

THE FUTURE OF COLLEGE SPORTS AFTER *ALSTON*:  
REFORMING THE NCAA VIA CONDITIONAL  
ANTITRUST IMMUNITY

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ABSTRACT

*In June 2021, a unanimous U.S. Supreme Court issued its eagerly anticipated decision in National Collegiate Athletic Association v. Alston, ruling for the first time that NCAA rules governing student-athlete eligibility are subject to full scrutiny under federal antitrust law. Although the immediate impact of the Alston decision was rather modest—merely requiring the NCAA to allow its schools to compete by offering prospective players education-related benefits such as laptop computers and stipends for future graduate-level study—the Court hinted that it was prepared to extend the logic of this ruling much further, calling into question the legality of the NCAA’s entire model of “amateur” intercollegiate athletics. As a result, many suspect that it is only a matter of time before the judiciary requires the NCAA to introduce some form of “pay-for-play” to college sports.*

*This setback for the NCAA coincided with another monumental change to the college sports landscape in the summer of 2021. Within days of its decisive loss at the Supreme Court, the NCAA—for the first time—decided to allow student-athletes to retain their collegiate eligibility despite having monetized their so-called “name, image, and likeness” (NIL) rights by signing endorsement contracts with third-party companies. The association did not do so willingly, however, but only after its hand was forced by the twenty-seven different states that had enacted legislation prohibiting universities*

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*within their jurisdiction from denying their college athletes this right.*

*In response to these events—and the Supreme Court’s admonishment in particular—the NCAA and its membership began to rethink the association’s supervisory role over intercollegiate athletics. Most notably, the NCAA recently ratified a significant overhaul of its organizational constitution in January 2022. This has set the stage for a meaningful decentralization of the industry, with increased decision-making authority likely to be delegated back to individual universities and conferences.*

*Although such a response to the events of 2021 is more than understandable given the association’s potential legal liability post-Alston, the NCAA’s restructuring nevertheless threatens to exacerbate several undesirable trends in intercollegiate athletics. Indeed, the uncommon industrial organization of U.S. intercollegiate athletics has created atypical economic incentives that have already resulted in remarkably elevated levels of deficit spending, a high degree of competitive imbalance on the playing field, and insufficient protection of student-athletes’ education and medical well-being. Unfortunately, because the college sports industry faces an unusual legal impediment that will hinder its ability to successfully adjust to increased commercialization and competition between schools—namely, an inability to collectively bargain with its players on an industry-wide basis—the coming decentralization is likely to only further exacerbate these problems.*

*Therefore, this Article asserts that Congress should intervene to help chart the course for the future of U.S. intercollegiate athletics. Specifically, this Article makes the case for granting the NCAA and its member institutions a limited and conditional antitrust exemption, proposing two alternative models that would give the industry the power to regulate itself while simultaneously imposing meaningful reforms on the NCAA to ensure that its governance model better advances the interests of its players in the future.*

TABLE OF CONTENTS

INTRODUCTION . . . . . 388

I. COLLEGE ATHLETICS AND THE NONPROFIT PARADOX . . . . . 394

II. THE NCAA’S DAY OF RECKONING AT THE  
 SUPREME COURT . . . . . 402

III. DECENTRALIZATION IS UNLIKELY TO FIX THE COLLEGE  
 SPORTS INDUSTRY . . . . . 409

*A. The Legal Constraints on the NCAA and Its Schools* . . . . . 410

*B. The Likely Implications of Decentralization and  
 Unrestrained Salary Competition for College Sports* . . . . . 416

IV. THE CASE FOR A CONDITIONAL ANTITRUST EXEMPTION FOR  
 THE NCAA. . . . . 421

*A. The Theoretical Basis for an NCAA Antitrust  
 Exemption* . . . . . 423

        1. *Natural Monopoly* . . . . . 424

        2. *Market Failure* . . . . . 427

        3. *Socially Desired Activity* . . . . . 429

*B. Two Alternate Proposals for NCAA Reform* . . . . . 431

        1. *Conditional Antitrust Immunity* . . . . . 432

        2. *The “Olympic” Model* . . . . . 437

        3. *The Limited “Free-Market” Model* . . . . . 439

CONCLUSION . . . . . 442

## INTRODUCTION

Even by its own tumultuous standards, the National Collegiate Athletic Association (NCAA)<sup>1</sup> currently finds itself at a particularly uncertain juncture.<sup>2</sup> For years, the association's "amateur" model of intercollegiate athletics has been under attack, with critics highlighting the system's perceived exploitation of its student-athletes. Indeed, despite helping to generate nearly \$19 billion per year in revenue,<sup>3</sup> the NCAA's code of amateurism has historically forbidden

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1. The NCAA is an unincorporated association of over 1,100 athletics-sponsoring colleges and universities that have vested the association with the power to regulate nearly every aspect of intercollegiate athletic competition. *See, e.g.*, Nathan Hunt, Note, *Cureton v. NCAA: Fumble! The Flawed Use of Proposition 16 by the NCAA*, 31 U. TOL. L. REV. 273, 277-78 (2000) ("The NCAA is the governing body of American intercollegiate sports. It is a voluntary, unincorporated organization, with a current membership of [approximately] 1,200 U.S. colleges, universities, conferences, and other bodies of higher education. The NCAA divides its membership into three separate classes: Division I, Division II, and Division III." (footnotes omitted) (first citing *Cureton v. NCAA*, 37 F. Supp. 2d 687, 690 (E.D. Pa. 1999); and then citing Kenneth L. Shropshire, *Colorblind Propositions: Race, the SAT, & the NCAA*, 8 STAN. L. & POL'Y REV. 141, 151 tbl.1 (1997))). In particular, the NCAA's member institutions have charged the association with the mission of "govern[ing] competition in a fair, safe, equitable and sportsmanlike manner, and ... integrat[ing] intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount." *NCAA Mission Statement*, CITADEL (Mar. 6, 2007), [http://www.citadel.edu/root/ncaa\\_mission](http://www.citadel.edu/root/ncaa_mission) [<https://perma.cc/223U-BLZ5>]. Although membership in the NCAA is strictly voluntary as a legal matter, in reality, any four-year college or university that wishes to participate in major, intercollegiate athletic competition has no choice but to join the association as no feasible alternatives exist to provide a source of competition. *See* Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1305 n.35 (1992) (contending that "college and university membership in the NCAA may not truly be voluntary" because "[i]f a university wishes to benefit from the national media exposure and revenues that participation in intercollegiate athletics provides, it must join the NCAA" (citing *Gulf S. Conf. v. Boyd*, 369 So. 2d 553, 557 (Ala. 1979))).

2. A number of commentators have contended that the NCAA has been mired in a crisis for better part of the last decade. *See, e.g.*, Thomas J. Horton, Drew DeGroot & Tyler Custis, *Addressing the Current Crisis in NCAA Intercollegiate Athletics: Where Is Congress?*, 26 MARQ. SPORTS L. REV. 363, 363 (2016) ("American intercollegiate athletics are in a state of crisis today." (citing commentators asserting same)); Todd A. McFall, *Hey, College Sports. Compromise on Compensation and You Can Have a Legal Monopoly*, 26 MARQ. SPORTS L. REV. 459, 462 (2016) (contending that the NCAA is facing an "existential crisis"); Stephen F. Ross, *Radical Reform of Intercollegiate Athletics: Antitrust and Public Policy Implications*, 86 TUL. L. REV. 933, 934 (2012) ("Universities operating major intercollegiate athletic programs are heading for, if not already in, a crisis.").

3. *See* NCAA RESEARCH, 15-YEAR TRENDS IN DIVISION I ATHLETICS FINANCES, [https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES\\_D1-RevExp\\_Report.pdf](https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES_D1-RevExp_Report.pdf)

players from receiving any non-education-related compensation.<sup>4</sup> Thus, while college coaches and administrators often rake in salaries in the hundreds of thousands or millions of dollars, the players—disproportionately students of color from disadvantaged backgrounds—are, in the eyes of many, insufficiently compensated for their efforts.<sup>5</sup>

The NCAA's detractors have, in turn, attacked the association on numerous fronts in recent years in the hopes of forcing the industry to reform. Two of these efforts converged in the summer of 2021, presenting an unprecedented challenge to the traditional business model of intercollegiate athletics.

First, the U.S. Supreme Court released its highly anticipated decision in the case of *National Collegiate Athletic Association v. Alston*, an antitrust lawsuit challenging NCAA restrictions on student-athlete compensation under the Sherman Act.<sup>6</sup> In *Alston*, a unanimous Supreme Court ruled that the NCAA could not legally prevent its member colleges and universities from competing by offering current and prospective student-athletes various education-related benefits (such as laptop computers, study abroad trips, or

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[<https://perma.cc/SH4K-FVN6>] (reporting that total athletics revenue reported among all NCAA athletics departments in 2019 was \$18.9 billion); see also Gabe Feldman, *A Modest Proposal for Taming the Antitrust Beast*, 41 PEPP. L. REV. 249, 250 (2014) ("Commentators have long derided the stubborn 'myth of amateurism,' noting that the NCAA has morphed into a profit-seeking machine that serves the decidedly professional and economic function of regulating college sports. That criticism has only amplified over the last decade with the birth of billion dollar television deals, expanding tournament fields, and, of course, conference realignment." (footnotes omitted) (quoting Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 496 (2008)) (citing Taylor Branch, *The Shame of College Sports*, ATL. MONTHLY, Oct. 2011, at 80, <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>)).

4. See Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 343 (2005) (describing "the NCAA's most basic amateurism rule" as being "the prohibition on athletes' receiving monetary compensation for playing sports" (citing *Jones v. NCAA*, 392 F. Supp. 295, 295 (D. Mass. 1975))).

5. In fact, at least one study has found that upwards of 80 percent of full-scholarship student-athletes live at or below the poverty level. See William B. Gould IV, *American Amateur Players Arise: You Have Nothing to Lose but Your Amateurism*, 61 SANTA CLARA L. REV. 159, 160 (2020) (quoting comments by California state senators Nancy Skinner and Steven Bradford, asserting the same).

6. 141 S. Ct. 2141, 2147 (2021).

stipends for future graduate-level study).<sup>7</sup> Although the immediate implications of the Court's opinion were relatively modest, when reading between the lines, the decision suggests that the Justices were prepared to issue a much broader rebuke of the NCAA's amateurism model had the posture of the case permitted them to do so.<sup>8</sup> In fact, in a scathing concurring opinion, Justice Kavanaugh went so far as to state that the "NCAA's business model [of relying on unpaid, amateur athletes] would be flatly illegal in almost any other industry in America."<sup>9</sup> As a result, many believe it is only a matter of time before the judiciary forces the NCAA to allow its schools to pay their athletes above and beyond the cost of their college attendance, effectively introducing a system of "pay-for-play" to college sports.<sup>10</sup>

Meanwhile, at the same time the Supreme Court was preparing its decision in *Alston*, the NCAA was attempting to fend off a series of state-level statutes enacted to provide college student-athletes with an express right to profit off of their name, image, and likeness (NIL). Following the lead of California, whose enactment of the Fair Pay to Play Act in 2019 initiated this wave of legislation,<sup>11</sup> by the summer of 2021, a total of twenty-seven states had passed laws forbidding any institution of higher education within their borders from punishing its student-athletes for signing endorsement contracts with third-party businesses.<sup>12</sup> Thus, student-athletes in these twenty-seven states were poised—for the first time in NCAA

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7. *Id.* at 2164.

8. See *infra* notes 93-99 and accompanying text.

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

10. See, e.g., Ian Millhiser, *The Supreme Court's Unanimous Decision on Paying NCAA Student-Athletes, Explained*, VOX (June 21, 2021, 12:56 PM), <https://www.vox.com/2021/6/21/22543598/supreme-court-ncaa-alston-student-athletes-football-basketball-sports-antitrust> [<https://perma.cc/UA7P-A7CD>] ("The NCAA may suffer an even more significant loss in a future case.").

11. See Sarah Traynor, Note, *California Says Checkmate: Exploring the Nation's First Fair Pay to Play Act and What It Means for the Future of the NCAA and Female Student-Athletes*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 203, 216 (2020) ("California's passage of the Fair Pay to Play Act has resulted in an unprecedented wave of state legislation seeking to control the NCAA.").

12. See Dan Murphy, *Everything You Need to Know About the NCAA's NIL Debate*, ESPN (Sept. 1, 2021), [https://www.espn.com/college-sports/story/\\_/id/31086019/everything-need-know-ncaa-nil-debate](https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate) [<https://perma.cc/6P77-P2M6>] (identifying the various laws and their respective effective dates).

history—to be allowed to retain their college eligibility despite being compensated for their athletic abilities above and beyond the cost of their scholarships. Because many of these laws were scheduled to go into effect on July 1, 2021, the NCAA faced a looming deadline to enact meaningful reform of its compensation restrictions.<sup>13</sup> After failing to secure a nationwide legislative reprieve from Congress, the NCAA ultimately relented, announcing that it would allow student-athletes to receive endorsement income without restriction effective July 1.<sup>14</sup>

Acknowledging its tenuous legal position post-*Alston*—and responding to the agitation for a meaningful restructuring of the industry by countless leaders throughout college sports—the NCAA responded to these collective developments by announcing in the fall of 2021 that it would be undertaking a historic revision of its organizational constitution, along with a corresponding reevaluation of its supervisory role over intercollegiate athletics.<sup>15</sup> The end result of these efforts is widely anticipated to be a significant deregulation of the industry, with the NCAA ceding large swaths of its authority back to individual universities and conferences to govern themselves.<sup>16</sup> It is believed that such a restructuring would free the schools and conferences to more efficiently implement market-based reforms to the present system while simultaneously decreasing the industry’s potential antitrust liability (by avoiding the formulation of industry-wide, mandatory rules applicable to the entire NCAA membership).<sup>17</sup>

Unfortunately, although the NCAA’s response to the events of 2021 is quite understandable from a legal perspective, granting the

13. See *id.* (reporting the effective dates of each state’s legislation).

14. See Alan Blinder, *College Athletes May Earn Money from Their Fame, N.C.A.A. Rules*, N.Y. TIMES (Sept. 29, 2021), <https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html> [<https://perma.cc/G6Z2-KYZM>].

15. Charlie Henry, *Constitution Committee Introduces Draft Constitution*, NCAA (Nov. 8, 2021, 10:02 AM), <https://www.ncaa.org/news/2021/11/8/general-constitution-committee-introduces-draft-constitution.aspx> [<https://perma.cc/YG5R-4EGL>].

16. See, e.g., ASSOCIATED PRESS, *NCAA Releases Draft of Streamlined Constitution That Would Give Power to Schools*, ESPN (Nov. 8, 2021), [https://www.espn.com/college-sports/story/\\_/id/32583346/ncaa-releases-draft-streamlined-constitution-give-power-schools](https://www.espn.com/college-sports/story/_/id/32583346/ncaa-releases-draft-streamlined-constitution-give-power-schools) [<https://perma.cc/573J-V374>].

17. See generally Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA’s Amateurism Rules*, 6 VA. SPORTS & ENT. L.J. 51 (2006).

most powerful athletic conferences even further autonomy to create their own rules is likely to exacerbate several troubling trends in the industry. Specifically, intercollegiate athletics is already subject to an “arms race” mentality, in which vigorous competition between athletic programs for any leg up on the playing field leads to spending patterns in which all but a handful of universities consistently lose money on their sports programs—losses that often reach into the tens of millions of dollars.<sup>18</sup> This phenomenon results from the industry’s atypical—but heretofore largely overlooked— industrial organization and its corresponding economic incentives, in which highly competitive, nonprofit entities, un beholden to shareholder interests, are motivated to spend every possible dollar advancing their competitive mission.<sup>19</sup> Not only have these incentives often resulted in extreme levels of competitive imbalance on the playing field but these overriding competitive concerns have also frequently led NCAA schools to shortchange the educational and medical well-being of their student-athletes in the pursuit of greater success on the playing field.<sup>20</sup>

Thus, left to their own devices, individual universities and athletic conferences will likely free their schools to compete with one another in far greater ways (both financially and otherwise), further exacerbating these concerns. Indeed, given the industry’s unusual legal constraints—and its inability to collectively bargain with its players on an industry-wide basis, in particular<sup>21</sup>—it is doubtful that NCAA schools will be able to take the steps necessary to ensure that the coming decentralization does not result in additional deficit spending, greater deprioritization of student-athletes’ educational and medical needs, or a further erosion of the industry’s already questionable level of competitive balance.<sup>22</sup>

Consequently, this Article asserts that the time has come for Congress to intervene to help chart a sustainable course for the future of intercollegiate athletics. Specifically, it argues that the

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18. See *infra* Part I.

19. See *infra* Part I.

20. See *infra* notes 62-66 and accompanying text (summarizing recent NCAA scandals involving schools cutting corners with respect to their athletes’ best educational and medical interests).

21. See *infra* Part III.A.

22. See *infra* Part III.B.



NCAA should be granted a limited and conditional antitrust exemption, laying out two potential paths for Congress to follow depending on its preferred policy outcome. Option one would effectively preserve the new status quo by providing the NCAA with an antitrust exemption allowing the association to continue to prohibit schools from directly providing cash compensation to student-athletes while nevertheless maintaining the rights of athletes to freely monetize their NIL. Thus, in effect, this first option would implement something akin to the so-called “Olympic” governance model. Meanwhile, the second option would allow NCAA schools to provide cash compensation to their student-athletes, while nevertheless granting the NCAA an antitrust exemption, permitting it to impose reasonable spending limits on this monetary competition (and other related spending). Thus, option two would help to remedy the perceived injustice of the current system while still providing the necessary safeguards to ensure that the resulting competition does not become financially or competitively ruinous.

At the same time, however, this Article cautions that giving the NCAA—at least in its current form—unchecked free reign to preside over the college sports industry on a going-forward basis would be inadvisable, as history has shown that the association’s membership is often either unable or unwilling to meaningfully reform itself in order to advance the interests of its student-athletes. As a result, regardless which path Congress chooses, any resulting antitrust immunity should—at a minimum—be conditioned on the NCAA taking concrete steps to better protect and advance the rights of student-athletes.

This Article proceeds in four Parts. Part I explores the often-overlooked, unusual structural economic incentives at play in U.S. intercollegiate athletics and documents the various suboptimal effects that have resulted. Part II then provides a brief overview of the *Alston* litigation, explaining why the Supreme Court’s decision in the case is widely expected to invite further antitrust challenges to the NCAA’s amateurism model. Next, Part III considers the legal impediments that will likely prevent the college sports industry from effectively regulating itself post-*Alston*, as well as the deleterious policy ramifications that can be expected to result. Finally, Part IV sets forth the case for a conditional antitrust exemption for

the NCAA, proposing two alternative paths that Congress could follow to reform U.S. intercollegiate athletics, as well as several key conditions that should be imposed on the NCAA in exchange for this protection.

### I. COLLEGE ATHLETICS AND THE NONPROFIT PARADOX<sup>23</sup>

There is little doubt that the optics of the current economic structure of U.S. intercollegiate athletics are—especially at first glance—not particularly flattering. The NCAA and its member schools collectively generate billions of dollars of revenue per year. In turn, these universities reward their administrators and coaches richly, with salaries routinely reaching into the millions of dollars.<sup>24</sup> At the same time, however, according to one study, upwards of 80 percent of student-athletes attending school on full scholarships find themselves living below the poverty line.<sup>25</sup> As a result, few would seriously dispute that the values of college sports are—one way or the other—currently out of whack or that the industry is in dire need of reform.<sup>26</sup>

Indeed, countless commentators have observed that the college sports industry is engaged in a classic “arms race,” with institutions continuously competing to outspend one another.<sup>27</sup> Unable to

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23. This subtitle is borrowed in part from Kevin Blue, *Rising Expenses in College Athletics and the Non-Profit Paradox*, ATHLETICDIRECTORU, <https://www.athleticdirector.com/articles/kevin-blue-rising-expenses-in-college-athletics-and-the-non-profit-paradox/> [<https://perma.cc/A2M6-W2XG>].

24. See *supra* notes 3-5 and accompanying text.

25. See Gould, *supra* note 5, at 160 (quoting comments by California state senators Nancy Skinner and Steven Bradford, asserting the same).

26. See Josephine (Jo) R. Potuto, *The Once and Future NCAA and Collegiate Sports*, 6 ARIZ. ST. SPORTS & ENT. L.J. 85, 90 (2016) (“Most everyone agrees that collegiate sports ... are out of whack with the values that should underlie athletics on our campuses. Finding a way to re-achieve a balance ... so far has proved elusive.” (footnote omitted) (first citing Jake New, *Left Behind*, INSIDE HIGHER ED (Aug. 5, 2014), <https://www.insidehighered.com/news/2014/08/05/growing-stratification-ncaa-conferences-concerns-less-wealthy-division-i-colleges>; and then citing Jon Solomon, *Power Five Passes on Tackling Big NCAA Issues to Help Athletes*, CBS SPORTS (Jan. 15, 2016, 2:15 PM), <https://www.cbssports.com/college-football/news/power-five-passes-on-tackling-big-ncaa-issues-to-help-athletes/>).

27. See, e.g., Lora Wuerdeman, *Sidelining Big Business in Intercollegiate Athletics, How the NCAA Can De-Escalate the Arms Race by Implementing a Budgetary Allocation for Athletic Departments*, 39 N.C. CENT. L. REV. 85, 88-89 (2017) (characterizing the college sports industry as being engaged in an “arms race” in which “universities are outspending one

compete for the services of their student-athletes through differences in monetary compensation, schools must instead attempt to differentiate themselves by using noneconomic factors such as the caliber of their coaching staffs and the quality of their athletic facilities.<sup>28</sup> Consequently, while recent years have seen an explosion in the revenues college athletics departments generated, the industry has also witnessed a commensurate rise in expenses.<sup>29</sup> Today, the highest-paid state employee in most states will inevitably be a college football or basketball coach,<sup>30</sup> with the most extreme example currently being the University of Alabama's Nick Saban, who makes over \$9 million per year to coach the school's football team.<sup>31</sup> At the same time, universities are also spending ever greater sums upgrading their stadiums, arenas, and practice facilities in the hopes of wooing the best talent to their athletic programs.<sup>32</sup>

Thus, although many casual observers believe that college athletic departments generate considerable excess revenues for their institutions, in most cases this could not be further from the truth.<sup>33</sup> Only around twenty to twenty-five athletic departments generate a net profit in any given year while the overwhelming majority spend

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another in an effort to remain competitive in recruitment”).

28. See Allen R. Sanderson & John J. Siegfried, *The National Collegiate Athletic Association Cartel: Why It Exists, How It Works, and What It Does*, 52 REV. INDUS. ORG. 185, 199 (2018) (“When direct price (salary) competition is prohibited, non-price competition will increasingly affect prospective players’ choices about which institution to attend.”).

29. See Blue, *supra* note 23 (explaining that the college sports industry exhibits the typical trend that “when revenues increase for a non-profit organization, expenses tend to grow commensurately”).

30. See Reuben Fischer-Baum, *Infographic: Is Your State’s Highest-Paid Employee a Coach? (Probably)*, DEADSPIN (May 9, 2013, 3:23 PM), <http://deadspin.com/infographic-is-your-states-highest-paid-employee-a-co-489635228> [<https://perma.cc/26DM-P2VX>].

31. Edward Sutelan, *Nick Saban’s Salary & Net Worth: Here’s How Much Money the Alabama Coach Made in 2021*, SPORTING NEWS (Dec. 31, 2021), <https://www.sportingnews.com/us/ncaa-football/news/nick-saban-salary-net-worth-alabama-coach-2021/7v1yrpfp5lozin062r07cav> [<https://perma.cc/6V7S-5XGH>].

32. See David A. Grenardo, *The Continued Exploitation of the College Athlete: Confessions of a Former College Athlete Turned Law Professor*, 95 OR. L. REV. 223, 240-41 (2016) (“Athletic departments also spend millions on facilities to attract the top college athletes.” (citing Telephone Interview with Jay Bilas, J.D., ESPN Analyst, Of Counsel, Moore & Van Allen (July 24, 2015))).

33. See Sanderson & Siegfried, *supra* note 28, at 190 (“Most Americans believe that intercollegiate athletics raises money for their host institutions.” (citing a 2006 Knight Commission survey)).

more money than they earn in revenue (often considerably so).<sup>34</sup> As of the 2017-18 school year, for example, the median deficit at a major Division I Football Bowl Subdivision (FBS) athletic department was \$16.3 million.<sup>35</sup> Even if one were to only focus on the five richest college conferences that generate the bulk of the college sports industry's revenue—the so-called “Power Five”<sup>36</sup>—the median operating deficit still stood at \$2.6 million.<sup>37</sup> And even that number obscures the substantial wealth disparities within the elite tier of intercollegiate athletics, as the bottom half of the Power Five schools faced a median operating deficit of \$10.6 million.<sup>38</sup> Indeed,

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34. See Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 846 (2014) (“[U]nder certain accounting conventions relatively few Division I athletic departments (no more than approximately twenty to twenty-five each year) have revenues that equal or exceed their respective costs of producing intercollegiate athletics.” (citing DANIEL L. FULKS, NCAA, REVENUES & EXPENSES: 2004-2012 NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 8, 13 (2013), <https://www.ncaapublications.com/p-4306-revenues-and-expenses-2004-2012-ncaa-division-i-intercollegiate-athletics-programs-report.aspx>)).

35. Andrew Zimbalist, *Rescuing College Sports from Its Economic and Moral Abyss*, FORBES (Aug. 10, 2020, 10:27 AM), <https://www.forbes.com/sites/andrewzimbalist/2020/08/10/rescuing-college-sports-from-its-economic-and-moral-abyss/#:~:text=NIL%20reform%20promises%20to%20allow,contracts%20with%20university%20athletics%20departments> [<https://perma.cc/C6LC-67V3>].

The NCAA member institutions are currently divided into three divisions, with those in Division I competing at the highest (and most expensive) level. Meanwhile, Division I itself has subsequently been divided into different tiers, with the schools participating at the FBS level constituting those who compete at the highest level of Division I athletics. See Nathan Boninger, Comment, *Antitrust and the NCAA: Sexual Equality in Collegiate Athletics as a Procompetitive Justification for NCAA Compensation Restrictions*, 65 UCLA L. REV. 754, 777 n.171 (2018) (“Among the three NCAA divisions, Division I schools generally have the biggest student bodies, manage the largest athletics budgets and offer the most generous number of scholarships.’ ... Division I is also further divided solely with respect to football, with the highest level being the Football Bowl Subdivision (FBS), which is comprised of schools that participate in bowl games.” (quoting *NCAA Division I*, NCAA, <http://www.ncaa.org/about?division=d1> [<https://perma.cc/97SK-6YTQ>])).

36. Specifically, the Power Five conferences currently consist of the Atlantic Coast Conference (ACC), Big Ten Conference, Big 12 Conference, Pacific 12 Conference (Pac-12), and the Southeastern Conference (SEC). See Nicholas C. Daly, Note, *Amateur Hour Is Over: Time for College Athletes to Clock In Under the FLSA*, 37 GA. ST. U. L. REV. 471, 487 (2021) (identifying the Power Five athletic conferences).

37. See Zimbalist, *supra* note 35.

38. *Id.*

as but one example, in 2014 alone, the Rutgers athletic department ran a \$28 million operating budget deficit.<sup>39</sup>

In order to cover these cost overruns, NCAA schools frequently divert resources from their general coffers to subsidize their sports programs. In 2013, for instance, U.S. colleges and universities collectively transferred over \$1 billion per year in general student fees and tuition to their athletic departments.<sup>40</sup> Meanwhile, a different study has shown that 90 percent of NCAA Division I athletic programs rely on economic subsidies from their universities to cover their costs.<sup>41</sup> As a result, a school's intercollegiate athletics program today often consumes upwards of 5 percent of its overall institutional budget.<sup>42</sup>

Pinning the blame for such extreme levels of spending on a failure of institutional leadership is easy—and, at some level, undoubtedly correct.<sup>43</sup> Meanwhile, other critics may contend that the accounting methodologies above fail to factor in all of the benefits that flow from a college sports program to its larger university (such as the free marketing that a winning team can generate among prospective student applicants).<sup>44</sup> Even acknowledging this latter point, however,

39. See Cody J. McDavis, Comment, *The Value of Amateurism*, 29 MARQ. SPORTS L. REV. 275, 280 (2018) (citing Steve Berkowitz, Jodi Upton & Erik Brady, *Most NCAA Division I Athletic Departments Take Subsidies*, USA TODAY (July 1, 2013, 12:48 PM), <https://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443/>).

40. See Sanderson & Siegfried, *supra* note 28, at 190 (citing the same *USA Today* report cited *supra* note 39 showing the same).

41. See McDavis, *supra* note 39, at 280.

42. See Matthew J. Mitten, James L. Musselman & Bruce W. Burton, *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 803 (2010) (“Total athletic department spending was approximately 5% of total university expenses at median FBS institutions.” (citing DANIEL L. FULKS, NCAA, REVENUES & EXPENSES: 2004-06 NCAA REVENUES AND EXPENSES OF DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 7 (2008), <https://www.ncaapublications.com/productdownloads/RE2008.pdf>)).

43. *But see* Blue, *supra* note 23 (asserting that, perhaps counterintuitively, the college sports arms race is “not the result of ‘flawed institutional leadership’”).

44. See Linda Emma, *The Importance of College Athletic Programs to Universities*, SEATTLEPI, <https://education.seattlepi.com/importance-college-athletic-programs-universities-1749.html> [<https://perma.cc/R877-JYB4>] (“College athletics programs represent a multibillion dollar industry and are integrally linked to school branding and reputation. And while individual sports programs—even in Division I schools—don’t necessarily turn a profit, the many other benefits to colleges have far-reaching implications for students, faculty and community.”); *see also* Mitten & Ross, *supra* note 34, at 845 (“The use of intercollegiate sports by university leaders as part of their efforts to enable their respective institutions to flourish in an increasingly competitive higher education environment is a rational response to

one cannot fully understand the current economic structure of U.S. intercollegiate athletics without considering its unique—but often overlooked—industrial organization, the implications of which help explain the seemingly unjustifiable spending patterns highlighted above.

Specifically, college athletic departments are typically structured as nonprofit organizations.<sup>45</sup> Unlike for-profit businesses, which exist to maximize the income of their owners or shareholders, nonprofits “do not operate with the goal of making a profit.”<sup>46</sup> Instead, the purpose of a nonprofit is ultimately to maximize the impact of its mission, with any new income generated by the organization put to use to further its objective.<sup>47</sup> Importantly, however, college sports programs occupy an unusual space amongst the greater universe of nonprofit organizations. Whereas most nonprofits exist to advance the greater good by conferring benefits to the public,<sup>48</sup> college athletic departments exist primarily to facilitate zero-sum competition amongst one another. “[I]n other words, a college sports program can only succeed at the competitive part of its mission (win) if another fails (lose).”<sup>49</sup> Unlike professional sports organizations—whose ownership balances on-field competitive considerations with the need to manage overall profits and long-term franchise value—administrators in the intercollegiate athletics industry are incentivized to spend “[e]very dollar of generated

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marketplace realities.”).

45. Cf. Ted Tatos, *An Empirical Evaluation of EADA and NCAA College Sports Financial Data: Applications for Research and Litigation*, 29 MARQ. SPORTS L. REV. 411, 411 (2019) (noting discussion of the “ostensibly nonprofit” nature of “college athletic departments”).

46. Blue, *supra* note 23; see also Jayma Meyer & Andrew Zimbalist, *Reforming College Sports: The Case for a Limited and Conditional Antitrust Exemption*, 62 ANTITRUST BULL. 31, 33 (2017) (“Unlike a typical commercial enterprise, college sports programs do not have stockholders who demand a profit at the end of each quarter so that the price of the company’s stock will rise or that dividends may be paid out.”).

47. Blue, *supra* note 23 (explaining that “when revenues increase for a non-profit organization,” any additional “income is used by the organization to further pursue its mission, not to create profitable operating margins”).

48. See Michael J. DeBoer, *Religious Hospitals and the Federal Community Benefit Standard—Counting Religious Purpose as a Tax-Exemption Factor for Hospitals*, 42 SETON HALL L. REV. 1549, 1609 (2012) (“People and groups form nonprofit organizations to confer public or mutual benefits or to advance religious purposes.” (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012))).

49. Blue, *supra* note 23.

revenue ... in pursuit of the competitive and student-athlete education missions.”<sup>50</sup>

Therefore, from a behavioral economics perspective, the current deficit spending patterns of the college sports industry are actually perfectly rational.<sup>51</sup> Indeed, as Professor Matthew Mitten has noted, “[t]he significant economic rewards of winning [on the playing field] have generated fierce off-field competition among universities.”<sup>52</sup> College administrators often face substantial pressure to win from their various stakeholders: alumni, boosters, current students, and—at least in the case of state universities—occasionally even politicians.<sup>53</sup> So great is this pressure, in fact, that surveys have shown that upwards of 80 percent of college presidents at institutions with major sports programs believe that “they are unable to control the excesses of ... commercialized” intercollegiate athletics.<sup>54</sup>

As a result, athletic departments are strongly incentivized to seek out any possible competitive advantage they can secure over their rivals.<sup>55</sup> And because relatively small differences in spending can yield significant advantages on the playing field,<sup>56</sup> even the less financially successful athletic programs can feel considerable pressure to keep up with the spending habits of the handful of schools that actually turn a profit on their sports programs, lest they fall even further behind the competition (which, in turn, would fuel a vicious cycle resulting in even greater financial disparities).<sup>57</sup>

50. *Id.*

51. *See id.*

52. Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of “Big Time” College Athletics: The Need to Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1, 2 (2000).

53. *See* Zimbalist, *supra* note 35 (observing that university athletic “programs ... have stakeholders (boosters, alumni, state legislators, students) pressuring for victories”).

54. Donna A. Lopiano, *Fixing Enforcement and Due Process Will Not Fix What Is Wrong with the NCAA*, 20 ROGER WILLIAMS U. L. REV. 250, 270 (2015) (citing research from the Knight Commission on Intercollegiate Athletics).

55. *See infra* note 57 and accompanying text.

56. *See* Sanderson & Siegfried, *supra* note 28, at 191 (“Small differences in spending can yield large advantages in recruiting and subsequently in winning. Unsuccessful programs have little choice but to ratchet up spending, or they may fall even farther behind in the competition for players and coaches, with devastating effects on their revenues.”).

57. *See* Blue, *supra* note 23 (“[E]ven though Power Five schools have more revenue to deploy than others on an absolute basis, a majority of them remain under financial pressure trying to keep up with the small group of schools who set a high bar on expenses in search of every possible competitive advantage.”); *see also* Sanderson & Siegfried, *supra* note 28, at 191

Consequently, the persistent deficit spending by intercollegiate athletics programs is not simply evidence of some widespread failure in leadership but instead represents a fundamental flaw innate to the industry's structural organization.<sup>58</sup>

Unfortunately, the same structural incentives that have driven many athletic departments to seemingly unsustainable levels of deficit spending in the pursuit of success on the playing field can also lead to other pernicious effects. Specifically, the tremendous competitive pressure that universities often face to "win-at-all costs" has arguably led a number of prominent programs to cut corners in various ways in recent years, resulting in a degradation of both their student-athletes' educational experience as well as their physical health and safety.<sup>59</sup>

With respect to education, the perception has long existed that rather than strive to provide their athletes with the best educational experience possible, many high-profile athletic programs instead funnel players into easier classes in order to ensure that they remain academically eligible to compete on the playing field. Perhaps the most noteworthy example of such a phenomenon comes from the University of North Carolina, which maintained a series of so-called "paper classes" for years, in which student-athletes "took sham courses and participated in fake independent study projects ... earning academic credit and high grades for little or no work."<sup>60</sup>

Similarly, critics of the NCAA often allege that its member schools have been allowed to deemphasize the health and safety of their student-athletes in various ways in the pursuit of competitive success on the playing field.<sup>61</sup> These allegations range from a failure

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("Thus, the net positive revenues of a few dozen teams steadily drive up costs for all competitive teams.")

58. See Blue, *supra* note 23 ("Expense increases thus reflect systemic characteristics, and not 'flaws' of involved individuals. College athletics decision-makers are acting rationally and predictably in the current system, just like others would if confronted with similar industry characteristics.")

59. See Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 257 (1990) ("The money generated from college athletics has reached such levels that it is almost inevitable that all persons involved in big-time college athletics develop a 'win-at-all costs' mentality that compromises educational interests.")

60. Carl T. Bogus, *Introduction to Symposium: Should There Be Some Form of Judicial or Other Independent Review of NCAA Enforcement Actions?*, 20 ROGER WILLIAMS U. L. REV. 209, 211 (2015).

61. See, e.g., John T. Holden, Marc Edelman, Thomas A. Baker III & Andrew G. Shuman,



to protect players from the dangers of head injuries,<sup>62</sup> to risky practice methods,<sup>63</sup> abusive coaching practices,<sup>64</sup> and even the “systemic failure to protect [student-athletes] from sexual abuse” in the case of Michigan State University and its former employee, Larry Nassar.<sup>65</sup> Although a variety of factors have undoubtedly contributed to these unfortunate incidents, it seems clear that the tremendous pressure placed on coaches and college athletics administrators to win will inevitably result in some programs—if left largely to their own devices—deprioritizing the educational and medical well-being of their athletes in pursuit of competitive success.<sup>66</sup>

Thus, the U.S. intercollegiate athletics’ irregular structural organization and resulting incentives have had a variety of suboptimal ramifications for the industry. These dynamics will be further explored in greater detail below, but for now merely noting that the nature of the college sports’ “nonprofit paradox” would suggest that any new economic competition between schools is only likely to further the industry’s already persistent levels of deficit spending, whereas any substantial divestment of authority by the NCAA is

*Reimagining the Governance of College Sports After Alston*, 74 FLA. L. REV. 427, 446-51 (2022) (outlining concerns).

62. See Rodney K. Smith, *Head Injuries, Student Welfare, and Saving College Football: A Game Plan for the NCAA*, 41 PEPP. L. REV. 267, 302 (2014) (attributing the NCAA’s concussion-related injury issues with the “win at all costs’ and ‘play through injury’ mentality” that exists in many programs (quoting Rodney K. Smith, Opinion, *Picking Politics and Football Over Education*, USA TODAY (Jan. 3, 2013, 3:00 PM), <https://www.usatoday.com/story/opinion/2013/01/03/penn-state-ncaa-sanctions-sandusky-tom-corbett/1805189/>)).

63. See Holden et al., *supra* note 61, at 446-47 (recounting the circumstances surrounding the death of former University of Maryland football player Jordan McNair “who died as a result of heat stroke during a football practice” (citing Rae-Anna Sollestre, Comment, *Wrongful Death: Does the NCAA Have an Affirmative Duty to Protect Its Student-Athletes?*, 30 MARQ. SPORTS L. REV. 393, 394-96 (2020))).

64. See *id.* at 447 (“[F]ormer Rutgers University basketball coach, Mike Rice, ... was caught on video hitting his players.” (citing Tom Canavan, *Rutgers Fires Basketball Coach Over Abuse, Taunts*, ASSOCIATED PRESS, Apr. 3, 2013, <https://apnews.com/article/aee9e01877184066b1007074c984cd45>)).

65. 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-michigan-state-systemic-failure-address-sexual-abuse-larry-nassar-case/> [<https://perma.cc/W7QV-PMGL>].

66. See Smith, *supra* note 62, at 302.

unlikely to alleviate—and may very well exacerbate—the existing educational and health-related concerns outlined above is sufficient.

## II. THE NCAA'S DAY OF RECKONING AT THE SUPREME COURT

The perception that the NCAA's existing amateurism model exploits student-athletes has generated several high-profile lawsuits over the past decade. Somewhat surprisingly, however, prior to the most recent spate of litigation, the judiciary was frequently willing to shield the NCAA's student-athlete compensation and eligibility restrictions from scrutiny under federal antitrust law. Dating back to the U.S. Supreme Court's 1984 decision in *NCAA v. Board of Regents of the University of Oklahoma*, jurists had generally adopted a bifurcated approach when considering antitrust lawsuits against the NCAA.<sup>67</sup> Specifically, while courts were willing to strike down NCAA restraints that directly affected commercial interests such as television contracts or coaches' salaries,<sup>68</sup> in cases challenging the association's student-athlete eligibility rules, courts either held that the procompetitive benefits of amateurism outweighed any anticompetitive effects, or that the Sherman Act did not even apply to such "non-commercial" restrictions at all.<sup>69</sup>

Recently, however, this deferential approach has begun to erode,<sup>70</sup> perhaps most notably starting with the landmark case of *O'Bannon v. NCAA*, proceedings that helped shape the course of the *Alston* litigation in important ways.<sup>71</sup> The *O'Bannon* litigation centered on the rights of college football and men's basketball players to receive compensation for the use of their NIL in both video games and televised sporting events.<sup>72</sup> Following extensive proceedings and a lengthy bench trial, Judge Claudia Wilken ruled that the NCAA's restrictions on athlete pay constituted illicit commercial restraints

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67. See 468 U.S. 85 (1984).

68. See *id.* at 119-20; *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998).

69. See Feldman, *supra* note 3, at 257-61 (synthesizing cases).

70. See Daniel E. Lazaroff, *An Antitrust Exemption for the NCAA: Sound Policy or Letting the Fox Loose in the Henhouse?*, 41 PEPP. L. REV. 229, 230-37 (2014) (reviewing the trend in the judicial treatment of the NCAA).

71. See 802 F.3d 1049, 1053 (9th Cir. 2015).

72. See Meyer & Zimbalist, *supra* note 46, at 42-45 (reviewing the "tortured history" of the *O'Bannon* litigation).

in violation of the Sherman Act.<sup>73</sup> While conceding that amateurism played a “limited” role in generating consumer demand for intercollegiate athletics, Judge Wilken nevertheless determined that the NCAA’s existing rules ran afoul of antitrust law’s rule of reason, insofar as any procompetitive benefits the amateurism model provided could be obtained through less restrictive means.<sup>74</sup> In particular, Judge Wilken ordered the NCAA to allow its member schools to set aside up to \$5,000 per student-athlete per year in a trust as compensation for the use of their NIL, payable when an athlete’s college eligibility was finished.<sup>75</sup>

Unsurprisingly, the NCAA appealed the district court’s ruling in *O’Bannon* to the Ninth Circuit. Although the appellate court agreed with Judge Wilken’s determination that the NCAA’s student-athlete compensation rules were subject to antitrust scrutiny,<sup>76</sup> the panel nevertheless took issue with portions of Judge Wilken’s resolution of the case. Specifically, the court held that requiring the NCAA to allow its members to set aside up to \$5,000 per year for its student-athletes would be fundamentally inconsistent with the concept of amateurism: “The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap.”<sup>77</sup> Consequently, the Ninth Circuit reversed that portion of Judge Wilken’s opinion while nevertheless affirming other education-related remedies in the lower court’s decision (such as the requirement that the NCAA allow its member schools to provide their student-athletes with scholarships covering the full cost of attendance, beyond just tuition, room, board, books, and fees).<sup>78</sup>

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73. *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 988 (N.D. Cal. 2014), *aff’d in part, vacated in part*, 802 F.3d 1049.

74. *Id.* at 1005 (finding that the plaintiffs had established “two legitimate less restrictive alternatives” for the NCAA’s twin goals of “preserving the popularity of the NCAA’s product by promoting its current understanding of amateurism and improving the quality of educational opportunities for student-athletes by integrating academics and athletics”).

75. *Id.* at 1005-08 (“[T]he NCAA could permit its schools to hold in trust limited and equal shares of its licensing revenue to be distributed to its student-athletes after they leave college or their eligibility expires.”).

76. *O’Bannon*, 802 F.3d at 1064 (“[W]e accept *Board of Regents*’ guidance as informative with respect to the procompetitive purposes served by the NCAA’s amateurism rules, but we will go no further than that. The amateurism rules’ validity must be proved, not presumed.”).

77. *Id.* at 1078.

78. *Id.* at 1075-76 (“The district court’s determination that the existing compensation

During the period between the trial and appellate court rulings in *O'Bannon*, two new lawsuits were filed against the NCAA by a group of then-current and former college football and men's and women's basketball players. Both of these new cases launched a much broader challenge against the NCAA's student-athlete compensation regulations. In *Alston v. NCAA* and *Jenkins v. NCAA*—both later consolidated in the court of Judge Wilken under the moniker *In re National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation*<sup>79</sup>—the plaintiffs contended that NCAA rules restricting schools from providing cash compensation to players constituted a form of illegal price fixing in violation of the Sherman Act.<sup>80</sup> Put differently, the cases effectively sought to force the NCAA to implement “a free market for college football and ... basketball players.”<sup>81</sup>

Although portions of these litigations were ultimately settled,<sup>82</sup> Judge Wilken eventually issued a ruling once again condemning the NCAA's athlete compensation restrictions under antitrust law.<sup>83</sup> However, because the Ninth Circuit's decision in *O'Bannon* had determined that any judicial relief “untethered” to education would be incompatible with the NCAA's tradition of amateurism, Judge

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rules violate Section 1 of the Sherman Act was correct and its injunction requiring the NCAA to permit schools to provide compensation up to the full cost of attendance was proper.”)

79. See 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, 28 (2019) (“*Alston v. NCAA* and *Jenkins v. NCAA* ... were consolidated into *In re National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation*.” (citing *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1065 n.5 (N.D. Cal. 2019))).

80. See Horton et al., *supra* note 2, at 381 (observing that the “*Jenkins* class action directly attacks the NCAA's eligibility rules” (citing Complaint, *Jenkins v. NCAA*, No. 14-01678, 2014 WL 1008526 (D.N.J. Mar. 17, 2014), ECF No. 1)).

81. Benjamin A. Tulis & Gregg E. Clifton, *Ninth Circuit Holds NCAA Subject to Antitrust Scrutiny, but Vacates Injunction Allowing up to \$5,000 Per Year Deferred Compensation to College Athletes*, NAT'L L. REV. (Oct. 1, 2015) (emphasis omitted), <http://www.natlawreview.com/article/ninth-circuit-holds-ncaa-subject-to-antitrust-scrutiny-vacates-injunction-allowing> [<https://perma.cc/P9H9-M5XK>].

82. In particular, the “plaintiffs in the *Alston* case and the NCAA reached a settlement for \$209 million to cover the additional amount that *Alston* and his colleagues might have been paid” had the NCAA moved to allow colleges to offer scholarships covering the full cost of attendance at an earlier date. Sanderson & Siegfried, *supra* note 28, at 205.

83. *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1110 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *aff'd sub nom. NCAA v. Alston*, 141 S. Ct. 2141 (2021) [hereinafter *NCAA Antitrust Litig.*].

Wilken found herself “constrained” with respect to the relief she could order the association to provide to the plaintiffs.<sup>84</sup> Consequently, Judge Wilken enjoined the NCAA from preventing its members from offering their student-athletes noncash, education-related benefits beyond their scholarships.<sup>85</sup> Such benefits, she noted, might include “computers, science equipment, musical instruments and other items not currently included in the cost of attendance calculation but nonetheless related to the pursuit of various academic studies.”<sup>86</sup> The Ninth Circuit affirmed this decision on appeal,<sup>87</sup> setting the stage for the NCAA to seek—and ultimately be granted—Supreme Court review.<sup>88</sup>

The NCAA hoped to convince the Supreme Court to rule that its athlete eligibility rules were beyond the scope of federal antitrust law.<sup>89</sup> Specifically, the association relied heavily on language from the Court’s decision in the 1984 *Board of Regents* case, where Justice Stevens wrote that “the NCAA seeks to market a particular brand of football—college football,” a hallmark of which was the expectation that the “athletes must not be paid, must be required to attend class, and the like.”<sup>90</sup> The *Board of Regents* opinion then went on to state:

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.<sup>91</sup>

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84. Gould, *supra* note 5, at 169-70.

85. NCAA Antitrust Litig., 375 F. Supp. 3d at 1109 (“Current NCAA limits on other education-related benefits that can be provided on top of a grant-in-aid are invalidated. The NCAA may not limit these benefits in the future.”).

86. *Id.* at 1088.

87. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d at 1270-71.

88. NCAA v. Alston, 141 S. Ct. 1231 (2020) (mem.), *cert. granted In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 958 F.3d 1239.

89. See NCAA v. Alston, 141 S. Ct. 2141, 2147 (2021).

90. 468 U.S. 85, 101-02 (1984).

91. *Id.* at 120.

The NCAA interpreted these passages as effectively blessing its amateurism model, thereby foreclosing any antitrust challenge to its eligibility rules.<sup>92</sup>

A unanimous Supreme Court rejected the NCAA's interpretation of *Board of Regents* in *Alston*, however.<sup>93</sup> In an opinion authored by Justice Gorsuch, the Court ruled that the language relied on by the NCAA effectively amounted to dicta, insofar as the association's television broadcast restrictions—and not its amateurism rules—had been at issue in the *Board of Regents* case.<sup>94</sup> Moreover, the Court noted that current circumstances had changed markedly, rendering any conclusions regarding the legal status of college sports in 1984 inapt today:

When it comes to college sports, there can be little doubt that the market realities have changed significantly since 1984. Since then, the NCAA has dramatically increased the amounts and kinds of benefits schools may provide to student-athletes.... Nor is that all that has changed. In 1985, Division I football and basketball raised approximately \$922 million and \$41 million respectively. By 2016, NCAA Division I schools raised more than \$13.5 billion. From 1982 to 1984, CBS paid \$16 million per year to televise the March Madness Division I men's basketball tournament. In 2016, those annual television rights brought in closer to \$1.1 billion.<sup>95</sup>

Thus, even if the *Board of Regents* Court had intended to broadly immunize the NCAA's eligibility rules from antitrust challenge, the *Alston* Court believed that the dramatically increased commercialization of the industry would have subsequently undermined the continued vitality of such a holding today.

Nor was the Court willing to create a new exemption for the NCAA out of whole cloth: "This Court has regularly refused materially identical requests from litigants seeking special dispensation

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92. See *Alston*, 141 S. Ct. at 2157-58 ("On the NCAA's telling, these observations foreclose any rule of reason review in this suit.").

93. See *id.* at 2167 (Kavanaugh, J., concurring).

94. *Id.* at 2158 (majority opinion) ("[T]hese remarks do not suggest that courts must reflexively reject *all* challenges to the NCAA's compensation restrictions. Student-athlete compensation rules were not even at issue in *Board of Regents*.").

95. *Id.* (citations omitted).

from the Sherman Act.”<sup>96</sup> Instead, the Court explained, any such grant of immunity must come from Congress.<sup>97</sup> As a result, the *Alston* Court made clear that, moving forward, all NCAA rules and regulations are subject to scrutiny under the Sherman Act.<sup>98</sup>

Nevertheless, the immediate practical effect of the Court’s majority decision in *Alston* was rather modest. Although the Court clearly ruled that the NCAA’s student-athlete compensation and eligibility rules were subject to the Sherman Act, the majority merely upheld the rather narrow relief that Judge Wilken had granted (which had itself been constrained by the Ninth Circuit’s decision in *O’Bannon*).<sup>99</sup> Indeed, the Court noted in several different passages in its opinion that it was only rendering judgment on the legality of the NCAA’s restraints on education-related benefits because the plaintiffs had declined to appeal the lower courts’ rejection of their broader attack on the NCAA’s compensation and eligibility rules.<sup>100</sup>

Justice Kavanaugh was not nearly as restrained in his concurring opinion in the case, however. Justice Kavanaugh added his concurring opinion “to underscore that the NCAA’s remaining compensation rules also raise serious questions under the antitrust laws.”<sup>101</sup> Observing that “[t]he bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year,”<sup>102</sup> Justice Kavanaugh contended that such a “business model would be flatly illegal in almost any other industry in America.”<sup>103</sup> This

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96. *Id.* at 2159.

97. *Id.* at 2160 (“The NCAA is free to argue that, ‘because of the special characteristics of [its] particular industry,’ it should be exempt from the usual operation of the antitrust laws—but that appeal is ‘properly addressed to Congress.’” (alteration in original) (quoting *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 689 (1978))).

98. *Id.* at 2159 (“[T]he NCAA itself *is* subject to the Sherman Act.”).

99. *See id.*; *O’Bannon v. NCAA*, 802 F.3d 1049, 1079 (9th Cir. 2015).

100. *See Alston*, 141 S. Ct. at 2154-55 (“For their part, the student-athletes do not renew their across-the-board challenge to the NCAA’s compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court’s judgement upholding them.... [T]he student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market.... With all these matters taken as given, we express no views on them.”).

101. *Id.* at 2166-67 (Kavanaugh, J., concurring).

102. *Id.* at 2168.

103. *Id.* at 2167.

exploitation was particularly troubling to Justice Kavanaugh in light of the fact that “the student athletes who generate the revenues” are disproportionately “African American and from lower-income backgrounds.”<sup>104</sup> Thus, Justice Kavanaugh concluded:

Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.<sup>105</sup>

Consequently, one need not read too closely between the lines of the Court’s decision in *Alston* to conclude that the NCAA’s amateurism rules are in grave danger of being struck down by the judiciary in a future lawsuit. The majority’s opinion makes clear that courts should not shield the NCAA’s amateurism model from full antitrust scrutiny when applying the Sherman Act in future cases. And Justice Kavanaugh’s concurring opinion shows that at least one member of the Court was seemingly prepared to rule that the NCAA’s entire system of amateurism ran afoul of federal antitrust law had the posture of the litigation allowed him to do so.

Indeed, the *Alston* Court’s holding that the NCAA’s athlete compensation rules are subject to full antitrust scrutiny all but spells doom for the association’s amateurism tradition. Typically, courts applying the Sherman Act to other industries have rejected noneconomic arguments related to the social welfare benefits of an otherwise anticompetitive restraint.<sup>106</sup> Applying that same line of reasoning to the NCAA, then, would suggest that any of the purported societal benefits of amateurism would now be given relatively little weight when balanced against the clear deleterious

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104. *Id.* at 2168.

105. *Id.* at 2169.

106. See Feldman, *supra* note 3, at 253-54 (“[T]he Supreme Court has consistently rejected social welfare justifications in antitrust analysis.” (citing Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA’s Amateurism Rules*, 6 VA. SPORTS & ENT. L.J. 51, 85 (2006))); Horton et al., *supra* note 2, at 384 (“The Supreme Court long has recognized that economic regulations seeking to implement the types of social and moral values and benefits that the NCAA espouses are ‘properly addressed to Congress.’” (quoting Nat’l Soc’y of Pro. Eng’rs v. United States, 435 U.S. 679, 689 (1978))).



financial impact that the association's rules have on the market for student-athletes' labor.

For its part, the NCAA appeared to immediately recognize the writing on the wall. Within days of the *Alston* ruling, the association announced it would not be promulgating any of its long-anticipated rules regulating student-athletes' monetization of their NIL rights—a decision that some commentators attributed to the fear that any such restrictions would merely invite a future antitrust challenge.<sup>107</sup> Meanwhile, the NCAA's subsequent decision to overhaul its constitution in order to decentralize and disperse its regulatory authority amongst its member institutions and conferences evidences a similar desire to avoid antitrust liability on a going-forward basis.<sup>108</sup>

Consequently, following *Alston*, it may only be a matter of time before a large swath of the college sports industry—whether voluntarily or as the result of a court order—is compelled to implement free-market competition for the services of their student-athletes. And although little doubt exists that such an outcome would be a welcome and long-overdue corrective for the NCAA's exploitative treatment of its student-athletes in the eyes of many, there are nevertheless compelling reasons to doubt whether such an outcome would ultimately prove sustainable for the industry.

### III. DECENTRALIZATION IS UNLIKELY TO FIX THE COLLEGE SPORTS INDUSTRY

As well-founded as the criticisms of the NCAA's current model of intercollegiate athletics may be, nevertheless, compelling reasons exist to believe that the association's coming decentralization—with much greater regulatory authority vested at the individual school or conference level—will fail to most effectively advance the greater

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107. See ASSOCIATED PRESS, *NCAA's Mark Emmert Says 'This Is the Right Time' to Consider Decentralized, Deregulated College Sports*, ESPN (July 15, 2021), [https://www.espn.com/college-sports/story/\\_/id/31824357/ncaa-president-mark-emmert-says-right-consider-decentralized-deregulated-college-sports](https://www.espn.com/college-sports/story/_/id/31824357/ncaa-president-mark-emmert-says-right-consider-decentralized-deregulated-college-sports) [<https://perma.cc/SWM7-XNYT>] (quoting Big 12 commissioner Bob Bowlsby as stating that the NCAA opted not to enact NIL regulations in order to “prevent us from getting sued”).

108. See, e.g., Michael McCann, *NCAA Draft Constitution Heeds Alston's Antitrust Warnings*, SPORTICO (Nov. 9, 2021, 12:30 PM), <https://www.sportico.com/law/analysis/2021/ncaa-constitution-1234646189/> [<https://perma.cc/6AZ5-37VY>] (explaining how a decentralized NCAA structure reduces the industry's potential antitrust liability).

public interest. Part of this stems from the atypical organizational structure of college athletic departments—and the unusual economic incentives that result—as discussed in Part I above.<sup>109</sup> At the same time, however, the industry also faces atypical legal constraints that will likely prevent the NCAA and its member schools from effectively adjusting to a world of increased institutional autonomy and unrestrained economic competition for the services of college athletes of the sort hinted at in *Alston*.<sup>110</sup> As a result, several undesirable implications are likely to result from the NCAA's intended decentralization of the college sports industry.

### A. *The Legal Constraints on the NCAA and Its Schools*

As discussed above, following *Alston*, any attempt by the NCAA to regulate how its member schools compensate their student-athletes will likely be met with an antitrust lawsuit, one that the association may find difficult to win given the current state of the law.<sup>111</sup> Importantly, not only does this mean that any NCAA bylaws (or other agreement between a critical mass of universities) restricting the compensation of student-athletes via non-education-related cash benefits would be at risk of being struck down in future lawsuits, so too would any attempt by the NCAA or its members to cap the amount of money its schools are permitted to collectively pay their players in a pay-for-play world.<sup>112</sup> In other words, should

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109. See *supra* Part I.

110. See *infra* Part III.A.

111. See *supra* note 106 and accompanying text (discussing how antitrust law typically disfavors arguments based on noneconomic considerations such as the alleged social value of amateurism).

112. To be sure, the Supreme Court has previously suggested that attempts to promote competitive balance among the members of a sports league would provide a potential pro-competitive justification for a challenged restraint under the rule of reason. See *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 204 (2010) (“We have recognized, for example, ‘that the interest in maintaining a competitive balance’ among ‘athletic teams is legitimate and important.” (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984))). And although an attempt to cap the ability of NCAA schools to pay their student-athletes could be viewed as a competitive-balance-enhancing measure, it seems unlikely that a court would hold that this beneficial aspect of the restraint outweighed the harm inflicted on the players. Indeed, as discussed later, U.S. professional sports leagues have only been able to impose a salary cap on their players after collectively bargaining the provision with their respective players union, thereby immunizing the provision under the nonstatutory labor exemption to the antitrust laws. See *infra* notes 115-17.

the NCAA member schools determine that some sort of salary cap (or related mechanism) is necessary to ensure a level of competitive balance amongst their teams, the industry currently lacks the lawful ability to implement any such measure.

U.S. professional sports leagues have long recognized that unrestrained competition for the services of players could have negative ramifications for the quality of their product overall, as sporting competition typically becomes less attractive to the public when the wealthiest teams are consistently able to utilize their financial advantages to acquire the services of the best (and thus, the most expensive) players.<sup>113</sup> Consequently, each of the major U.S. professional sports leagues has adopted some form of salary cap (or analogous salary restraint) to equalize the level of spending amongst their teams for competitive balance purposes.<sup>114</sup> Although

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113. See ANDREW ZIMBALIST, MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY 35 (2004) (“Conventional wisdom has it that a successful team sports league must have a healthy dose of competitive balance or parity across its teams. Without such balance, there will not be the necessary uncertainty of outcome in individual games and in seasons to maintain fan interest.”).

Admittedly, some international professional sports leagues have thrived without a salary cap, perhaps most notably England’s Premier League in soccer. Cf. Ashton E. Stine, Comment, *Unsportsmanlike Conduct—Calling a Penalty on the NFLPA and NHLPA’s Duty of Fair Representation for Entering Players*, 24 CHAP. L. REV. 303, 310 (2020) (“The salary control exhibited in American sports can be contrasted with the five major European soccer leagues: England’s Premier League, Italy’s Serie A, Spain’s La Liga, Germany’s Bundesliga, and France’s Ligue 1, which all lack a salary cap or luxury tax structure, resulting in staggering salary inequality.” (citing *Global Sports Salaries Survey 2018*, SPORTING INTEL. (Nov. 25, 2018), <https://globalsportssalaries.com/GSSS%202018.pdf> [<https://perma.cc/KQX9-GCJ7>])). Be that as it may, the even greater deficit spending patterns that are likely to emerge from unrestrained free-market competition for the services of student-athletes in the U.S. college sports industry raises a number of different policy concerns due to their resulting implications for the higher education industry as a whole. See *infra* Part III.B.

114. See Thomas M. Schiera, Note, *Balancing Act: Will the European Commission Allow European Football to Reestablish the Competitive Balance that It Helped Destroy?*, 32 BROOK. J. INT’L L. 709, 722, 724 (2007) (“All four major professional sports leagues in the United States have some form of salary cap.” (footnote omitted)). Although professional baseball players have famously avoided the implementation of an actual salary cap in their league, Major League Baseball’s luxury tax penalizes teams for spending over a certain amount of money each year on player salaries and thus has effectively served to deter teams from spending too much on their team payroll. See Matthew J. Parlow, *Restarting Professional Sports During a Global Pandemic*, 59 U. LOUISVILLE L. REV. 227, 236 (2021) (“MLB does not have a salary cap but does impose a luxury tax, which it refers to as the competitive balance tax, to achieve its parity goals.” (citing Brett Pollard, Note, *Creating Economic Equality Among Major League Baseball Franchises: The Removal of Major League Baseball’s Archaic Antitrust Exemption*, 18 TEX. REV. ENT. & SPORTS L. 49, 50-51 (2016))).

such an agreement among thirty or more independently owned and operated businesses to restrain the pay of their employees would normally be a clear violation of the Sherman Act, these leagues are nevertheless able to legally impose such salary restraints under a legal doctrine known as the nonstatutory labor exemption.<sup>115</sup> Specifically, the nonstatutory exemption generally shields employment-related restraints from antitrust scrutiny so long as the affected employees have agreed to the restrictions through their certified union and the collective bargaining process.<sup>116</sup> In the case of a salary cap, because professional players have consented to these restraints as part of their validly negotiated collective bargaining agreement with the league's ownership, these salary restrictions can no longer be challenged under the Sherman Act.<sup>117</sup>

Unfortunately for the NCAA and its members, there are several reasons why collective bargaining does not offer a realistic path forward for the negotiation of a salary cap with their student-athletes.<sup>118</sup> First, the National Labor Relations Act—the statutory provision creating a right to unionize and collectively bargain<sup>119</sup>—generally applies only to those workers who are characterized as “employees” under the law.<sup>120</sup> Federal courts have, to date,

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115. Sean W.L. Alford, Comment, *Dusting Off the AK-47: An Examination of NFL Players' Most Powerful Weapon in an Antitrust Lawsuit Against the NFL*, 88 N.C. L. REV. 212, 232 (2009) (“Salary caps in sports leagues have rarely been considered under antitrust scrutiny due to courts’ rigorous application of the nonstatutory labor exemption.” (first citing *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996); then citing *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 959 (2d Cir. 1987); and then citing *Nat’l Basketball Ass’n v. Williams*, 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994), *aff’d*, 45 F.3d 684 (2d Cir. 1995))).

116. See *Clarett v. Nat’l Football League*, 369 F.3d 124, 130-31 (2d Cir. 2004) (explaining that the nonstatutory labor exemption is intended “to allow meaningful collective bargaining to take place” by protecting “some restraints on competition imposed through the bargaining process” from antitrust scrutiny” (quoting *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996))).

117. See *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 959 (2d Cir. 1987) (rejecting a challenge to the NBA’s salary cap in light of the nonstatutory labor exemption).

118. See Meyer & Zimbalist, *supra* note 46, at 52 (observing that “collective bargaining” in the college sports industry “seems beyond reach”).

119. See Hannah Esquenazi, Note, *Who Can “Seize the Day?”: Analyzing Who Is an “Employee” for Purposes of Unionization and Collective Bargaining Through the Lens of the “Newsie” Strike of 1899*, 59 B.C. L. REV. 2551, 2551 (2018) (“[T]he National Labor Relations Act (NLRA) ... protect[s] employees’ rights to unionize, collectively bargain, and strike.”).

120. *Id.* at 2553 (noting that “the question of whether workers constituted ‘employees’ has historically “decided whether they could form a union and bargain with their employer” (quoting National Labor Relations Act § 7, 29 U.S.C. § 157 (2018))).

consistently ruled that NCAA student-athletes are not employees of their universities,<sup>121</sup> and therefore these players would not be eligible to unionize to negotiate terms with the NCAA or its schools.<sup>122</sup> Without a union, then, there is no path forward for the NCAA to rely on the nonstatutory labor exemption.

Second, even if NCAA players were legally considered to be employees of their universities, only those student-athletes enrolled at certain Division I schools would be eligible to unionize. The National Labor Relations Board (NLRB) specifically excludes employees of state and local governmental entities from its coverage, so its unionization provisions would only apply to student-athletes “employed” by private universities.<sup>123</sup> Meanwhile, the right of public employees to unionize is instead governed by the provisions of each respective state’s own constitution and labor laws.<sup>124</sup>

Thus, even if student-athletes were characterized as employees, only those players enrolled at one of the seventeen private institutions within the NCAA’s Division I, along with those playing for state universities in jurisdictions allowing public-sector unions, would have the right to collectively bargain. Consequently, although a professional league can negotiate a single collective bargaining agreement with all of its players—thereby placing all of its teams on equal competitive footing—any collectively bargained caps on student-athlete compensation in the college sports industry would at most apply only to a subset of schools, preventing the NCAA from implementing uniform rules across its membership. This limitation would, in turn, substantially limit the effectiveness of any such salary restraints from a competitive-balance standpoint.

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121. See, e.g., *Berger v. NCAA*, 843 F.3d 285, 288 (7th Cir. 2016); *Dawson v. NCAA*, 250 F. Supp. 3d 401, 403 (N.D. Cal. 2017), *aff’d*, 932 F.3d 905 (9th Cir. 2019).

122. For its part, the National Labor Relations Board (NLRB) has officially remained noncommittal on the question of student-athletes’ employment status, as discussed in greater detail below. See *infra* notes 128-31 and accompanying text.

123. See 29 U.S.C. § 152(2) (excluding employees of state and local government from NLRA protection).

124. See Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1009 (2012) (stating that “state labor law dictates whether” public employees of state governments have a right to unionize (first citing 29 U.S.C. § 152(2) (2006); and then citing Leroy D. Clark, *New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 HOW. L.J. 259, 278 n.53 (1993))).

The impracticality of the potential unionization of NCAA student-athletes was highlighted in the matter of *Northwestern University & College Athletes Players Ass'n*, a proceeding arising from the attempted unionization of Northwestern University's scholarship football players.<sup>125</sup> In that case, a regional office of the NLRB had initially ruled that scholarship football players were employees of Northwestern because the school closely controlled the players' daily schedules and expressly conditioned their continued scholarship eligibility (that is, "compensation") on the players performing forty to fifty hours of football-related activity per week during the season.<sup>126</sup> As a result, the regional office allowed an election to be held to determine whether a majority of the Northwestern football team supported the unionization effort.<sup>127</sup>

The regional NLRB decision was appealed to the national office.<sup>128</sup> There, the full NLRB declined to resolve the question of whether the Northwestern players were properly characterized as employees of the university, instead declining to assert jurisdiction over the case on the grounds that subjecting college sports to federal labor law "would not effectuate the purposes of the [NLRA]."<sup>129</sup> Specifically, the NLRB feared that even though only a portion of student-athletes would be eligible to collectively bargain with their universities—due to the restrictions placed on the unionization of state employees discussed above<sup>130</sup>—any terms one school and its players negotiated would inevitably have ramifications for other institutions by specifying rules relating to the playing conditions for athletic competition.<sup>131</sup> Recognizing that "such an arrangement [would]

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

126. Decision and Direction of Election at 2, 5-6, Nw. Univ. & Coll. Athletes Players Ass'n, No. 13-RC-121359 (N.L.R.B. Mar. 26, 2014); see also 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, 1637-39 (2017) (summarizing the regional decision).

127. See Michael H. LeRoy, *How a "Labor Dispute" Would Help the NCAA*, 81 U. CHI. L. REV. ONLINE 44, 44 (2014), [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1026&context=uclev\\_online](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1026&context=uclev_online) [<https://perma.cc/RS2U-5WB2>] (reporting that the NLRB's "regional director determined that Northwestern University football players" were "eligible to vote in a union-representation election").

128. *Northwestern*, 362 N.L.R.B. at 1350.

129. *Id.*

130. See *supra* notes 123-24 and accompanying text.

131. *Northwestern*, 362 N.L.R.B. at 1354 ("Many terms applied to one team therefore would

seemingly [be] unprecedented” in the sports industry, the Board concluded that this outcome “would not promote stability in labor relations.”<sup>132</sup> As a result, the Board rejected the Northwestern unionization effort.<sup>133</sup>

Consequently, unlike their professional counterparts, the NCAA and its member institutions find themselves in an unusual legal posture, one in which any attempt to apply consistent spending limits across competing teams is, in effect, legally untenable.<sup>134</sup> Because collective bargaining is not presently an option—and even if it were, would only apply on an uneven, institution-by-institution basis—the NCAA cannot rely on the nonstatutory labor exemption to shield any spending caps that it may wish to place on its membership from an antitrust challenge.<sup>135</sup> Thus, any attempt to enhance competitive balance by imposing a salary cap (or similar restraint) in a future pay-for-play world would, post-*Alston*, likely be struck down as an illicit restraint of trade under the Sherman Act.

At the same time, the present inability of student-athletes to unionize will also hamper any efforts to impose industry-wide reforms better protecting the players’ educational and medical interests. Because student-athletes cannot currently bargain collectively for additional protections in these areas, any hope for industry-wide reform rests with the NCAA. However, with the association poised to cede substantial portions of its rulemaking power back to individual universities and conferences, the industry’s coming decentralization will make it harder to impose safeguards applicable to all NCAA schools in the future.<sup>136</sup> Although some

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likely have ramifications for other teams.”).

132. *Id.*

133. *Id.* at 1355-56. Although the NLRB’s new general counsel under the Biden administration has recently suggested that a reconsideration of this decision may be in order, see David W. Chen, *Labor Memo Amounts to New Stance from Feds Against the N.C.A.A.*, N.Y. TIMES (Sept. 29, 2021), <https://www.nytimes.com/2021/09/29/sports/ncaafootball/ncaa-labor-memo-student-athletes-unionize.html> [<https://perma.cc/N6CA-LLBN>] (“Jennifer A. Abruzzo, the N.L.R.B.’s general counsel ... warned in a memo ... that universities ‘misclassifying such employees as mere “student-athletes” could be threatened with legal action for creating a ‘chilling effect’ on athletes who wanted to organize.”), the underlying pragmatic concerns regarding stability in labor relations expressed by the full NLRB in the *Northwestern* case nevertheless remain.

134. See Fram & Frampton, *supra* note 124, at 1009.

135. See *Clarett v. Nat’l Football League*, 369 F.3d 124, 130-31 (2d Cir. 2004).

136. See *supra* note 17 and accompanying text.

individual universities or conferences may elect to impose such reforms on themselves voluntarily, history would suggest that many others will fail to do so, instead choosing to prioritize competitive success on the playing field.<sup>137</sup> As a result, although the coming changes to the college sports industry will likely result in greater economic competition between schools, this transformation is unlikely to resolve many of the other commonly criticized aspects of the current system.

*B. The Likely Implications of Decentralization and Unrestrained Salary Competition for College Sports*

The foregoing analysis has established three key points: (1) the college sports industry's unusual industrial organization—featuring nonprofit organizations engaged in fierce, zero-sum competition— incentivizes many schools to both spend far greater resources on their athletic departments than those sports programs generate and deemphasize their student-athletes' best educational and health interests;<sup>138</sup> (2) following *Alston*, any attempt by the NCAA to restrict its member schools from providing monetary compensation to their student-athletes is highly vulnerable to being successfully challenged under antitrust law;<sup>139</sup> and (3) structural legal constraints prevent NCAA schools from collectively bargaining with players to implement measures to restrict and equalize spending of the sort that have been widely adopted and viewed as essential by the U.S. professional sports leagues, or that would better protect the educational and medical well-being of student-athletes on an industry-wide basis.<sup>140</sup>

Taken together, these observations would suggest that the NCAA's planned decentralization—and the relaxing of restrictions on student-athlete compensation that will presumably follow—will likely trigger several undesirable implications. First, as noted above, any industry-wide reforms protecting student-athletes' educational and medical interests will likely prove harder to obtain, as it will fall to individual conferences and schools to overcome the

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137. See *supra* notes 59-66 and accompanying text (discussing historical examples).

138. See *supra* Part I.

139. See *supra* notes 97-98 and accompanying text.

140. See *supra* Part III.A.



countervailing competitive concerns in order to implement such measures.<sup>141</sup>

Second, the resulting increase in financial competition between schools for the services of prospective student-athletes—and especially those in the highest-profile sports—can also be expected to result in several other arguably less-than-desirable implications for society (despite the benefits that may flow to those players the NCAA’s amateurism model currently exploits). Specifically, should the NCAA allow its schools to pay their players, one would expect that the wealthiest athletic programs—those roughly two dozen that turn a profit on their sports teams each year<sup>142</sup>—would quickly move to parlay their existing financial advantages into even greater competitive advantages on the playing field.<sup>143</sup> As a result, one could reasonably anticipate that a shift to a pay-for-play model in college athletics would further exacerbate the industry’s existing competitive disparities (in which a handful of historically dominant programs already win a disproportionate amount of their games).<sup>144</sup> This would inflict a societal cost by threatening to further decrease the attractiveness of a historically popular and culturally embedded form of entertainment.<sup>145</sup>

Less financially successful athletic programs would thus, in turn, be faced with two suboptimal choices: either unilaterally relent, thereby ceding a permanent competitive advantage to the richest programs, or else place even greater financial demands on their

141. See Nw. Univ. & Coll. Athletes Players Ass’n, 362 N.L.R.B. 1350, 1354 (2015).

142. See Mitten & Ross, *supra* note 34, at 846.

143. See Sanderson & Siegfried, *supra* note 28, at 191 (“Small differences in spending can yield large advantages in recruiting and subsequently in winning. Unsuccessful programs have little choice but to ratchet up spending, or they may fall even farther behind in the competition for players and coaches, with devastating effects on their revenues.”).

144. See McDavis, *supra* note 39, at 282-83 (“[U]nbridled competition ... can lead to an environment that lacks competitive balance—where a few teams dominate all others.” (citing Stefan Szymanski, *The Sporting Exception and the Legality of Restraints in the US*, in HANDBOOK ON THE ECONOMICS OF SPORTS 730, 730 (Edward Elgar 2006))).

145. To be sure, some would undoubtedly argue that substantial competitive imbalance already exists in college sports. See, e.g., Neal Newman, *Let’s Get Serious—The Clear Case for Compensating the Student Athlete—By the Numbers: A University of Michigan Athletic Program Case Study*, 51 N.M. L. REV. 37, 54 (2021) (“The fact of the matter is that a disproportionate distribution of talent *already* exists.”). Although this may be true, the addition of unregulated cash payments to players to the mix is only likely to expand the gap between the handful of richest and most historically dominant programs and the rest of the field, further exacerbating the already existing competitive dynamics.

already strained budgets in an effort to keep pace with their rivals. Considering the immense pressure that college administrators face to field winning athletic programs,<sup>146</sup> relatively few schools are likely to opt for the first option. Instead, many Division I universities would undoubtedly elect to attempt to continue to compete with their wealthier counterparts by offering similar financial packages to prospective student-athletes.

This competition would force these more budget-strapped programs to try to address any new cost overruns in one of two ways. First, schools could elect to cover some of the added cost imposed by an unregulated pay-for-play regime by diverting a greater share of their general university operating budgets to their athletic departments.<sup>147</sup> In many cases, these costs will ultimately be recouped through increases in tuition and fees for the schools' general student population,<sup>148</sup> further exacerbating the existing college tuition and student-debt crises.<sup>149</sup>

Alternatively, schools could attempt to make room in their existing athletic budgets by repurposing some of their current expenditures to help offset the cost of additional financial compensation for their student-athletes.<sup>150</sup> For instance, one might anticipate that some schools would opt to shift a portion of the money they already spend on their football programs—whether for coaching salaries or other amenities provided to their student-athletes—in order to cover the cost of providing cash compensation to their

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146. See *supra* note 53 and accompanying text; see also Zimbalist, *supra* note 35 (observing that university athletic “programs ... have stakeholders (boosters, alumni, state legislators, students) pressuring for victories”).

147. See Sanderson & Siegfried, *supra* note 28, at 190 (noting that U.S. colleges and universities already collectively transfer more than \$1 billion per year in general student fees and tuition to their athletic departments).

148. Cf. McDavis, *supra* note 39, at 280 (reporting that 90 percent of Division I schools already subsidize their athletic departments from general university funds (citing Phil Mushnick, *Colleges Cutting Sports for ‘Revenue’ Doesn’t Add Up at All*, N.Y. POST (Dec. 28, 2013, 6:27 PM), <https://nypost.com/2013/12/28/colleges-cutting-sports-for-revenue-doesnt-add-up-at-all/>)).

149. See, e.g., Camilla E. Watson, *Federal Financing of Higher Education at a Crossroads: The Evolution of the Student Loan Debt Crisis and the Reauthorization of the Higher Education Act of 1965*, 2019 MICH. ST. L. REV. 883, 976 (acknowledging the “high cost of tuition, and crisis level student loan debt”).

150. See Newman, *supra* note 145, at 41 (contending that “sharing, prioritizing, and re-allocating” existing funds would allow athletic departments to compensate student-athletes).

football players.<sup>151</sup> Again, however, the wealthiest and most successful programs would likely view this as an opportunity to flex their financial muscle and further separate themselves from the pack on the playing field by forgoing any such accompanying budget reductions. As a result, many budget-challenged programs may be reluctant to cede too much ground in one area—such as coaching salaries—simply to keep pace in another.

Realistically, then, rather than simply elect to absorb the cost of paying their athletes in a particular sport exclusively by reallocating a portion of their team's existing budget, many schools would instead likely look to achieve cost savings in other areas to support additional expenditures for the highest-profile sports. One of the most likely ways that schools would achieve these budget cuts would be to eliminate several less popular, non-revenue-generating sports teams (such as track and field, swimming, field hockey, et cetera).<sup>152</sup> Indeed, history has shown that when facing financial challenges in their athletic departments, universities will seldom elect to substantially cut the budget of their football or men's basketball programs; instead, they typically reduce these budgetary pressures by eliminating one or more of their less popular teams.<sup>153</sup>

Although reasonable minds can certainly disagree on the extent to which universities ought to be expending hundreds of thousands (or millions) of dollars on sports programs that fail to generate self-supporting revenue,<sup>154</sup> any significant reduction in the number of nonrevenue sports teams U.S. colleges and universities field would

151. *See id.*

152. *Cf.* Dillon J. Besser, Note, *The Forgotten Party in O'Bannon v. National Collegiate Athletic Association: How Non-Revenue Sports Operate in a Changing Intercollegiate Marketplace*, 101 IOWA L. REV. 2105, 2131 (2016) (referencing a warning by "Pac-12 Commissioner Larry Scott ... that compensating athletes in the major sports could [lead to] the demise of non-revenue sports" (citing Jon Solomon, *If Football, Men's Basketball Players Get Paid, What About Women?*, CBS SPORTS (June 5, 2014, 5:52 AM), <https://www.cbssports.com/college-football/news/if-football-mens-basketball-players-get-paid-what-about-women/>)).

153. *See id.* at 2125 (observing that "some Division I institutions" elected to "eliminat[e] some sports programs" in order to cover the cost of the "change to [full] cost-of-attendance scholarships"); McDavis, *supra* note 39, at 280-81 (listing examples of nonrevenue sports being cut to offset budget deficits).

154. *Compare* Ross, *supra* note 2, at 950 (contending that schools should not offer athletic scholarships or robust coaching for sports that do not turn a profit), *with* McDavis, *supra* note 39, at 334-35 (discussing the ancillary benefits provided by non-revenue-generating sports programs).

have several notable policy implications. First, such a reduction would have important, but often overlooked, ramifications for the nation's current Olympic training model. Indeed, the United States Olympic & Paralympic Committee relies heavily on the intercollegiate athletics industry to prepare and train the nation's Olympic athletes for competition in a variety of traditionally non-revenue-generating sports.<sup>155</sup> Therefore, any significant reduction in the number of nonrevenue sports teams could meaningfully impact the nation's current Olympic training model, forcing the country to explore alternative methods of preparing its athletes for competition in high-profile Olympic sports such as swimming and track and field. At the same time, such a reduction would also threaten to reduce access to education in at least some student-athlete populations, thereby decreasing the availability of opportunities for these athletes to "leverage their athletic abilities into academic achievement that might otherwise be unavailable to them."<sup>156</sup>

Consequently, the introduction of unregulated "pay-for-play" in college sports can reasonably be anticipated to carry with it some combination of the following, arguably less-than-desirable, implications for society. First, the introduction of additional financial competition among schools will likely further degrade the industry's existing level of competitive balance on the playing field.<sup>157</sup> Second, at least some schools are likely to cover any resulting new cost overruns, at least in part, through greater reallocations of their general operating budgets—costs that will, in many instances, ultimately be passed on to the institutions' general student populations in the forms of higher tuition and/or student fees.<sup>158</sup> And finally, these new costs can be expected to lead to a further reduction in nonrevenue sports, which will present challenges to the

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155. See Dionne L. Koller, *A Twenty-First-Century Olympic and Amateur Sports Act*, 20 VAND. J. ENT. & TECH. L. 1027, 1039 (2018) ("[M]any Olympic athletes are drawn from intercollegiate sports." (citing *Student-Athletes at the 2018 Winter Olympics*, NCAA (Feb. 6, 2018, 8:48 AM), <https://www.ncaa.org/sports/2018/2/6/student-athletes-at-the-2018-winter-olympics.aspx> [<https://perma.cc/PW5L-Z23J>])); Dionne L. Koller, *How the Expressive Power of Title IX Dilutes Its Promise*, 3 HARV. J. SPORTS & ENT. L. 103, 133 (2012) ("[M]embers of Congress and sports leaders [have] express[ed] the sentiment that educational institutions have an important role to play in training Olympic athletes.").

156. Mitten & Ross, *supra* note 34, at 854.

157. See *supra* notes 142-45 and accompanying text.

158. See *supra* notes 146-53 and accompanying text.

nation's existing Olympic training model as well as efforts to expand educational opportunity via intercollegiate athletics.<sup>159</sup>

Of course, one could reasonably dispute whether any of these countervailing policy ramifications outweigh the gains that salary competition in the college sports industry would provide to those student-athletes economically exploited by the current system. Indeed, striking a socially optimal balance between the various implications of a pay-for-play model for the college sports industry is an especially difficult task, one that may regrettably be beyond the reach of the judiciary, given the current contours of the law.<sup>160</sup> As a result, then, this would appear to be an area ripe for legislative intervention and reform.<sup>161</sup>

#### IV. THE CASE FOR A CONDITIONAL ANTITRUST EXEMPTION FOR THE NCAA

Although the foregoing analysis has highlighted the need for legislative reform of intercollegiate athletics, there is considerable reason to doubt whether Congress will come to the NCAA's aid in the aftermath of the Supreme Court's decision in *Alston*. As sports columnist Andy Staples has noted, "one of the few things Republicans and Democrats can agree on is their hatred of the NCAA."<sup>162</sup> Indeed, the current system's perceived exploitation of student-athletes—many of whom are students of color coming from underprivileged backgrounds—would seemingly resonate with those on both the political left (from a social-justice perspective) and right (by distorting both the right to contract and free-market capitalism).<sup>163</sup>

159. See *supra* notes 152-53, 155-56 and accompanying text.

160. Cf. Mitten & Ross, *supra* note 34, at 861 (explaining why courts applying antitrust law cannot "meaningfully deal with ways in which non-commercial firms may act contrary to the public interest").

161. See *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1008-09 (N.D. Cal. 2014) ("[P]erceived inequities in college athletics and higher education generally, could be better addressed as a policy matter."), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015)); see also Meyer & Zimbalist, *supra* note 46, at 51-52.

162. Andy Staples, *Why the NCAA Is Taking a Massive Step Just by Discussing Athletes' Path to Profit*, SPORTS ILLUSTRATED (May 14, 2019), <https://www.si.com/college/2019/05/14/ncaa-working-group-schools-compensation-options-for-athletes> [<https://perma.cc/C765-TWJ9>].

163. Compare Erin E. Buzuvis, *Athletic Compensation for Women Too? Title IX Implications of Northwestern and O'Bannon*, 41 J. COLL. & U.L. 297, 307 (2015) ("These arguments take on a race and class dimension as well, since the NCAA's amateurism policy is

Nevertheless, recent public opinion polling data suggests that a substantial portion of the American public would oppose the introduction of unfettered “pay-for-play” to the college sports industry. Although approximately half of all Americans now support allowing student-athletes to receive greater compensation, 60 percent nevertheless “believe compensation or sponsorships should be capped to protect the amateur nature of college sports.”<sup>164</sup>

Meanwhile, the foregoing analysis has also established that there are significant reasons to doubt whether NCAA schools could successfully adjust to free-market competition for the services of their players in an economically efficient or sustainable manner.<sup>165</sup> Even two of the NCAA’s harshest judicial critics—Justice Kavanaugh and Judge Wilken—have both suggested that this is an area in which federal legislation could be warranted.<sup>166</sup> So although the NCAA appears to be heading down the path advocated by some commentators and college sports administrators who believe that the optimal social policy would be to give universities greater leeway to determine the applicable rules at their respective conference level—thereby forcing these conferences to compete in the marketplace for the services of players and attention of

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particularly harmful to athletes who are recruited out of poverty and who, owing to systemic discrimination, have lacked access to educational resources prior to attending college.” (first citing Amy Christian McCormick & Robert A. McCormick, *Race and Interest Convergence in NCAA Sports*, 2 WAKE FOREST J.L. & POL’Y 17, 24-25 (2012); then citing Erin E. Buzuvis, *Title IX Feminism, Social Justice, and NCAA Reform*, 5 FREEDOM CTR. J. 101, 112-14 (2014); then citing Taylor Branch, *The Shame of College Sports*, ATL. MONTHLY, Oct. 2011, at 80, 83, <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>; and then citing BILLY HAWKINS, *THE NEW PLANTATION: BLACK ATHLETES, COLLEGE SPORTS, AND PREDOMINANTLY WHITE NCAA INSTITUTIONS* 14-15 (2010)), with David French, *Championship Monday, Brought to You by the Oppressive Progressives at the NCAA*, NAT’L REV. (Apr. 4, 2016, 6:39 PM), <https://www.nationalreview.com/2016/04/ncaa-student-athletes-exploitation-conservative-issue/> [<https://perma.cc/JF55-VQSQ>] (stating the conservative case for NCAA reform).

164. *50 Percent of Americans Support Compensation for College Athletes*, TIPP ONLINE (Jan. 14, 2021), <https://www.tipponline.com/article/50-percent-of-americans-support-compensation-for-college-athletes> [<https://perma.cc/GQ37-BU7C>].

165. See *supra* Parts III.A & III.B.

166. *NCAA v. Alston*, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring) (acknowledging the “difficult questions” that could arise from full-throated competition for the services of NCAA student-athletes, and suggesting that “[l]egislation would be one option” to resolve these matters); *O’Bannon v. NCAA*, 7 F. Supp. 3d at 1008-09 (“[P]erceived inequities in college athletics and higher education generally, could be better addressed as a policy matter.... Such reforms and remedies could be undertaken by ... Congress.”).

fans<sup>167</sup>—there are compelling reasons to doubt whether such a restructuring will, on the whole, prove as effective as these reformers believe. Thus, this Article contends that Congress should intervene by granting the NCAA a conditional antitrust exemption and proposes two alternative paths such legislation could follow.

### A. *The Theoretical Basis for an NCAA Antitrust Exemption*

To begin, there is little doubt that Congress possesses the power to legislatively reform intercollegiate athletics.<sup>168</sup> Both the college sports industry and higher education more generally are already (in some cases, highly) regulated by the federal government.<sup>169</sup> Indeed, Congress’s decision to eschew free-market principles by requiring colleges and universities to provide equal athletic opportunity to women via the historic Title IX legislation has—despite its many beneficial aspects—helped contribute to the budgetary pressures currently afflicting most major college sports programs.<sup>170</sup>

And although U.S. antitrust law and policy are generally premised on the belief that “competition is the best method of allocating resources” across the nation’s economy,<sup>171</sup> commentators have identified three situations that may nevertheless warrant the creation of some form of antitrust exemption: (1) natural monopoly, (2) market failure, and (3) the subsidization of certain socially

167. See generally Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RESV. L. REV. 61, 97 (2013) (advocating for conference-level governance); Kreher, *supra* note 17, at 81-86 (advocating for the same).

168. See, e.g., Mitten & Ross, *supra* note 34, at 868 (contending that Congress “ha[s] the power to exempt specific private economic conduct from the federal antitrust laws” in order “to protect public welfare”).

169. See Meyer & Zimbalist, *supra* note 46, at 58 n.147 (observing that “regulating college athletics including eligibility, scholarships, scheduling, and spending is not so different from regulating college financial assistance such as covered in the Higher Education Act” or “gender equality in college sports” under Title IX).

170. Cf. Jennifer R. Capasso, Note, *Structure Versus Effect: Revealing the Unconstitutional Operation of Title IX’s Athletics Provisions*, 46 B.C. L. REV. 825, 841 (2005) (“[Recent] trend[s] in case law and Title IX interpretation, coupled with the intense pressures to reduce athletic budgets, ha[ve] caused institutions to resort to cutting only men’s teams in order to remain compliant with Title IX.” (first citing *Mia. Univ. Wrestling Club v. Mia. Univ.*, 302 F.3d 608, 611 (6th Cir. 2002); then citing *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 635 (7th Cir. 1999); and then citing *Kelley v. Bd. of Trs.*, 35 F.3d 265, 269 (7th Cir. 1994))).

171. *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 695 (1978).

desired activities.<sup>172</sup> Arguably, all three bases help support the creation of a limited, conditional antitrust exemption for the NCAA today.

### 1. *Natural Monopoly*

A natural monopoly has been classically defined as an industry in which “the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more.”<sup>173</sup> Although the NCAA may not, strictly speaking, meet this prototypical definition, a variety of economists and legal commentators have noted over the years that sports leagues nevertheless exhibit similar characteristics to natural monopolies in at least some respects.<sup>174</sup> Indeed, history has shown that the existence of multiple competing professional leagues in a single sport has proven unsustainable, insofar as the public “prefer[s] to watch the best players compete” with one another in competition that ultimately culminates in a single, unified championship team being crowned.<sup>175</sup>

The intercollegiate athletics industry exhibits similar preferences and pressures, with the history of the sport of college football serving as an illustrative example. Because the NCAA has never organized a national championship tournament for the upper tier of Division I football-sponsoring institutions, the major college football postseason has always been structured around a series of year-end bowl games pitting two schools’ teams against one another in

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172. See A.B.A. SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 53 (2007); see also Lazaroff, *supra* note 70, at 241 (citing ABA’s 2007 monograph).

173. Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548 (1969).

174. See PAUL C. WEILER, LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS 330 (2000) (noting “the arguably *natural* monopoly status of any major league sport”); Walter C. Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. ECON. 1, 4 (1964) (stating that from an economics perspective, “the theoretical conclusion is clear: each professional sport is a natural monopoly”); Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U.L. REV. 889, 899 (1999) (“[L]eagues should be viewed as ‘natural monopolies’ which have gained their market dominance by establishing the most efficient means of delivering their products to consumers.”).

175. Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH. & LEE L. REV. 573, 634 (2015) (discussing historical examples).



matchups held in various tourist-friendly destinations.<sup>176</sup> Up until the 1990s, no mechanism existed to ensure that the top two teams in the country were paired against one another in a season-ending bowl game, meaning that on a number of occasions, two or more teams could credibly stake some claim to that year's "national championship."<sup>177</sup> Eventually, public outcry over such an unsatisfactory conclusion to the season grew to a crescendo, resulting in the formation of various mechanisms—first the two-team Bowl Championship Series (BCS) national championship game, and presently the four-team College Football Playoff (CFP)—to ensure that the nation's best teams would face off at the end of each season, allowing an undisputed national champion to be crowned.<sup>178</sup>

In order for such a season-ending championship to be staged—whether in football, basketball, or any other NCAA sport—some meaningful level of coordination between the participating universities (or their conferences) is necessary. At a bare minimum, this requires the competing schools to agree on a time and place to play the championship game as well as a common set of playing rules to govern the competition. Similarly, some selection criteria must be agreed upon and applied in order to identify the teams that will compete.

To be sure, many of these basic agreements would undoubtedly be upheld as lawful under full antitrust scrutiny insofar as they are necessary to produce a beneficial joint product amongst competing schools.<sup>179</sup> But to the extent that the industry determines that it needs to go further to ensure that teams are competing on a

176. Cf. Dylan Williams & Chad Seifried, *The Taxing Postseason: The Potential Impact of Unrelated Business Income Taxation on College Football Bowl Organizers*, 23 J. LEGAL ASPECTS SPORT 72, 72 (2013) (“[B]owl games are postseason contests created to reward those institutions that completed a successful regular season in the Division I FBS.”).

177. See Joy Blanchard, *Flag on the Play: A Review of Antitrust Challenges to the NCAA. Could the New College Football Playoff Be Next?*, 15 VA. SPORTS & ENT. L.J. 1, 24 (2015) (“From 1946 to 1991, the top two collegiate football teams in the country played one another at the end of the season a mere nine times.” (citing Eric Thieme, Note, *You Can't Win 'Em All: How the NCAA's Dominance of the College Basketball Postseason Reveals There Will Never Be an NCAA Football Playoff*, 40 IND. L. REV. 453, 459 (2007))).

178. See *id.* at 25-32 (recounting history).

179. Cf. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 202 (2010) (“The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions.”).

relatively equal playing field in order to guarantee that the resulting competition is as compelling as possible for the viewing public, then, following *Alston*, some level of antitrust protection will likely prove necessary. Indeed, U.S. professional sports leagues have long recognized that some sort of spending controls are needed in order to maintain a sufficient level of competitive balance between their teams.<sup>180</sup> Because major college football has historically lacked any such overall spending limits, many believe that the sport is already suffering from a lack of competitive balance.<sup>181</sup> In the CFP era, just four universities—Alabama, Clemson, Ohio State, and Oklahoma—have dominated the competition, filling seventeen of the total twenty-four playoff slots available during the first six years of the current system’s existence.<sup>182</sup> The introduction of additional financial competition between schools for the services of their players following *Alston* is only likely to further this trend. Thus, in addition to the basic agreements relating to the time and place of any championship competition, some level of spending controls may well also prove necessary in a post-*Alston* world in order to provide the most compelling competition possible and prevent a small handful of universities from consistently dominating the field.

Therefore, although the college sports industry may not meet the traditional definition of a natural monopoly, it nevertheless exhibits some similar characteristics. No single university—or small group of schools—acting alone can provide the season-ending, national championship competition demanded by the market. But to make

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180. Cf. Nathaniel Grow, *Free Agency for the Front Office: How Data Analytics and Noncompete Agreements Threaten to Disrupt Competitive Balance in U.S. Professional Sports Leagues*, 58 AM. BUS. L.J. 121, 122 (2021) (“U.S. professional sports leagues have traditionally attempted to maintain a sufficient level of competitive balance amongst their franchises by implementing measures intended to help equalize the level of playing talent spread across the league’s teams (including measures such as salary caps and player drafts).”).

181. See, e.g., Austin Pert, *Is a Lack of College Football Parity Hurting Television Ratings?*, BUS. COLL. SPORTS (Jan. 20, 2021), <https://businessofcollegesports.com/television/is-a-lack-of-college-football-parity-hurting-television-ratings/> [<https://perma.cc/L3PR-9Y2J>] (analyzing data suggesting the same).

Indeed, such success is likely to form a self-perpetuating cycle, in which a team is able to reinvest the additional revenues generated during its championship-winning season to further improve its program, thereby further separating it from much of the rest of the competition.

182. See Chuck Culpepper, *The College Football Playoff Has Become an Exclusive Club. West Coast Schools Not Invited*, WASH. POST (Dec. 18, 2020), <https://www.washingtonpost.com/sports/2020/12/18/cfp-alabama-clemson-ohio-state/> [<https://perma.cc/72Y7-TUH8>].

such competition as consistently entertaining and compelling as possible, schools will likely need to coordinate in ways that, following *Alston*, may run afoul of antitrust law.

## 2. Market Failure

Meanwhile, a second context that has been found to justify a statutory exemption from antitrust law in some cases is when an industry exhibits some form of market failure.<sup>183</sup> Generally speaking, market failure “occurs when some characteristic of the market itself prevents competition from working properly,”<sup>184</sup> such as by failing to “sustain ‘desirable’ activities or to estop ‘undesirable’ activities.”<sup>185</sup> One such potential form of market failure is an industry exhibiting characteristics of “ruinous competition,”<sup>186</sup> in which vigorous competition between firms will all but inevitably prove so unprofitable that it will drive the competitors out of business.<sup>187</sup>

The theory of “ruinous competition” has generally fallen out of favor in antitrust circles,<sup>188</sup> and, in any event, is not strictly applicable to intercollegiate athletics (insofar as spending on sports is unlikely to be the sole factor causing an institution of higher education to go out of business). Still, one can argue that the college

183. See A.B.A. SECTION OF ANTITRUST LAW, *supra* note 172, at 53.

184. Herbert Hovenkamp, *Technology, Politics, and Regulated Monopoly: An American Historical Perspective*, 62 TEX. L. REV. 1263, 1266 (1984).

185. Francis M. Bator, *The Anatomy of Market Failure*, 72 Q.J. ECON. 351, 351 (1958).

186. See Peter Hettich, *YouTube to Be Regulated? The FCC Sits Tight, While European Broadcast Regulators Make the Grab for the Internet*, 82 ST. JOHN'S L. REV. 1447, 1497 (2008) (observing that “ruinous competition” could constitute a form of market failure); Lazaroff, *supra* note 70, at 241 (explaining that “[m]arket ... failures can deal with ... destructive or ruinous competition” (citing A.B.A. SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 56-81 (2007))).

187. See Marc P. Schwartz, Note, *Start-Up Sports Leagues: Why These Leagues Are Entitled to Use the Ruinous Competition Defense to Justify Anticompetitive Restraints*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 647, 649 n.12 (2002) (“The term ‘ruinous competition’ refers to industry competitors competing so vigorously that they ultimately drive each other out of business.” (citing Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105, 123 (1989))).

188. See Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890-1955*, 94 MINN. L. REV. 311, 330 (2009) (“By the 1920s, however, a consensus began to emerge that very high-scale economies producing truly ruinous competition probably existed in only a few industries.”).

sports industry is nevertheless engaged in an analogous form of highly inefficient, even if not ultimately “ruinous,” competition. As discussed above, intercollegiate athletics exhibits an atypical market structure, in which nonprofit organizations are engaged in fierce, zero-sum competition on the playing field, while simultaneously completing substantial commercial transactions off the field.<sup>189</sup> And because the economic rewards that result from triumphing in this sporting competition can be so considerable,<sup>190</sup> universities have continued to invest heavily in intercollegiate athletics, to the point that most schools lose millions of dollars per year on their sports programs.<sup>191</sup> Nor are such expenditures necessarily irrational from a behavioral economics perspective as the lack of accountability to shareholder interests in these nonprofit organizations motivates college athletics administrators to devote every possible resource to the goal of winning as many championships as possible.<sup>192</sup>

Consequently, the unique industrial organization of U.S. intercollegiate athletics—and the unusual economic incentives that result—suggest that the industry is inherently drawn towards an inefficient form of competition. Specifically, it appears inevitable that a large number of schools will be willing to absorb significant—and, arguably, socially undesirable—financial losses in order to avoid falling further behind the handful of their peers that have been able to translate historic success on the playing field into a consistent (if narrow) margin of profit.<sup>193</sup> The college sports industry therefore exhibits signs of what is, effectively, a form of market failure, one in which otherwise rational incentives are driving schools to spend socially undesirable amounts of money on an endeavor ancillary to their general educational mission.

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189. *See supra* Part III.A.

190. Mitten, *supra* note 52, at 2 (“The significant economic rewards of winning [on the playing field] have generated fierce off-field competition among universities.”).

191. *See supra* note 34 and accompanying text; Zimbalist, *supra* note 35 (reporting that from 2017 to 2018, the median operating loss for a Division I FBS university was \$16.3 million).

192. *See Blue, supra* note 23 (“From a behavioral economics perspective, financial decision-making in college sports has been perfectly rational within the structures of the current system. Aggressively reinvesting available revenue back into the competitive mission is sensible behavior that is aligned with the local interests of each school and its leadership.”).

193. *See supra* Part I.

Unfortunately, any attempt to regulate spending levels across NCAA institutions under the existing legal precedent would, as explained above, presumably run afoul of the Sherman Act.<sup>194</sup> Therefore, to the extent that Congress ultimately determines that this level of spending on college athletics is wasteful, some form of legislative intervention is necessary.<sup>195</sup>

### 3. *Socially Desired Activity*

Finally, Congress has, at times, also granted antitrust immunity in order to protect various forms of “socially desired activity,”<sup>196</sup> including several exemptions protecting what were perceived to be socially beneficial arrangements in both the higher education and sports industries.<sup>197</sup> Depending on one’s point of view, similar socially desirable activity is potentially at risk post-*Alston*, should a future court eventually strike down the NCAA’s student-athlete compensation restrictions in their entirety as an illegal restraint of trade. Specifically, as discussed above, after *Alston*, it only appears to be a matter of time until NCAA member institutions will—whether voluntarily or by court order—adopt an unregulated, free-market system of athlete compensation.<sup>198</sup> Should that occur, then one can—as laid out above—reasonably anticipate that schools will

194. See *supra* notes 97-98 and accompanying text (discussing the applicability of the Sherman Act to the NCAA generally); see also *Law v. NCAA*, 134 F.3d 1010, 1022-23 (10th Cir. 1998) (holding that an NCAA restriction on college basketball coaches’ salaries constituted an illegal restraint of trade).

195. Cf. Jordan Weissmann, *The Real Crisis in College Sports: It’s Wasted Money, Not Wasted Students*, THE ATLANTIC (Jan. 24, 2012), <https://www.theatlantic.com/business/archive/2012/01/the-real-crisis-in-college-sports-its-wasted-money-not-wasted-students/251922/> [<https://perma.cc/ECG7-7BDE>] (characterizing the college sports industry’s current spending habits as “waste[ful]”).

196. Lazaroff, *supra* note 70, at 241 (citing A.B.A. SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW (2007)).

197. For instance, the Need-Based Educational Aid Act of 2008 permits colleges and universities to share student financial aid information, and a separate antitrust exemption was enacted in 2004 to protect the medical school residency matching program. See Blanchard, *supra* note 177, at 37 (discussing examples). Meanwhile, the sports industry has also received various antitrust exemptions from Congress over the years, including most notably the Sports Broadcasting Act of 1961—to facilitate the negotiation of league-wide television broadcast agreements—and the 1966 exemption formally permitting the National Football League (NFL) and American Football League to merge. See *id.*

198. See *supra* Part III.B.

either increase tuition or student fees to cover the resulting increase in costs, and/or begin to eliminate various nonrevenue sports in order to help alleviate any resulting budgetary pressures.<sup>199</sup> Such responses would either further compound the existing college tuition and student loan crisis or decrease the available opportunities for talented individuals to use their athletic abilities to offset the cost of higher education<sup>200</sup> while also potentially hampering the nation's existing model of training Olympic athletes.<sup>201</sup>

At the same time, some would argue that one additional—albeit more controversial—societal interest is also at stake: the tradition of amateur intercollegiate athletics.<sup>202</sup> To the extent that Congress believes that the existing “amateur” model of college athletics is—at least to some extent—socially desirable, then that preference would also militate in favor of granting the NCAA an antitrust exemption, in order to ensure that the industry can lawfully impose some reasonable spending restraints on its members.

To reiterate, reasonable minds can certainly disagree as to the extent to which any of the aforementioned societal concerns warrant immunizing the NCAA from the Sherman Act.<sup>203</sup> But if Congress wishes to avoid risking any of the potentially adverse implications identified above, then it would appear that some form of antitrust exemption is necessary.

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199. See *supra* notes 152-53 and accompanying text (discussing the history of NCAA schools cutting nonrevenue sports).

200. See McDavis, *supra* note 39, at 340 (arguing that pay for play would have the result that “[s]ports will be cut and access to higher education will be restricted for many”).

201. See *supra* notes 155-56 and accompanying text (outlining the likely implications of a cut to nonrevenue sports).

202. See Adam R. Schaefer, Recent Development, *Slam Dunk: The Case for an NCAA Antitrust Exemption*, 83 N.C. L. REV. 555, 567 (2005) (suggesting that the NCAA needs an antitrust exemption in order to play its “critical role in the maintenance of a revered tradition of amateurism in college sports” (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984))).

203. See Marc Edelman, *The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2361 (2014) (contending that it “would be misguided for Congress” to grant the NCAA an antitrust exemption).

*B. Two Alternate Proposals for NCAA Reform*

Should Congress ultimately determine that a statutory antitrust exemption for the U.S. intercollegiate athletics industry is warranted, then it will be forced to resolve a series of difficult policy questions. Chief among these questions would be just how broadly the NCAA ought to be safeguarded, including—perhaps most importantly—what sort of student-athlete compensation model would best serve the public interest. Moreover, Congress would also have to consider what conditions, if any, ought to be placed on the college sports industry in return for this legal protection.

This Article contends that any antitrust immunity for the NCAA ought to be both (1) limited and (2) conditional. Specifically, granting a blanket antitrust exemption for the NCAA and its member institutions would be unwise as it would enable the association to implement socially undesirable, anticompetitive practices in any of its areas of operation (for example, the television broadcasting restrictions that the Supreme Court struck down in the *Board of Regents* case).<sup>204</sup> At the same time, any antitrust immunity for the NCAA and its members also ought to be conditioned on the industry implementing certain pro-athlete reforms. Indeed, considering the industry's widely perceived lackluster history of protecting the rights of student-athletes, most observers would agree that granting the NCAA an antitrust exemption without conditions would be unwise.<sup>205</sup>

This Part considers these issues by first setting forth what ought to be the minimum conditions upon which any NCAA antitrust exemption is premised, before sketching out two alternative paths by which Congress could reform the college sports industry via a limited antitrust exemption.

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204. See 468 U.S. 85, 86 (1984).

205. See Lazaroff, *supra* note 70, at 247-48 (“[G]ranted a blanket antitrust exemption to the NCAA, without the farmer watching the henhouse, would be the equivalent of leaving the fox free to devour its prey.”); Meyer & Zimbalist, *supra* note 46, at 57-58 (setting forth substantive conditions for an NCAA antitrust exemption); Mitten & Ross, *supra* note 34, at 869 (contending that an “independent commission overseeing big-time intercollegiate athletics” ought to be created in exchange for any limited antitrust immunity).

### 1. *Conditional Antitrust Immunity*

This Article is not the first to propose a potential antitrust exemption for the NCAA, nor is it the first to suggest that any such legislative measure be conditioned on the association implementing some set of reforms. Indeed, scholars have identified a number of such potential stipulations over the years for Congress to consider.<sup>206</sup> However, this Article asserts that, at a minimum, any antitrust exemption should be premised on the following four reforms.

First, any antitrust immunity should be conditioned on the NCAA revising its governance framework to provide meaningful representation of current student-athletes (at both the university and national-office level). Although the NCAA does currently convene a series of “Student-Athlete Advisory Committee” meetings for purposes of soliciting athlete “input on” the “rules, regulations and policies that affect” their lives on campus, the committee is, ultimately, just advisory; the association remains free to implement or discard this input however it sees fit.<sup>207</sup> Instead, the NCAA has historically largely vested its actual rulemaking authority in two key bodies: the Division I Council and Division I Board of Directors.<sup>208</sup> Although both of these groups have token student-athlete representation—two of the forty members of the Division I Council are student-athletes, whereas one student-athlete is included among the twenty-four members of the Division I Board of Directors<sup>209</sup>—this representation is ultimately proportionally insufficient to ensure that student-athletes have a meaningful voice in the formulation of the rules and regulations that will shape their college experience.

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206. See, e.g., Meyer & Zimbalist, *supra* note 46, at 57-58 (suggesting, inter alia, that Congress include requirements, such as mandatory injury insurance for its athletes and an NCAA-sponsored national tournament for FBS football schools, in exchange for antitrust immunity); Mitten & Ross, *supra* note 34, at 869-70 (advocating for antitrust immunity conditioned on certain requirements); Mitten et al., *supra* note 42, at 838-41 (same based on the adoption of various pro-education reforms by the NCAA).

207. See, e.g., *History of the Division II National SAAC*, NCAA, <https://www.ncaa.org/sports/2013/11/16/history-of-the-division-ii-national-saac.aspx> [<https://perma.cc/8EUV-RC45>].

208. See Nathaniel Grow & Todd Haugh, *Assessing the NCAA as a Compliance Organization*, 2021 WIS. L. REV. 787, 796-802 (2021) (summarizing the NCAA’s rulemaking process).

209. See *id.* at 797.



As historian Taylor Branch has noted, it was not until Congress passed the Olympic and Amateur Sports Act of 1978, giving U.S. Olympic athletes 20 percent of the voting power in the various organizations that govern the country's thirty-nine Olympic sports, that these organizations began to meaningfully consider the rights of the athletes subject to their regulations.<sup>210</sup> Congress should insist that the NCAA implement a similar reform in exchange for any immunity from antitrust liability, thereby granting current student-athletes a much greater stake in formulating the policies that govern their sports (and lives).<sup>211</sup> This reform would, in turn, hopefully lead to the industry adopting sensible reforms in a variety of areas, including the aforementioned concerns over student-athletes' educational and medical treatment.<sup>212</sup>

Second, any congressional action should also ensure that student-athletes are allowed to preserve the right to monetize their NIL, as is currently the case after the NCAA elected not to regulate the space in the summer of 2021.<sup>213</sup> Not only is the ability to control the use of your name, image, and likeness arguably a basic right but it also helps to decrease the exploitation of student-athletes under the current system, giving them access to a potentially lucrative source of revenue during their college careers.<sup>214</sup>

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210. See Taylor Branch, *Testimony of Taylor Branch United States Senate Committee on Commerce, Science, and Transportation*, TAYLORBRANCH.COM (July 9, 2014), <https://taylorbranch.com/2014/07/09/testimony-of-taylor-branch-united-states-senate-committee-on-commerce-science-and-transportation/> [<https://perma.cc/GM58-WEWK>] (“One key provision of [the Olympic and Amateur Sports Act of 1978] secured for active athletes a twenty-percent share of the voting seats on each of the thirty-nine new U.S. Olympic Committees. Though small, this representation soon transformed amateur sports.”).

211. At the same time, should it see fit, Congress could also require the NCAA to increase the representation of truly independent voices in its managerial structure. For instance, some have asserted that the NCAA should have a meaningful number of independent members on its board of directors to ensure that “the good of all athletes, rather than the commercial interests of a limited number of the wealthiest athletic programs,” drives organizational policy. Lopiano, *supra* note 54, at 271-72.

212. See *supra* notes 60-66 and accompanying text.

213. If deemed necessary, Congress could authorize some limited restrictions on players' NIL rights, such as a rule preventing players from associating with socially undesirable businesses (such as providers of adult-themed entertainment, et cetera). However, any such rules should be as narrowly tailored as possible, not only to preserve the rights of student-athletes but also to foster ease of administrability. See Grow & Haugh, *supra* note 208, at 846 (asserting that streamlined regulations will ultimately enhance the legitimacy of the NCAA and its bylaws).

214. Indeed, initial reports suggest that some student-athletes quickly signed NIL

Third, although not directly targeted at the NCAA, Congress would also be wise to include a provision in any NCAA reform legislation outlawing age-based restrictions that prevent college athletes from entering their respective professional sport's annual draft.<sup>215</sup> Much of the perceived exploitation of highly skilled college football and men's basketball players arguably stems from the fact that these individuals must wait a period of one or more years after their high school graduation to be eligible to be drafted by an NFL or National Basketball Association (NBA) team.<sup>216</sup> As a result, for years the NFL and NBA have essentially been free-riding off of U.S.

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endorsement deals totaling upwards of \$600,000 in just the first few weeks that such agreements were allowed. See JohnWallStreet, *College NIL Market's Top End Is Likely \$600K Despite Saban Claim*, SPORTICO (July 26, 2021, 5:55 AM), <https://www.sportico.com/leagues/college-sports/2021/nil-market-compensation-1234635276/> [<https://perma.cc/X9MG-5W4K>].

215. Such a policy recommendation is supported by a considerable body of academic literature outside the context of a NCAA antitrust exemption. See, e.g., Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape*, 3 NW. J.L. & SOC. POL'Y 1, 2 (2008); Zubin Kottoor, Note, *One-and-Done Is No Fun: The NBA Draft Eligibility Rule's Conundrum and a Proposed Solution*, 8 ARIZ. ST. SPORTS & ENT. L.J. 98, 101 (2018); Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 115 (2004); Brian Shaffer, Comment, *The NBA's Age Requirement Shoots and Misses: How the Non-Statutory Exemption Produces Inequitable Results for High School Basketball Stars*, 48 SANTA CLARA L. REV. 681, 683 (2008).

216. See Charles Barrowman III, *Can Congress Play Ball?: Congressional Power to Implement and Enforce Pay-for-Play Among Student-Athletes*, 18 U. DENV. SPORTS & ENT. L.J. 111, 130-31 (2015) ("A college football or men's college basketball player must wait until three years or one year, respectively, before they may enter a professional league's draft." (citing Ben Kercheval, *If the NCAA Allowed It, NFL Shouldn't Hesitate to Help Fund Cost of Scholarship*, BLEACHER REP. (Apr. 10, 2014), <https://bleacherreport.com/articles/2024136-if-ncaa-allowed-it-nfl-shouldnt-hesitate-to-help-fund-cost-of-scholarship>)). That being said, in recent years the NBA has allowed players to enter its developmental G League straight out of high school, although those players must still wait one year before being drafted. See Uriah Tagle, *Delay of Game: Analyzing the Legality of the NBA and WNBA Eligibility Rules and Their Effects on Top Amateur Basketball Players*, 21 U. DENV. SPORTS & ENT. L.J. 159, 167 (2018) ("[T]he only options available for eighteen-year-old prospects under the current eligibility rules are to: (1) play NCAA basketball for at least one year; (2) play professionally overseas for at least one year; or (3) play professionally in the G-League, the NBA's developmental league, for at least one year." (footnote omitted)); see also Gould, *supra* note 5, at 162 (describing the "symbiotic relationship between the universities and the professional leagues for which they serve as minor league preparatory bodies, which has helped to fuel discord"); Sanderson & Siegfried, *supra* note 28, at 196-97 (finding that the NFL and NBA draft-eligibility rules serve to "reduc[e] the paid alternatives that are available to talented young players" thereby "drastically reduc[ing] the viable paid options that are available" to these players, effectively forcing them "to attend a big-time university sports program").

colleges and universities, letting these schools shoulder the cost of training their future talent pools.<sup>217</sup> Were college athletes instead able to be drafted whenever their abilities warranted, elite players would no longer be forced to risk a career-threatening injury for below-market wages while spending the requisite time in college. Along with the preservation of NIL rights discussed above, this tweak would substantially reduce the perceived exploitation of these athletes under the current system.

Finally, in addition to the student-athlete-right-enhancing recommendations above, Congress should also require that the NCAA impose reasonable spending controls on the NCAA's constituents in exchange for any antitrust immunity, thereby helping to curb the current incentives driving the runaway college sports "arms race."<sup>218</sup> Left to their own devices, self-governing organizations such as the NCAA typically struggle to decrease wasteful expenditures amongst their membership.<sup>219</sup> Along these lines, commentators have been advocating for years for the college sports industry to implement various forms of spending limits.<sup>220</sup> Meanwhile, others have asserted that Congress should require that all university athletic departments be self-supporting financially.<sup>221</sup>

Regardless of the precise contours, Congress should require the NCAA to implement some set of reasonable spending restrictions in exchange for any antitrust relief.<sup>222</sup> The present (arguably

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217. See Mitten, *supra* note 52, at 2 ("[U]niversities sponsoring 'big-time' football and basketball programs effectively serve as a farm system for the [NFL] and [NBA] by providing the training environment and playing field for talented football and basketball players to hone their physical talents.").

218. See *supra* Part I (discussing the unusual economic incentives that result from the college sports industry's use of nonprofit organizations to run intercollegiate athletics departments).

219. See Mitten & Ross, *supra* note 34, at 858 ("Self-governing organizations also struggle to solve problems relating to wasteful expenditures.").

220. See Lazaroff, *supra* note 70, at 237 (citing a proposal by the Women's Sports Foundation that would have granted the NCAA "a limited antitrust exemption to restrain spending growth in the areas of coaches' salaries and recruiting in men's football and basketball"); Meyer & Zimbalist, *supra* note 46, at 56 ("[W]e propose a cap on spending to build new facilities that would be exempt from the antitrust laws.").

221. See Mitten & Ross, *supra* note 34, at 874 (proposing a requirement that "each Division I university's intercollegiate athletics department ... be financially self-sufficient").

222. See Meyer & Zimbalist, *supra* note 46, at 54 (contending that the NCAA should be allowed to "control the cost of athletics ... so the support of athletics programs does not damage the ability of the institution to support its primary academic programs").

undesirable) level of spending among athletic departments is largely driven by otherwise rational economic incentives that operate beyond the control of a single school or conference.<sup>223</sup> Not only is such widespread and sustained deficit spending arguably wasteful but it has also created a potentially existential threat for the industry, with university athletic departments largely ill-equipped to handle any sudden decline in revenue.<sup>224</sup> Requiring the NCAA to impose reasonable spending limits on its members would help diffuse this potential danger while also restricting athletics spending to more socially desirable levels.<sup>225</sup> Any surplus revenues could then be directed to the university's general educational mission.

In exchange for agreeing to implement the recommended reforms above, Congress would grant the NCAA the legal right to limit its members' athletics-related spending. This would, in turn, allow NCAA schools to agree to regulate their compensation of student-athletes and coaches—along with other related spending—without fear of antitrust challenge. Such immunity would have two benefits. First, it would allow the NCAA to avoid the potentially adverse results of the Supreme Court's decision in *Alston*.<sup>226</sup> Second, by reducing the extent to which the most commercially successful schools can translate their financial advantages to sustained dominance on the playing field, it would also likely improve the existing levels of competitive balance across the industry, thereby enhancing the appeal of college sports for the viewing public.

Depending on Congress's policy preferences, these restrictions on spending could take one of two forms with respect to student-athlete compensation, each discussed in turn below: one roughly akin to the

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223. See *supra* Part I (discussing the economic incentives of college athletic departments operated as nonprofit organizations).

224. See Blue, *supra* note 23 (discussing the long-term risks to intercollegiate athletics should revenue growth slow or reverse); Steve Berkowitz, *NCAA Revenue for 2020 Down 50% Due to Pandemic-Forced Cancellation of Basketball Tournament*, USA TODAY (Jan. 25, 2021, 5:02 PM), <https://www.usatoday.com/story/sports/college/2021/01/25/ncaa-revenue-decrease-due-to-no-basketball-tournament/6699352002/> [<https://perma.cc/JCQ6-LS4E>] (reporting the financial challenges to the NCAA that resulted from the COVID-19 pandemic and the forced cancellation of the 2020 NCAA Men's Basketball Tournament).

225. See *supra* note 218 and accompanying text.

226. See *supra* Part II.

“Olympic” model, or another providing a limited “free-market” approach.

## 2. *The “Olympic” Model*

One possible approach to student-athlete compensation, post-*Alston*, would be to model college athletics on the system utilized by the U.S. Olympic Committee. Such a system would expressly permit U.S. colleges and universities to cap the compensation of their student-athletes at no more than the full cost of their tuition, room, board, and related educational expenses, but allow players to profit from the use of their NIL. Currently, U.S. Olympic athletes receive at most only nominal compensation from their Olympic governing body in exchange for their athletic performance.<sup>227</sup> In lieu of direct compensation from their governing organizations, these athletes are instead permitted to freely monetize their NIL rights, giving them access to the potentially lucrative commercial endorsement marketplace.<sup>228</sup>

Implementing such an approach in the U.S. college sports industry would thus effectively cement the NCAA’s new status quo as of July 1, 2021, after the association announced that it would no longer place any restrictions on student-athletes’ monetization of their NIL.<sup>229</sup> That having been said, the legislative sanctioning of the Olympic model for the college sports industry is admittedly unlikely to fully satisfy those who believe that the current system significantly exploits high-profile athletes in the revenue sports of men’s basketball and football by failing to provide these players with a proportional share of the profits they generate for their institutions.

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227. See Meyer & Zimbalist, *supra* note 46, at 53 n.126 (“[T]he compensation of Olympic athletes in the United States is determined by each sport’s federation and tends to be nominal.”).

228. See Alex Moyer, Note, *Throwing Out the Playbook: Replacing the NCAA’s Anticompetitive Amateurism Regime with the Olympic Model*, 83 GEO. WASH. L. REV. 761, 825 (2015) (“Under the Olympic model, athletes have access to the commercial free market, permitting athletes to secure endorsement deals or get paid for signing autographs, among other things.” (citing RAMOGI HUMA & ELLEN J. STAUROWSKY, NAT’L COLL. PLAYERS ASS’N, *THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT* 5 (2011), <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>)).

229. See *supra* notes 12-14 and accompanying text (explaining that the NCAA elected not to regulate the NIL market).

Nevertheless, there is reason to believe that the current status quo may in fact provide the greatest benefit to the greatest number of student-athletes. Specifically, under the existing model of intercollegiate athletics, schools spent roughly \$116,000 per year on each of their student-athletes in 2014.<sup>230</sup> Although it is undoubtedly true that universities would be willing to spend more than this to attract certain star-level athletes,<sup>231</sup> the overall number of such players is likely to be relatively small.<sup>232</sup> Indeed, in the first six months that college athletes have been eligible to sign endorsement contracts, the median Division I student-athlete only earned approximately six dollars per month by licensing their NIL rights.<sup>233</sup> Meanwhile, even if one were to limit the analysis only to those players who actually signed an NIL deal, the average player still only received approximately \$250 per month in endorsement income in 2021.<sup>234</sup> Therefore, for the vast majority of college athletes, the educational and training benefits they receive under the current system are likely to be more economically valuable than what they would generate in salary on the open market.<sup>235</sup> Preserving those widespread benefits from disruption post-*Alston* would arguably be a worthwhile policy objective for Congress to pursue.

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230. See Meyer & Zimbalist, *supra* note 46, at 35 (reporting the average athletic spending per student-athlete).

231. For instance, the recent FBI investigation into men's college basketball alleged that the athletics apparel manufacturer Adidas was willing to funnel \$100,000 to entice a five-star high school basketball prospect to play at the University of Louisville. See William W. Berry III, *The Crime of Amateurism*, 61 SANTA CLARA L. REV. 219, 224 (2021) (discussing the FBI's college basketball investigation).

232. See Meyer & Zimbalist, *supra* note 46, at 53 (contending that "only the few biggest star athletes on FBS football and male basketball teams are economically exploited").

233. See Pat Eaton-Robb, *Foreign College Athletes Left Out of Rush for NIL Windfall*, U.S. NEWS & WORLD REP. (Dec. 24, 2021, 10:33 AM), [https://www.usnews.com/news/us/articles/2021-12-24/foreign-college-athletes-left-out-of-rush-for-nil-windfall#:~:text=While%20many%20college%20athletes%20have,on%20the%20sidelines%20%E2%80%94%20international%20athletes.&text=By%20Associated%20Press-,Dec.,2021%2C%20at%2010%3A33%20a.m.\[https://perma.cc/CZX2-ZSDR\]](https://www.usnews.com/news/us/articles/2021-12-24/foreign-college-athletes-left-out-of-rush-for-nil-windfall#:~:text=While%20many%20college%20athletes%20have,on%20the%20sidelines%20%E2%80%94%20international%20athletes.&text=By%20Associated%20Press-,Dec.,2021%2C%20at%2010%3A33%20a.m.[https://perma.cc/CZX2-ZSDR]) ("The median for all DI student athletes between July 1 and Nov. 30 was just \$6 per month.").

234. See *id.* ("But for those who actually land an NIL deal, the average compensation was \$1,256, or \$250 a month.").

235. See Mitten & Ross, *supra* note 34, at 855 (asserting that the benefits provided to most student-athletes under the current system "are likely to be more economically beneficial ... in the long term than compensating them with cash for their playing services").

Moreover, should Congress adopt the suggested conditions for NCAA antitrust immunity proposed above,<sup>236</sup> then any exploitation of those relatively few athletes who generate substantially more in revenue than they receive in kind would be reduced in two key respects. First, by preserving their newfound right to monetize their NIL, these athletes would be allowed to recoup a potentially significant portion of their value on the private marketplace.<sup>237</sup> Second, by eliminating any age-based draft eligibility restrictions, the proposed antitrust exemption would allow these athletes to begin their professional careers as soon as their skills warranted, no longer subjecting them to one or more years of effectively compulsory service as unpaid college athletes.<sup>238</sup>

At the same time—but again, more controversially—such a system would also arguably benefit the public interest insofar as it would impose a minimal disruption to the current model of “amateur” intercollegiate athletics.<sup>239</sup> Therefore, the adoption of an Olympic model for the U.S. college sports industry along the lines proposed here would protect the widespread benefits that the current system provides from disruption post-*Alston*, while simultaneously decreasing the exploitation of those star athletes harmed under the existing model.

### 3. *The Limited “Free-Market” Model*

Alternatively, should Congress instead prefer to prioritize the rights of the highest-value athletes, thereby ensuring that each player is compensated in a manner most directly fitting his or her ability, then it could instead impose a limited system of free-market competition on the industry. In this case, Congress would simply grant the NCAA limited protection to allow it to implement the basic, competitive-balance-enhancing mechanisms necessary to help regulate the resulting salary competition among schools.<sup>240</sup> As

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236. See *supra* Part IV.B.1.

237. See *supra* Part IV.B.1.

238. See *supra* Part IV.B.1.

239. See *supra* note 164 and accompanying text (discussing recent public opinion polling showing that few Americans support college athletes receiving salaries from their colleges and universities).

240. Cf. David A. Grenardo, *The Blue Devil’s in the Details: How a Free Market Approach to Compensating College Athletes Would Work*, 46 PEPP. L. REV. 203, 248-49 (2019) (advocating

discussed above, a completely unregulated system of compensation for the services of college athletes would risk allowing the wealthiest programs to exert their financial advantages to perpetually secure the services of the most promising athletes, thereby cementing their dominance on the playing field.<sup>241</sup> Because antitrust law presumably would prevent NCAA schools from unilaterally agreeing to some form of “salary cap” absent agreement with their players—and because many schools’ athletes cannot legally unionize under existing law—some form of limited antitrust exemption would therefore be necessary to ensure that a free-market system of player compensation was most closely aligned with the public interest.<sup>242</sup>

Congress could fashion such relief in any number of ways. For instance, it could simply immunize any salary restraints that were approved by a new NCAA governance framework restructured to include a suitable number of student-athlete representatives, as advocated for above.<sup>243</sup> Alternatively, Congress could attempt to craft some streamlined rules to ensure that a sufficient share of revenues go to the players who help generate them. For instance, drawing upon the general precedent established across the U.S. professional sports industry, Congress could immunize any agreement by NCAA schools to cap the amount of revenue spent on or paid to student-athletes at no less than one-half of the total amount of revenue their team (or their athletic department as a whole) has generated.<sup>244</sup> Or, Congress could—in conjunction with the overall spending limits advocated above<sup>245</sup>—establish a regime under which no NCAA school may spend more on their sports programs than, say, 150 percent of the median revenues generated by Division I athletic departments, with at least 50 percent of these expenditures having to take the form of student-athlete compensation and scholarship support. Each individual school could then decide whether to allocate this money equally to every athlete on a particular team’s

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for a modified free-market system for college athletics).

241. See *supra* notes 142-45 and accompanying text.

242. See *supra* Part III.A.

243. See *supra* notes 207-12 and accompanying text.

244. Similarly, Congress could also consider whether to require schools to maintain their current levels of scholarship support in addition to any additional cash compensation to players.

245. See *supra* notes 218-25 and accompanying text.



roster, or determine payments based on each individual player's talent level.<sup>246</sup>

Although such a system would unleash considerable change on the college sports industry, it would also yield several potential benefits. First, it would ensure that the most talented athletes are compensated more closely in line with their market value.<sup>247</sup> Second, it could in some ways actually help improve the quality of the NCAA's product, incentivizing players who may have otherwise left school early to pursue a professional salary to stay and complete their college eligibility.<sup>248</sup> At the same time, this reform would also help to rein in the existing financial advantages that are enjoyed by a few historically successful programs in each sport.

To be sure, such a systemic change would undoubtedly raise a variety of additional policy questions for Congress to consider (for example, what should the tax ramifications of these payments to student-athletes be,<sup>249</sup> and how should Title IX's gender-equity provisions apply to this sort of cash compensation?).<sup>250</sup> The ideal resolution of those questions is ultimately beyond the scope of this Article. Nevertheless, following *Alston*, it appears that it is only a matter of time before the judiciary forces the college sports industry

246. Indeed, any rules formulated in this area should ideally be as simplistic and streamlined as possible, in order to both facilitate administrability and engender greater legitimacy. See Grow & Haugh, *supra* note 208, at 845-46.

247. See Grenardo, *supra* note 240, at 248 (crediting such a system with treating athletes "equitably and like everyone else involved in the multibillion-dollar business of major college athletics because they will be able to earn compensation in a free market" (first citing Telephone Interview with Jay Bilas, J.D., ESPN Analyst, Of Counsel, Moore & Van Allen (July 24, 2015); then citing Andy Schwarz, *But Nobody Even Makes Any Money on College Sports*, SLATE (Jan. 6, 2014, 2:43 PM), <https://slate.com/culture/2014/01/paying-college-athletes-a-point-by-point-evisceration-of-the-ridiculous-myths-that-prevent-ncaa-athletes-from-getting-the-money-they-deserve.html>; then citing Andy Fixmer & Curtis Eichelberger, *CBS, Turner Sign \$10.8 Billion NCAA Basketball Deal*, BLOOMBERG (Apr. 22, 2010, 4:07 PM), <https://www.bloomberg.com/news/articles/2010-04-22/cbs-turner-ncaa-in-14-year-10-8-billion-pact-for-basketball-tournament#xj4y7vzkg>; and then citing REUTERS, *CBS, Turner Sign \$8.8 Billion Extension on NCAA Tournament Broadcast*, HUFFINGTON POST (Jan. 10, 2017), [https://www.huffpost.com/entry/cbs-turner-sign-88-billion-extension-on-ncaa-tournament-broadcast\\_n\\_570d6470e4b0836057a2bb8c](https://www.huffpost.com/entry/cbs-turner-sign-88-billion-extension-on-ncaa-tournament-broadcast_n_570d6470e4b0836057a2bb8c))).

248. See *id.* ("[P]layers may stay in school longer and either graduate or get closer to graduating if they sign multi-year deals." (citing *O'Bannon v. NCAA*, 802 F.3d 1049, 1059 (9th Cir. 2015))).

249. See Kathryn Kisska-Schulze, *Analyzing the Applicability of IRC § 162 on the Pay-for-Play Model*, 16 VA. SPORTS & ENT. L.J. 190, 190 (2017).

250. See Buzuvis, *supra* note 163, at 298-99.

to adopt an unregulated system of free-market competition for the services of its athletes. Therefore, to the extent that Congress wishes to avoid a further degradation of the industry's competitive balance, along with even greater levels of deficit spending and/or the elimination of a significant number of non-revenue-generating sports, then some form of intervention along the lines discussed above would appear to be necessary.

### CONCLUSION

Following the events of the summer of 2021, major systemic change to the U.S. college sports industry appears all but inevitable. In light of the U.S. Supreme Court's decision in *Alston*, it is only a matter of time until the judiciary forces universities to financially compete for the services of their student-athletes—unless the NCAA elects to allow its members to do so voluntarily first. Unfortunately, barring congressional intervention, such competition will only further exacerbate the industry's already existing levels of competitive imbalance and profligate deficit spending, while also making it harder to achieve meaningful reforms protecting student-athletes' educational and medical well-being on an industry-wide basis.

Luckily, several options exist for Congress to avoid this outcome, should it wish to do so. By granting the NCAA and its members a limited and conditional antitrust exemption, Congress can ensure that the existing model of intercollegiate athletics is modified in a manner that will best advance the public interest while still preserving one of the country's most deeply ingrained and revered cultural traditions.