in court.¹⁸⁵ As one attorney who has litigated against the NCAA stated, "[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?"¹⁸⁶ The Restitution Rule acts as a formidable shield for the NCAA and encourages schools to discourage athletes from challenging organizational decisions.¹⁸⁷ 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

181. 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> [<https://perma.cc/Q2AG-Z3CT>] (describing the inconsistent enforcement of NCAA rules).

182. Robin J. Green, Note, *Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations*, 42 DUKE L.J. 99, 114 (1992) (quoting *NCAA Enforcement Program: Hearings Before the Subcomm. on Oversight and Investigations of the H. Comm. on Interstate and Foreign Com.*, 95th Cong. 2 (1978) (statement of John E. Moss)).

183. NCAA, *supra* note 131, at 388; see Steve Silver, *How a Little-Known NCAA Rule Shuts Athletes Out of the Legal System*, VICE (Dec. 20, 2016, 10:50 AM), <https://www.vice.com/en/article/8qy533/how-a-little-known-ncaa-rule-shuts-athletes-out-of-the-legal-system> [<https://perma.cc/UN2G-MCRZ>].

184. Stephen F. Ross et al., *Judicial Review of NCAA Eligibility Decisions: Evaluation of the Restitution Rule and a Call for Arbitration*, 40 J. COLL. & U. L. 79, 87 (2014).

185. Silver, *supra* note 183.

186. *Id.* (emphasis omitted).

187. 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, 470 (2010).

of the courts in the first place.¹⁸⁸ 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, the NCAA has abdicated its commitment to academics.¹⁸⁹ Secondly and thirdly, the NCAA continues to be the disproportionate beneficiary of a model that generates billions of dollars on largely uncompensated labor, all while it restricts the ability for athletes to have a say.¹⁹⁰ Fourthly, the NCAA has abandoned its initial mission of protecting athlete health in favor of increasing the bottom line, to the detriment of generations of college athletes.¹⁹¹ Finally, the NCAA has done all this while limiting the ability for athletes to challenge their decisions.¹⁹²

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 opened the gateways to far grander reform.¹⁹³ Specifically, three important regulatory events took place to facilitate more meaningful changes to the internal governance structure of college sports.¹⁹⁴ First, a number of states passed new laws granting college athletes the right to endorse products free from NCAA interference.¹⁹⁵ Second, Congress held the first meaningful hearings to discuss the lack of medical benefits and other safety precautions afforded

188. See Silver, *supra* note 183.

189. Oppenheimer, *supra* note 92.

190. 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> [<https://perma.cc/H2AF-3QVW>].

191. See 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 [<https://perma.cc/9YQR-KLPH>].

192. Branch, *supra* note 122.

193. Zach Braziller, *NCAA Changes College Sports Forever: "An Entirely New Landscape,"* N.Y. POST (June 30, 2021, 8:56 PM), <https://nypost.com/2021/06/30/ncaas-new-nil-rule-changes-everything/> [<https://perma.cc/EMR3-E9C3>].

194. See Dennis Dodd, *NCAA Pushing to Adopt Name, Image and Likeness Rules Before July 1 After Supreme Court Decision Clears Way*, CBS SPORTS (June 22, 2021, 11:19 AM), <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/> [<https://perma.cc/YV6Q-Z5DD>].

195. *Name, Image and Likeness (NIL): What It Means, Why It Matters and How It's Impacting the NCAA and College Sports*, ATHLETIC (July 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/> [<https://perma.cc/P7K9-9HEX>].

to college athletes.¹⁹⁶ And finally, the Supreme Court ruled that several of the NCAA's longstanding restraints on college athlete compensation violated federal antitrust law.¹⁹⁷ These three events are significant, as, in keeping with the history and five main criticisms of the NCAA discussed in Part II of this Article, they help set the stage for how the internal governance structure of college athletics in the twenty-first 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 Senator Nancy Skinner.¹⁹⁸ The two first met at an Oakland Rotary Club luncheon in 2015, where Schwarz led a discussion about the NCAA's anticompetitive, monopolist behavior.¹⁹⁹ Senator 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 because of his reasonable understanding of antitrust law but also because of his belief that depriving college athletes of the opportunity to earn money presented a “civil rights” issue.²⁰⁰ With the help of another California senator, Steven Bradford, Schwarz and Senator Skinner then set out to draft a bill that would force NCAA member colleges in California to allow their athletes to endorse products despite the NCAA's prohibition on this sort of activity.²⁰¹

Thereafter, in early 2019, Senators Skinner and Bradford introduced Senate Bill 206, which became known as the Fair Pay to Play Act.²⁰² 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

196. Molly Hensley-Clancy, *Senators Hide NCAA for Not Solving Athlete-Pay Issue as Fast Federal Help Looks Unlikely*, WASH. POST (June 9, 2021, 2:18 PM), <https://www.washingtonpost.com/sports/2021/06/09/ncaa-congress-nil-hearing/> [<https://perma.cc/P92L-3CEN>].

197. Andrew Brandt, *Business of Football: The Supreme Court Sends a Message to the NCAA*, SPORTS ILLUSTRATED (June 29, 2021), <https://www.si.com/nfl/2021/06/29/business-of-football-supreme-court-unanimous-ruling> [<https://perma.cc/7EK2-W47M>].

198. See *How California Started the NIL Revolution and Helped NCAA Athletes Get Paid Today*, UNITED NEWS POST (July 1, 2021) [hereinafter *How California Started the NIL Revolution*], <https://unitednewspost.com/news/sports/how-california-started-the-nil-revolution-and-helped-ncaa-athletes-get-paid-today/> [<https://perma.cc/9YBZ-E9LG>].

199. *Id.*

200. *Id.*

201. *Id.*

202. 2019 Cal. Stat. 3526.

matter of antitrust law—legally do so.²⁰³ 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, 2019²⁰⁴—making California the first state to ensure college athletes the right to market their names, images and likenesses.²⁰⁵ But, perhaps even more importantly, as of July 1, 2021, at least twelve other state laws have gone into effect that ensure college athletes in those states are not prevented from signing endorsement deals by their colleges.²⁰⁶

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 recent Supreme Court case *NCAA 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 begin taking effect, contained three main provisions.²⁰⁷ First, the policy 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.”²⁰⁸ Second, the policy allows athletes to retain “professional services provider[s]” in association with their NIL activities.²⁰⁹ Third, the policy advises that schools should develop processes for reporting NIL contracts to their institution or conference.²¹⁰ At the same time, the NCAA’s policy still allows for individual colleges and individual athletic conferences to adopt their own NIL rules to replace the nationwide rules that the NCAA had previously enforced.²¹¹

203. *How California Started the NIL Revolution*, *supra* note 198; see also Sam Metz, *California Student-Athletes One Step Closer to Getting Paid, Despite NCAA Threat*, DESERT SUN (July 10, 2019, 1:02 PM) (quoting Professor Marc Edelman), <https://www.desertsun.com/story/news/politics/2019/07/10/california-advances-bill-allow-ncaa-athletes-profit-name-image-and-likeness/1688951001/> [<https://perma.cc/XD72-G83V>]. See generally Marc Edelman, *The NCAA, Fair Pay to Play, Antitrust Scrutiny, and the Need for Institutional Reform*, 20 WAKE FOREST J. 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).

204. Alaa Abdeldaiem, *California Senate Unanimously Passes Legislation to Pay College Athletes*, SPORTS ILLUSTRATED (Sept. 11, 2019), <https://www.si.com/college/2019/09/12/california-senate-passes-fair-pay-play-act> [<https://perma.cc/T69C-3JCT>].

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

206. *Id.*

207. *Alston* was decided on June 21, 2021, and the new NCAA policy took effect on July 1, 2021. *NCAA v. Alston*, 141 S. Ct. 2141 (2021); Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy> [<https://perma.cc/K3WG-9XNL>].

208. Hosick, *supra* note 207.

209. *Id.*

210. *Id.*

211. *Id.*

The NCAA's interim policy is only temporary. The press release notes that the policy will be a placeholder until either permanent rules are enacted or federal legislation is passed.²¹² The policy is a positive start for NCAA reform. However, it seems to set the stage for conferences to assume the power that the NCAA is abdicating.

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.²¹³ Around the same time as a number of 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.²¹⁴ Initially, these hearings seemed to serve as a precursor to drafting federal law to define a college athletes' NIL rights and to curtail attempts by states like California to grant their athletes broader rights.²¹⁵ But these hearings eventually turned from being strictly about athletes' financial opportunities to focusing somewhat, if not more, on the long-disregarded NCAA purpose of promoting athlete safety.²¹⁶

At the first hearing, Senator Roger Wicker (R-Miss.), the then-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.²¹⁷ Senator Maria Cantwell (D-Wash), the then-minority chair of the Committee, received just one invitation 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 were asked to play through the COVID-19 pandemic while

212. *Id.*

213. Alan Binder, *How Blowing up College Sports Became A Rallying Cry for Some in Washington*, N.Y. TIMES (June 9, 2021), <https://www.nytimes.com/2021/03/30/sports/ncaabasketball/ncaa-college-sports-laws.html> [https://perma.cc/8NPT-LD89].

214. Ross Dellenger, *Critical Senate NIL Hearing Set to Take Place with NCAA President Mark Emmert's Revealing Testimony*, SPORTS ILLUSTRATED (June 9, 2021), <https://www.si.com/college/2021/06/09/crucial-nil-hearing-mark-emmert-testimony> [https://perma.cc/F3TZ-HGMV].

215. *Id.*

216. Emily Giambalvo, *As the NCAA Asks Congress for Help on NIL Legislation, Lawmakers Want More Rights for College Athletes*, WASH. POST (July 23, 2020), <https://www.washingtonpost.com/sports/2020/07/23/ncaa-asks-congress-help-nil-legislation-lawmakers-want-more-rights-college-athletes/> [https://perma.cc/33HT-M9X4].

217. See Ross Dellenger, *NCAA Leaders Still Wary of NIL Modernization as Congress Aims for Federal Solution*, SPORTS ILLUSTRATED (July 1, 2020), <https://www.si.com/college/2020/07/01/ncaa-congress-name-image-likeness-federal-standard> [https://perma.cc/N3CS-DBSY].

most college campuses were closed, and yet were still proclaimed by the NCAA to be no different from regular students.²¹⁸ Professor Koller also raised a number of important health and safety concerns involving the wellbeing of college athletes.²¹⁹

While these hearings arguably began as a form of pandering to the NCAA, Professor Koller's testimony about the reality of college sports was well-received by several senators on both sides of the political spectrum.²²⁰ In turn, these senators began to rethink their superficial acceptance of the NCAA's worldview of college sports.²²¹ Then, after the Democrats took control of the Senate in November 2019, Senator 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,²²² as Professor Koller suggested.²²³ Perhaps the clearest evidence of this transition in focus came at the Senate hearing on June 17, 2021, when 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, which included protecting their physical on-field safety.²²⁴

Martin McNair's call for a bill of rights for college athletes has since gained traction, both in Congress and in society at large.²²⁵ For example, one bill currently awaiting congressional review is the 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-

218. *Exploring a Compensation Framework for Intercollegiate Athletes: Hearing Before the S. Comm. on Com., Sci. & Transp.*, 116th Cong., at 59:30–1:04:37 (2020) [hereinafter 2020 *NIL Hearing*] (statement of Professor Dionne Koller), <https://www.commerce.senate.gov/2020/7/a-federal-framework-for-the-compensation-of-intercollegiate-athletes#> [<https://perma.cc/A7EG-UU4Q>].

219. *Id.*

220. For example, Senators Wicker (R-MS) and Blumenthal (D-CT) expressed openness to Professor Koller's testimony. *See id.* at 2:27:10–2:33:48, 2:38:40–2:40:25.

221. *See* Dellenger, *supra* note 4 (explaining how, after reviewing the NCAA's amateurism model, federal lawmakers on both sides of the political spectrum have been proposing sweeping changes to the NCAA's system).

222. *See* Dellenger, *supra* note 214.

223. 2020 *NIL Hearing*, *supra* note 218, at 1:36:40–1:37:17 (statement of Professor Dionne Koller).

224. 2021 *NIL Hearing*, *supra* note 9, at 1 (statement of Mr. Martin McNair, Founder, The Jordan McNair Foundation).

225. *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> [<https://perma.cc/2HDZ-MKZA>] (describing legislation providing protections akin to those McNair advocated for).

HI). Among other things, this bill attempts to improve the health and safety of college athletes.²²⁶ While it does not currently have bipartisan sponsorship, the involvement of Senator Booker, a former college football player at Stanford University, helps push the conversation further in some respects.²²⁷ 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 another avenue remains to be seen. It is clear, however, that Congress remains skeptical of the NCAA's current governance model, and some form of change is on the horizon.

C. *The Supreme Court Antitrust Decision: NCAA v. Alston*

If state NIL legislation marked a tipping point for change in terms of college athletes' financial interests, and the congressional hearings shifted the focus towards athlete safety, the Supreme Court's unanimous antitrust decision in favor of the athletes in *NCAA 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.²²⁸ The case also placed the NCAA on notice that if it continued to restrain trade in college athletics recruiting, it may ultimately find itself facing additional legal liability under antitrust law.²²⁹

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 *Board of Regents*.²³⁰ 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

226. College Athletes Bill of Rights, S. 5062, 116th Cong. (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 regardless of school sponsorship agreements. *Id.* § 3(a)(5)(B). Additionally, athletes would have greater freedom over their academic majors and the ability to stay on scholarship after their athletic eligibility expires. *Id.* § 8(a). Schools would also be required to distribute royalties from commercial deals to covered athletes. *Id.* § 5(b)(1)–(2).

227. See Richard Johnson et al., *Yep, Cory Booker Was an Elite Football Recruit*, BANNER SOC'Y (Feb. 1, 2019, 12:48 PM), <https://www.bannersociety.com/2019/2/1/20707353/cory-booker-football-career> [<https://perma.cc/5TAL-8WM2>] (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).

228. Darren Heitner, *The NCAA Is Not Above the Law*, ABOVE L. (June 21, 2021, 12:41 PM), <https://abovethelaw.com/2021/06/the-ncaa-is-not-above-the-law/> [<https://perma.cc/34RQ-NT4V>].

229. *Id.*

230. 468 U.S. 85 (1984).

violation of Section 1 of the Sherman Act,²³¹ and held that it was.²³² Importantly, Section 1 of the Sherman Act—a federal competition law passed in 1890—prohibits any “contract, combination . . . , or conspiracy in restraint of trade.”²³³

Board of Regents is not only significant because it was the Supreme Court’s last antitrust decision involving college sports before *Alston*, but also because the NCAA has since relied on dicta from the decision to support its amateurism arguments. Specifically, the NCAA relied on Justice John Paul Stevens’s statement that the NCAA should be afforded “ample latitude” to uphold the “revered tradition of amateurism.”²³⁴ With this backdrop, in reaching the *Alston* decision in 2021—nearly forty years after *Board of Regents*—the Court unanimously rejected the NCAA’s dubious argument that the Supreme Court’s earlier dicta in *Board of Regents* somehow insulated NCAA rules about college athlete compensation from antitrust scrutiny.²³⁵ While this point was made in a number of different ways throughout the *Alston* decision, it was perhaps stated clearest in the final sentence of Justice Brett Kavanaugh’s concurring opinion.²³⁶ Simply stated, “[t]he NCAA is not above the law.”²³⁷

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, men’s basketball, and women’s basketball players.²³⁸ These college athletes alleged that NCAA member colleges illegally “earn[ed] billions of dollars in revenues” through the maintenance of a “perpetual horizontal price-fixing agreement” that restrained trade among colleges seeking these athletes’ services.²³⁹ After several years of litigation, the matter eventually went for adjudication

231. Ch. 647, § 1, 26 Stat. 209 (1890) (codified at 15 U.S.C. § 1).

232. *Board of Regents*, 468 U.S. at 119–20.

233. 15 U.S.C. § 1.

234. 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) (quoting *Bd. of Regents*, 468 U.S. at 120).

235. See *NCAA v. Alston*, 141 S. Ct. 2141, 2157–58 (2021) (“*Board of Regents* may suggest that courts should take care when assessing the NCAA’s restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject *all* challenges to the NCAA’s compensation restrictions.”).

236. *Id.* at 2169 (Kavanaugh, J., concurring).

237. *Id.*

238. Second Amended Complaint-Class Action Seeking Injunction ¶¶ 1, 119, *In re NCAA Grant-In-Aid Cap Antitrust Litigation*, 375 F. Supp. 3d 1058 (N.D. Cal. 2015) (Nos. 4:14-md-02541, 4:14-cv-02758), 2015 WL732448.

239. *Id.*

before Judge Claudia Wilken of the U.S. District Court for the Northern District of California, under the caption *In re NCAA Grant-In-Aid Cap Antitrust Litigation*.²⁴⁰

On March 8, 2019, the Northern District of California issued its ruling on matters of both fact and law.²⁴¹ In the decision, Judge Wilken explained that the NCAA member schools' agreement to curb the compensation of college athletes was an agreement among the member colleges to restrain trade in a manner that affected interstate commerce (two necessary predicates to the finding of an antitrust violation),²⁴² and that the underlying restraint was subject to a full economic review on its merits by applying a full Rule of Reason analysis.²⁴³ Applying the four-step Rule of Reason analysis—a burden-shifting test whereby courts determine whether Section 1 of the Sherman Act was 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;²⁴⁴ (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”;²⁴⁵ (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;²⁴⁶ and (4) on balance, the court 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.²⁴⁷

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

240. 375 F. Supp. 3d 1058 (N.D. Cal. 2019).

241. *Id.* at 1110.

242. *Id.* at 1092; see also Thomas A. Baker III et al., *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).

243. *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1092.

244. *Id.* at 1096–98 (quoting *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991)).

245. *Id.* at 1101.

246. *Id.* at 1105.

247. *Id.* at 1108–09.

the Ninth Circuit.²⁴⁸ Nonetheless, on appeal, the three-judge panel unanimously agreed that the district court properly applied the Rule of Reason analysis.²⁴⁹ The majority opinion, drafted by Chief Judge Sidney R. Thomas and joined by Judge Ronald Gould—both President Bill Clinton appointees²⁵⁰—simply affirmed the lower court decision in a rather straightforward manner.²⁵¹ But the concurring opinion, drafted by Judge Milan Smith, a President George W. Bush appointee,²⁵² expressed 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.”²⁵³ Pointing out that the NCAA is a “cartel” in the economic sense, Judge Smith proceeded to imply that, were it not for binding Ninth Circuit precedent, he likely would have lifted the NCAA’s restraints on college athlete compensation in their entirety.²⁵⁴ 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 could potentially follow if they petitioned the Supreme Court for certiorari.²⁵⁵ And yet, it did not.

2. Supreme Court Decision

After 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 might theoretically draft an opinion in line with Judge Smith’s Ninth Circuit concurrence, if not worse.²⁵⁶ Yet,

248. *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d 1239 (9th Cir. 2020), *aff’d sub nom.* *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

249. *Id.* at 1244.

250. *Thomas, Sidney Runyan*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/thomas-sidney-runyan> [<https://perma.cc/3NKH-Q7XN>]; *Gould, Ronald Murray*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/gould-ronald-murray> [<https://perma.cc/5Z5H-C8SE>].

251. *See In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d at 1243 (majority opinion).

252. *Smith, Milan Dale, Jr.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/smith-milan-dale-jr> [<https://perma.cc/9RUS-WZYK>].

253. *See In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d at 1266 (Smith, J., concurring).

254. *Id.* at 1267; *see also id.* at 1270 (“Although the district court correctly applied our precedents, the result of this analysis seems to erode the very protections a Sherman Act plaintiff has the right to enforce.”).

255. Indeed, Judge Smith’s statements may have foreshadowed Justice Kavanaugh’s Supreme Court concurrence. *See NCAA v. Alston*, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

256. *See In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d at 1266–67 (Smith, J., concurring).

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, the NCAA instead petitioned for certiorari, 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[d] federal antitrust law."²⁵⁷ Ultimately, the Supreme Court concluded that the Ninth Circuit decision had not been erroneous at all, and it thus upheld the decision unanimously, 9–0, with Justice Neil Gorsuch writing the majority opinion on behalf of eight of the Justices, and Justice Brett Kavanaugh drafting his own standalone concurrence.²⁵⁸

The majority opinion was a clear and decisive ruling for the college athletes because it delivered a striking blow to the NCAA's long-held argument that *Board of Regents* created an implicit antitrust exemption for "amateurism" that shielded the NCAA's rules limiting college athlete compensation from traditional scrutiny.²⁵⁹ Indeed, the Supreme Court seemed to make short work of each of the NCAA's three core arguments. 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.²⁶⁰ Second, the Court clarified that the comments about the potential virtue of the NCAA's amateurism rules in 1984's *Board of Regents* decision were not intended to address the legality of the NCAA's amateurism rules on their merits, but rather were mere dicta, given that "[s]tudent-athlete compensation rules were not even at issue" in that case.²⁶¹ Finally, the Court rejected the NCAA's claims that the district court injunction set up a system that would subject the NCAA to judicial micromanagement, with the majority opinion explaining that the district court's injunction was limited to the case before it, and did not create the NCAA nightmare of a free market hellscape where every college athlete is given a Lamborghini to commute to class.²⁶²

257. *Question Presented*, <https://www.supremecourt.gov/qp/20-00512qp.pdf> [<https://perma.cc/EAR3-LY4R>].

258. *Alston*, 141 S. Ct. at 2147 (majority opinion); *id.* at 2166 (Kavanaugh, J., concurring).

259. *Id.* (majority opinion) (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").

260. *Id.* at 2158–59.

261. *Id.* at 2158.

262. *Id.* at 2165.

Yet, as damaging as the Supreme Court's majority decision in *Alston* was for the NCAA, Justice Kavanaugh's concurring opinion seemed to plunge a dagger into the trade association's longstanding insistence on preferential treatment under antitrust law.²⁶³ Despite being confined to the narrow question presented about academic-related aid, Justice Kavanaugh's concurring opinion made sure to 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.²⁶⁴ Justice Kavanaugh further questioned the legality of the NCAA's remaining compensation restrictions, noting the growing sums of money flowing into the industry and going to many different people, just not the athletes.²⁶⁵ And Justice Kavanaugh concluded his concurring opinion by rejecting the idea that the NCAA should be allowed to continue evading 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.²⁶⁶

D. *After Alston*

The *Alston* decision represented one of the NCAA's most significant defeats since the Association's founding, and it caused fear that more court-ordered antitrust reform could be coming to college sports if the NCAA did not change its ways.²⁶⁷ Even before any new laws took effect, Judge Claudia Wilken, the same district court judge who oversaw the *O'Bannon v. NCAA*²⁶⁸ and *Alston* litigation, denied an NCAA motion to dismiss a case filed by an Arizona State University swimmer (Grant House) and a University of Oregon basketball player (Sedona Prince) challenging the NCAA's exclusion of athletes from lucrative television contracts, which could potentially allow for those athletes to receive compensation as though they had NIL rights at the time of past televised competitions.²⁶⁹ The decision also seemed to imply that the NCAA could

263. *See id.* at 2168 (Kavanaugh, J., concurring).

264. *Id.* at 2167.

265. *Id.* at 2167–68.

266. *Id.* at 2168.

267. *See* James Dator, *NCAA Obliterated 9–0 by Supreme Court of the United States*, SB NATION (June 21, 2021, 1:28 PM), <https://www.sbnation.com/2021/6/21/22543821/ncaa-supreme-court-ruling> [<https://perma.cc/2FKF-FUYU>] (“There is virtually no way the NCAA can move past the SCOTUS ruling with ‘business as usual.’”).

268. 802 F.3d 1049 (9th Cir. 2015).

269. *NCAA v. House*, 545 F. Supp. 3d 804, 820 (N.D. Cal. 2021); *see also* Michael McCann, *NCAA to Face More Collusion Claims in Wake of Alston NIL Defeats*, SPORTICO (June 28, 2021, 2:15 PM), <https://www.sportico.com/law/analysis/2021/house-v-ncaa-legal-primer-1234632887/> [<https://perma.cc/JN8U-W2XL>] (noting that the House and Prince lawsuit is accompanied by

not ban a member college for granting greater financial rights, including NIL rights, to its athletes than NCAA governance documents permitted.²⁷⁰

The summer of 2021 witnessed the passage of new state laws granting college athletes the right to endorse products free from NCAA interference, saw 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, more than ever, it is now 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 the governance of college sports can be reimaged to create the model best suited to promote the rights of student athletes in the twenty-first century and beyond.

IV. BUILDING BETTER COLLEGE SPORTS GOVERNANCE

The three important regulatory events involving college sports in the summer of 2021 invite meaningful discourse about how to build a better college sports governance structure moving forward.²⁷¹ 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. This Section offers seven proposals for rebuilding the governance of college sports for the twenty-first century. In doing so, it builds upon the Supreme Court's recent holding in *Alston*, the state-law NIL movement, and far broader calls for massive institutional change. Specifically, this Part presents 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 (7) improving access to 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 exit the business of regulating college athletes'

another lawsuit filed by former University of Illinois football player Tymir Oliver, who makes related allegations).

270. See *House*, 545 F. Supp. 3d at 817–18.

271. See Braziller, *supra* note 193.

economic endeavors.²⁷² Recent state NIL legislation shows the NCAA's efforts to regulate athletes' third-party compensation has become unpopular with much of society.²⁷³ And the Supreme Court in *Alston* at least intimated that when the more than 1,200 NCAA member colleges come together to limit college athletes' compensation, such conduct reasonably violates antitrust law.²⁷⁴

The NCAA made an unexpected, 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.²⁷⁵ Nevertheless, there is a reasonable concern that the NCAA member schools will attempt to reinstitute certain restraints as the scrutiny the Association is facing in the immediate aftermath of *Alston* begins to wane.²⁷⁶ 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.²⁷⁷ At a minimum, such continued interference with college athletes' economic opportunities invites renewed antitrust scrutiny.²⁷⁸

272. 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. See *NCAA v. Alston*, 141 S. Ct. 2141, 2168–69 (2021) (Kavanaugh, J., concurring).

273. See The Athletic College Football Staff, *supra* note 195.

274. *Alston*, 141 S. Ct. at 2166–69 (Kavanaugh, J., concurring); see also *id.* at 2159 (majority opinion) (explaining that the Court has refused to recognize a special antitrust immunity for certain restraints of trade on grounds that those restraints serve unique socially beneficial purposes, and that the NCAA's justification for its restraints on compensation seem "materially identical" to those requests (citing *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679 (1978); and then citing *FTC v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411 (1990))).

275. Hosick, *supra* note 207. The NCAA subsequently developed a slightly more substantial policy while still deferring substantially to schools and conferences. Michelle Brutlag Hosick, *DI Board of Directors Issues Name, Image and Likeness Guidance to Schools*, NCAA (May 5, 2022), <https://www.ncaa.org/news/2022/5/9/media-center-di-board-of-directors-issues-name-image-and-likeness-guidance-to-schools.aspx> [<https://perma.cc/WAG4-BEEE>].

276. 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. (July 29, 2021), <https://www.legalsportsreport.com/54286/analysis-ncaa-nil-sports-betting/> [<https://perma.cc/NP4U-NDB4>].

277. Dan Murphy, *NCAA Name, Image and Likeness FAQ: What the Rule Changes Mean for the Athletes, Schools, and More*, ESPN (June 30, 2021), https://www.espn.com/college-sports/story/_/id/31740112/rule-changes-mean-athletes-schools-more [<https://perma.cc/8GZG-AZDC>].

278. Marcia Coyle, "The NCAA Is Not Above the Law": Justice Kavanaugh Invites More Student-Athlete Pay Challenges, NAT'L L.J. (June 21, 2021), <https://www.law.com/national-lawjournal/2021/06/21/the-ncaa-is-not-above-the-law-justice-kavanaugh-invites-more-student-athlete-pay-challenges/?sreturn=20210631163751> [<https://perma.cc/H6T7-H872>].

Of course, a single college or a small group of colleges may still pass rules limiting financial opportunities for athletes. 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.” 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.²⁷⁹

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

A second area in which the college sports system needs reform is the management and oversight of athlete health and safety protocols.²⁸⁰ In many ways, these health and safety concerns represent the core of the NCAA’s purported mission at the time of its inception.²⁸¹ While progress has ensued in the past century, much work remains, and the litmus test for adequate protection remains a moving target. The COVID-19 pandemic has only underscored the fragility of our collective health and the pillars of protection for college athletes who are vulnerable and underrepresented.²⁸²

A logical first step is to ensure that member colleges and administrative structures are committed to 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.²⁸³ 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.²⁸⁴ As this author team has expressed in a previous law review article:

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

280. B. David Ridpath, *A Path Forward for Reforming College Sports*, JAMES G. MARTIN CTR. ACAD. RENEWAL (Jan. 15, 2020), <https://www.jamesgmartin.center/2020/01/a-path-forward-for-reforming-college-sports/> [<https://perma.cc/ENT8-VC54>].

281. Smith, *supra* note 14, at 12.

282. Scooby Axson, *College Football Means Big Money. Black Athletes Stand at the Intersection of Risk and Profit*, NBC NEWS (Aug. 27, 2020, 11:20 AM), <https://www.nbcnews.com/news/nbcblk/college-sports-mean-big-money-black-athletes-stand-intersection-risk-n1238450> [<https://perma.cc/C858-EF2D>].

283. *Meet the People Behind the NCAA’s COVID-19 Advisory Panel*, NCAA (Apr. 10, 2020), <https://www.ncaa.org/about/resources/media-center/news/meet-people-behind-ncaas-covid-19-advisory-panel> [<https://perma.cc/D6HZ-3QGZ>].

284. Edelman et al., *supra* note 3, at 537–38.

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.²⁸⁵

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 the necessity of further research in this arena.²⁸⁶ Legal arguments for more proactive approaches to NCAA concussion management have existed for some time.²⁸⁷ In some ways, the National Hockey League concussion paradigm is instructive as well, as it represents a straightforward approach in which medical decisions are separate from coaching or administrative action that might color these judgments.²⁸⁸ The NCAA has indeed taken this issue on and is becoming more proactive.²⁸⁹ Their guidelines on this topic are also explicit and clear.²⁹⁰ However, ensuring that such procedures are consistently and mandatorily followed 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.

285. *Id.* at 520–21 (footnotes omitted).

286. *See, e.g., Concussion Center*, CONCUSSION CTR.: UNIV. MICH., <https://concussion.umich.edu/> [<https://perma.cc/QW8M-Q27W>].

287. *See* Rodney K. Smith, *Head Injuries, Student Welfare, and Saving College Football: A Game Plan for the NCAA*, 41 PEPP. L. REV. 267, 274, 278–82 (2014) (describing the prevalence of and practices surrounding head injuries in college football).

288. *See* David Schoen, *Here's How the NHL Concussion Protocol Works*, LAS VEGAS REV. J. (Feb. 7, 2020, 12:07 PM), <https://www.reviewjournal.com/sports/nhl/heres-how-the-nhl-concussion-protocol-works-1953072/> [<https://perma.cc/4V6Z-PPHH>] (describing the concussion protocol used in the National Hockey League).

289. *Concussion*, NCAA, <https://www.ncaa.org/sport-science-institute/concussion> [<https://perma.cc/A6JD-4FNR>].

290. *See, e.g., 2014-2015 NCAA Sports Medicine Handbook*, NCAA 56–64 (2014), <http://www.ncaapublications.com/productdownloads/MD15.pdf> [<https://perma.cc/X2NH-MN2L>].

Clemson University'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 University's football team members contracted COVID-19.²⁹¹ 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.²⁹² Of course, a closed head injury is, to some degree, an inherent risk of some contact sports, but other risks, 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.²⁹³ It should also be established 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 college sports governance has substantial room to improve is in the mechanisms available for college athletes to report abuse.²⁹⁴ Such abuse of college athletes may occur in several different forms, including physical abuse, mental abuse, and sexual abuse.²⁹⁵ At present, many U.S. colleges are “notoriously bad at maintaining whistleblower protection systems to detect systematic abuse of athletes and at taking proactive approaches toward restorative justice once such abuse is uncovered.”²⁹⁶ Meanwhile, the NCAA, as the purported central oversight body, lacks any mechanism whatsoever for reporting abuse—claiming instead that the Association “does not ‘owe’ student-athletes protection from sexual abuse and harassment.”²⁹⁷

291. Michael David Smith, *37 Clemson Football Players Have Tested Positive*, NBC SPORTS (June 26, 2020, 6:28 PM), <https://profootballtalk.nbcsports.com/2020/06/26/37-clemson-football-players-have-tested-positive/> [https://perma.cc/GZY2-W5KD].

292. Edelman et al., *supra* note 3, at 526.

293. *Id.* at 492–94.

294. *See supra* Section II.D.

295. *See supra* Section II.D.

296. Marc Edelman, *10 Ways the NCAA Violates Core Values of Higher Education*, FORBES (Feb. 9, 2020, 10:30 AM), <https://www.forbes.com/sites/marcedelman/2021/02/09/10-ways-the-ncaa-violates-core-values-of-higher-education/?sh=3d7175d15d11> [https://perma.cc/3NJR-EQ MJ].

297. *NCAA Continues to Claim It Has No Legal Responsibility to Protect Student-Athletes from Sexual Abuse*, LIEFF CABRASER HEIMANN & BERNSTEIN (Sept. 23, 2020), <https://www.lieffcabraser.com/2020/09/ncaa-continues-to-claim-it-has-no-legal-responsibility-to-protect-student-athletes-from-sexual-abuse> [https://perma.cc/DF8Y-QVBA]; *see also* Scott M. Reid, *NCAA Argues in Sex Abuse Case that It Has No Legal Duty to Protect Athletes*, ORANGE CNTY. REG. (June 2, 2020, 12:58 PM), <https://www.oregister.com/2020/06/02/ncaa-argues-in-sex-abuse-case-it-has-no-legal-duty-to-protect-athletes> [https://perma.cc/NC96-P3H4].

The NCAA's failure to implement meaningful mechanisms for reporting abuse has enabled sexual predators like Michigan State University sports medicine doctor Larry Nassar, who was able to abuse hundreds of college athletes for twenty years before facing federal prosecution.²⁹⁸ Meanwhile, the University of Maryland's head football coach, D.J. Durkin, remained employed by the school and in charge of a team of approximately eighty-five 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.²⁹⁹ Durkin's extraordinary mistreatment of his players did not come to the forefront until one player, Jordan McNair, died after being forced to run 110-yard sprints in extreme heat.³⁰⁰ And even after Durkin's 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.³⁰¹ Since then, another school, the University of Mississippi, has decided to give Durkin another chance to coach college students.³⁰² There is no evidence that 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 enforcing the "show-cause penalty," which is the "equivalent to a modern day scarlet letter," against coaches who allow athletes to receive pay,³⁰³ while devoting almost no resources to detecting or sanctioning coaches that mentally, physically, or sexually abuse their players.³⁰⁴ While one can reasonably question whether the NCAA has the power under antitrust law to ban an individual from coaching college sports altogether, an

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

299. *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 [<https://perma.cc/XSF3-MGM6>].

300. *Id.*

301. See David Ginsberg, *Maryland Fires Coach DJ Durkin Day After Reinstatement*, ASSOCIATED PRESS (Oct. 31, 2018), <https://apnews.com/article/4445cd69c46143118738e28d75c36de3> [<https://perma.cc/5NXS-NFSY>].

302. 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 [<https://perma.cc/P9B7-38D7>].

303. 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> [<https://perma.cc/3E97-XMSJ>].

304. See generally Reid, *supra* note 297 (discussing the NCAA's unwillingness to accept legal or moral responsibility for protecting athletes against abuse).

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.³⁰⁵

One way 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.”³⁰⁶ 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.³⁰⁷ 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.”³⁰⁸ Thus, a situation such as the one at the University of Maryland—where football players came forward to discuss Durkin’s abusive culture and the Board of Regents’ ultimately responded by sending Durkin right back into the locker room³⁰⁹—arguably does less to promote future whistleblowing than not hearing the college football players’ complaints in the first instance.

In this same vein, a proper system for reporting abuse in college sports must include appropriate anti-retaliation provisions to protect both internal and external reporters of abuse.³¹⁰ 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.”³¹¹ 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 becomes especially risky if such protections are not in place.³¹² Indeed, even the most popular, famous, and well-respected individuals associated with college sports have faced severe ostracism for blowing the whistle

305. See Edelman et al., *supra* note 3, at 521 n.321 (explaining that NCAA rules concerning player safety are likely to withstand antitrust scrutiny since they are less likely to produce a commercial anticompetitive effect on any relevant market).

306. Edelman & Pacella, *supra* note 298, at 482–83.

307. *Id.* at 484.

308. *Id.*

309. Ginsberg, *supra* note 301.

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

311. *Id.* at 488.

312. See Strauss, *supra* note 170 (explaining how Nebraska softball players struggled to remain anonymous while reporting their coach’s abusive behavior only to see their coach, who had been coaching at Nebraska for over 26 years and accumulated 989 wins, placed on paid leave and reinstated a few months later with little explanation from the university).

on the abuse of college athletes.³¹³ 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.³¹⁴ This backlash transpired against Murdock 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.³¹⁵

As the examples involving Larry Nassar and D.J. Durkin illustrate, there must be an effective mechanism in place for college 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 will 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.³¹⁶ As it now stands, the NCAA's dispute resolution process is problematic because athletes have little agency in the process.³¹⁷ Due to NCAA rules, schools face serious financial and competitive consequences if an athlete challenges NCAA decisions.

313. 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 [https://perma.cc/L658-P6G5].

314. *Id.*

315. See *Eric Murdock Player Statistics*, BASKETBALL REFERENCE, <https://www.basketball-reference.com/players/m/murdoer01.html> [https://perma.cc/TH3Y-F2NF].

316. See *Remaining Eligible: Student-Athlete Reinstatement*, NCAA, <https://www.ncaa.org/compliance/reinstatement/remaining-eligible-student-athlete-reinstatement> [https://perma.cc/TL73-LD5E] (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 (June 24, 2021), <https://www.ncaa.org/sport-science-institute/drug-testing-appeals-process> [https://perma.cc/KQH4-KLKB] (noting that only an institution can initiate an appeal of a positive drug test and that the appeal is heard by "[a]t least three members of the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports drug-test appeal subcommittee").

317. See, e.g., *NCAA Drug-Testing Program, 2021–22*, at 13–15 (LaGwyn Durden ed., 2021), https://ncaaorg.s3.amazonaws.com/ssi/substance/2021-22/2021-22SSI_DrugTestingProgram.pdf [https://perma.cc/8Z34-9BCK] (limiting the student athletes' agency in the appeals process by requiring that the institution initiate any appeals of positive drug tests and conduct any communications related to the appeals with the NCAA).

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.

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 channels.³¹⁸ As a result of Rule 19.13, schools are liable to the NCAA for financial penalties if a college athlete chooses to seek judicial review of an NCAA appeal, and receives an injunction that is later "voluntarily vacated, stayed or reversed or it is finally determined by the courts that injunctive relief is not or was not justified."³¹⁹ Rules like these not only chill a school's desire to challenge an NCAA decision but also strip agency away from athletes themselves, as the NCAA often requires schools to serve as appellants in lieu of an athlete—thereby giving the athlete no control over his or her career.³²⁰

To challenge the NCAA rules that limit college athletes' 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.³²¹ Professor Stephen Ross of Penn State University and other scholars advocate for an independent and impartial binding arbitration system to handle NCAA eligibility disputes.³²² In many ways, the proposed plan would mirror the system that provides quick hearings and resolutions to Olympic athletes.³²³ As Professor 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.³²⁴

While an arbitration system has long been viewed as the standard in professional sports, some professional leagues have pushed towards mediation as a first step.³²⁵ A system that provides college athletes with a chance to first mediate with the NCAA, or a successor organization, allows for a confidential and private forum to resolve disputes, whereas arbitration could play out in public.³²⁶ Unlike the arbitration system

318. NCAA, *supra* note 131, at 388.

319. *Id.*

320. *See, e.g., Drug-Testing Appeals Process, supra* note 316 (noting that schools must initiate student athlete drug testing appeals).

321. Ross et al., *supra* note 184, at 100.

322. *Id.* at 109.

323. *Id.* at 109–11.

324. *Id.* at 112–13.

325. Katie Shonk, *How Mediation Can Help Resolve Pro Sports Disputes*, HARV. L. SCH. PROGRAM ON NEGOT.: DAILY BLOG (Oct. 26, 2021), <https://www.pon.harvard.edu/daily/mediation/how-mediation-can-help-resolve-pro-sports-disputes/#:~:text=Unlike%20arbitration%2C%20the%20dispute%20resolution,compared%20to%20arbitration%20or%20litigation.&text=More%20productive%20relationships> [<https://perma.cc/K6PL-KFTP>].

326. *Id.*

suggested by Professor Ross and others, this Article suggests 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.³²⁷

Should mediation fail, it would be advisable that an arbitration system loosely modeling what Professor Ross advocated—one that promotes fairness for all parties—be implemented.³²⁸ 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 arbitration agreement 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.

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 of the Court of Arbitration for Sport at the Olympics or other multinational sporting events.³²⁹ 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; 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.³³⁰

327. *Id.*

328. Ross et al., *supra* note 184, at 112–13.

329. See 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).

330. See Shonk, *supra* note 325.

E. *College Athlete Access to Representation*

Each of the four above proposals for reforming college sports would, to a significant extent, benefit from 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.³³¹ 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 NLRB 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.³³² For example, the NLRB recently recognized a bargaining unit that encompassed undergraduate students, including Columbia University teaching assistants and research assistants.³³³ Other potential bargaining units of elite college athletes, such as one that includes multiple private colleges, or one that includes many public and private colleges and treats the NCAA as a joint employer, would overcome the concerns about labor market stability that led the NLRB to discretionarily decline jurisdiction over the Northwestern University grant-in-aid football players.³³⁴ Further, it is worth noting that Peter Sung Ohr, who President Joseph Biden has appointed as the Acting General Counsel of the NLRB, previously served on Region Thirteen of the NLRB where he recognized the Northwestern University grant-in-aid college football

331. See Edelman, *supra* note 112, at 1630.

332. See *id.* at 1639–41 (discussing the NLRB's decision to decline jurisdiction over the Northwestern University grant-in-aid college football players as the only meaningful attempt to date to give college athletes NLRB recognition).

333. 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/> [<https://perma.cc/H9BS-S992>].

334. See Edelman, *supra* note 112, at 1642–53.

players as employees, and would have granted them employee status had his decision not been later overturned by the full NLRB.³³⁵

Beyond simply allowing college athletes to unionize, the college sports governance structure should allow college 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 would be 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*

The college sports system also needs reform to allow college athletes more freedom to transfer between schools for academic, athletic, and personal reasons.³³⁶ 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 so-called year-in-residence rule that, absent exceptional circumstances, required college basketball, ice hockey, football, and baseball players to sit out a year of playing their sport before transferring between schools.³³⁷ 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 without needing to sit out for a season.³³⁸ 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

335. See Michael McCann, *Biden Picks College Athlete Advocate as Acting General Counsel of NLRB*, SPORTICO (Feb. 21, 2021, 3:27 PM), <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> [<https://perma.cc/2BFA-FZCV>].

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

337. See *Transfer Terms*, NCAA, <http://www.ncaa.org/student-athletes/current/transfer-terms> [<https://perma.cc/DDS2-782Q>] (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”).

338. 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 [<https://perma.cc/Z5DJ-EYHU>].

before returning to their sport—impeding an athlete’s physical development.³³⁹ 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. For this reason, the NCAA transfer restraints will likely 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.³⁴⁰

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 drives a wedge between college athletes and the rest of the student body by placing additional restrictions on college athlete movement.³⁴¹ 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 a cappella groups, their school newspaper, or quiz bowl teams.³⁴² 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. 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 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.”³⁴³

339. See, e.g., Michael A. Carrier & Marc Edelman, *College Athletics: The Chink in the Seventh Circuit’s “Law and Economics” Armor*, 117 MICH. L. REV. ONLINE 90, 97 (2019) (explaining an example of a college football kicker who desired to transfer to a different school that was more willing to award him a scholarship).

340. See LeRoy, *supra* note 129, at 59–60, 104–07.

341. See Ross Dellenger, *“It’s Going to Change the Landscape”: The NCAA’s Transfer Revolution Is Here, and Its Impact Will Be Felt Far and Wide*, SPORTS ILLUSTRATED (Apr. 14, 2021), <https://www.si.com/college/2021/04/14/ncaa-transfers-rule-change-football-basketball> [<https://perma.cc/GT8E-X99T>] (“The new rule would allow all athletes to move freely at least once, though it includes some stipulations.”).

342. Jay Bilas, *Solving the Transfer Question Is Easy: Let Them Play*, ESPN (Sept. 7, 2017), https://www.espn.com/mens-college-basketball/story/_/id/20616506/change-transfer-rule-let-athletes-play-immediately-not-sit-year [<https://perma.cc/SVN2-DJWE>].

343. *Indianapolis Colts v. Metro. Balt. Football Club*, 34 F.3d 410, 413 (7th Cir. 1994).

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.³⁴⁴ For example, one less restrictive alternative would 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.”³⁴⁵ 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,”³⁴⁶ 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.³⁴⁷ 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.

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; one study found that college athletes have better academic outcomes than their peers.³⁴⁸ Despite these positive findings, there are several negatives that can be found as well, including situations where college athletes receive virtually no actual instruction, athletes are funneled into bogus classes, and athletes receive essentially fake grades.³⁴⁹ Academic scandals do not appear as an isolated bug of the NCAA system. Indeed, they may be a feature: between 1990 and 2015, there were 40 cases of academic fraud that the NCAA investigated.³⁵⁰

344. See Carrier & Edelman, *supra* note 339, at 98–99 (discussing less restrictive alternatives to the NCAA’s “year-in-residence rule”).

345. *Id.* at 98.

346. *Id.*

347. *Id.*

348. *A Study of NCAA Student-Athletes: Undergraduate Experiences and Post-College Outcomes*, GALLUP 20–21 (2020), <https://www.gallup.com/education/312941/ncaa-student-athlete-outcomes-2020.aspx> [<https://perma.cc/LH8U-FWTK>].

349. See Steve Delsohn, *UNC’s McCants: “Just Show up, Play,”* ESPN (June 6, 2014) (quoting former North Carolina basketball star Rashad McCants as saying that he made the dean’s list in classes that he did not attend), https://www.espn.com/espn/otl/story/_/id/11036924/former-north-carolina-basketball-star-rashad-mccants-says-took-sham-classes [<https://perma.cc/MK8J-ULGJ>].

350. Bradley David Ridpath et al., *NCAA Academic Fraud Cases and Historical Consistency: A Comparative Content Analysis*, 25 J. LEGAL ASPECTS SPORT 75, 84–85 (2015).

Academic fraud is hardly an isolated incident.³⁵¹ 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.³⁵² 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.³⁵³ For example, studies have found that athletes tend to be clustered into specific majors,³⁵⁴ with a *USA Today* article determining that 83% of schools had at least one major where 25% or more team members were enrolled.³⁵⁵ While not problematic in itself, the question arises whether college athletes have a say in their own academic pursuits, or whether they are being pressured into specific majors to benefit their team.³⁵⁶

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 with remaining on scholarship.³⁵⁷ 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.³⁵⁸ Notably, the graduation rates for white students have increased, yet Black male students are graduating far less frequently than their white teammates.³⁵⁹ These racial disparities raise fundamental questions about the fairness of NCAA regulations and their disparate impact on different

351. *Id.* at 87, 92–93.

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

353. Kevin Trahan, *Athletes Are Getting Degrees, But Does That Actually Mean Anything?*, SB NATION (July 9, 2014, 7:03 PM), <https://www.sbnation.com/college-football/2014/7/9/5885433/ncaa-trial-student-athletes-education> [<https://perma.cc/K2XR-W3CN>].

354. 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 [<https://perma.cc/S25B-KDAD>].

355. *Id.*

356. Trahan, *supra* note 353.

357. Kimberlee J. Henrion, *Key Challenges Facing Student Athletes and Connections to Their Choice of Major* 17 (Apr. 2009) (Ph.D. dissertation, Western Michigan University) (on file with ScholarWorks). Some schools have scholarship rules that allow student athletes who did not graduate to return later on their university's dime. *See, e.g.*, 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> [<https://perma.cc/6363-9GDY>] (stating that, as of October 2014, 12,979 student athletes at the University of Miami have returned to complete their degrees since 2004 on the program).

358. New, *supra* note 357.

359. 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/> [<https://perma.cc/CCE8-M9VG>].

demographics.³⁶⁰ The commitment of schools to 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 offer scholarships that renew on an annual basis.³⁶¹

In sum, the current policies of the NCAA do not allow for many college athletes to reach their full potential as students.³⁶² 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.³⁶³ While athletes may naturally group with others on their teams, academic-major clusters with more than twenty-five percent of the members of any team with more than ten athletes should trigger an investigation into whether the university or its agents pressured the athletes 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,³⁶⁴ and college athletes face many more demands on their time than the average student.

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

361. Kyle Winters, *NCSA: Are Athletic Scholarships Guaranteed for Four Years?*, USA TODAY HIGH SCHOOL SPORTS (July 23, 2019), <https://usatodayhss.com/2019/ncsa-are-athletic-scholarships-guaranteed-for-four-years> [<https://perma.cc/7UXV-MUST>].

362. See Shane Battier, *Let Athletes Be Students*, PLAYERS' TRIB. (Oct. 25, 2016), <https://www.theplayertribune.com/articles/shane-battier-ncaa-let-athletes-be-students> [<https://perma.cc/JR8A-VQAZ>] (explaining that college athletes are registered in easy classes and less demanding majors).

363. Doug Lederman, *Concerns About Clustering*, INSIDE HIGHER ED (Nov. 20, 2008), <https://www.insidehighered.com/news/2008/11/20/concerns-about-clustering> [<https://perma.cc/Q7QD-U4AA>] (describing the practice of clustering).

364. See *Graduation Rates*, NAT'L CTR. ED. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=40> [<https://perma.cc/6RGH-FHK2>] (noting that the six-year graduation rate in 2018 was 65% for female college students and 59% for male college students).

external developments, the time has come to reimagine the internal governance structure of collegiate athletics. Through (1) forcing the NCAA to take a hands-off approach 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 college 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.³⁶⁵ But its consistent focus on financial endpoints strains its legitimacy and viability.³⁶⁶ 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.³⁶⁷ This opposition is in addition to internal threats from the NCAA's own most powerful members, who have, on at least some level, contemplated

365. Edelman et al., *supra* note 3, at 506–07.

366. See generally Mark Schlabach, *NCAA: Where Does The Money Go?*, ESPN (July 12, 2011), https://www.espn.com/college-sports/story/_id/6756472/following-ncaa-money [<https://perma.cc/M8MY-DV6N>] (providing an overview of where the NCAA spends its revenue).

367. See Dean Barker, *Biden VP Pick Kamala Harris Favors College Athletes Getting Paid*, CAMPUS REFORM (Aug. 18, 2020), <https://www.campusreform.org/?ID=15466> [<https://perma.cc/6SAG-9RDD>] (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/> [<https://perma.cc/U8LC-DWJR>] (noting the possibility of a Supreme Court decision that fundamentally changes how the NCAA governs college athletics); Darren Heitner, *Jerry Moran Introduces Another NIL Bill for Congress to Possibly Consider*, ABOVE L. (Feb. 26, 2021, 1:13 PM), <https://abovethelaw.com/2021/02/jerry-moran-introduces-another-nil-bill-for-congress-to-possibly-consider/> [<https://perma.cc/3F2F-2T4H>] (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> [<https://perma.cc/U4PW-HNVQ>] (listing states with NIL laws).

breaking off from the organization.³⁶⁸ The *Alston* decision presents a meaningful opportunity to reform an archaic and punitive institution.

The exact shape of how college athletics governance will emerge from the Supreme Court's *Alston* decision is to be determined. However, the lessons learned have highlighted the need for a system that better protects athletes.³⁶⁹ Moving forward, measures must be positioned to protect athletes' economic interests and allow them to monetize what, for some, will be the most valuable earning years of their lives.³⁷⁰ 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.³⁷¹ But the economic restraints are far from the only ones that should be lifted from college athletes as we, as a society, advance our standards of acceptable behavior and treatment. From the poor handling of concussions and the dubious response to COVID-19 to the insufficient 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.³⁷² The primacy of college athletes' safety, well-being, rights, 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.

368. 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/> [https://perma.cc/LJS9-5BE8].

369. See Jenn Hatfield, *Even Students Who Aren't Athletes Think the NCAA Is A Problem*, FIVETHIRTYEIGHT (July 12, 2021), <https://fivethirtyeight.com/features/college-students-dont-like-how-the-ncaa-treats-student-athletes/> [https://perma.cc/QX5Z-GBRZ] (discussing the unpopularity of the NCAA on various high-profile subjects including gender equity and athlete compensation).

370. Molly Hensley-Clancy, *College Athletes Can Finally Profit Off Their Celebrity. These Five Are Ready*, WASH. POST (June 29, 2021, 4:00 AM), <https://www.washingtonpost.com/sports/2021/06/29/college-athletes-nil-rights/> [https://perma.cc/H67F-GN54].

371. See Derek Van Rheenen, *Exploitation in College Sports: Race, Revenue, and Educational Reward*, 48 INT'L REV. SOCIO. SPORT 550, 551 (2013) (discussing the exploitation of some athletes in college sports).

372. See Bennett Conlin, *How Does COVID-19 Immunity Affect College Athletic Programs and Their Safety Protocols?*, DAILY PROGRESS (July 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 [https://perma.cc/F5P3-ELDZ] (describing how some college athletics programs may receive a competitive advantage if players are infected with the coronavirus before the start of a season and recover before play starts).

