

THE DAWN OF A NEW ERA: ANTITRUST LAW VS. THE ANTIQUATED NCAA COMPENSATION MODEL PERPETUATING RACIAL INJUSTICE

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ABSTRACT—Two crises in 2020 fueled the fire underlying a debate that has been smoldering for years: whether student athletes should be compensated. The COVID-19 pandemic coincided with the Black Lives Matter movement and drew unprecedented attention to systemic racism permeating society, including college sports that rely disproportionately on Black men risking physical harm to support an entire industry. The Supreme Court’s decision in *NCAA v. Alston* opened the door for some athletic conferences to offer student athletes unlimited education-related benefits and called out the NCAA’s business model that relies on not paying student athletes under the justification of amateurism. *Alston* asserted that the NCAA amateurism model is not exempt from antitrust law, and a scathing concurrence by Justice Brett Kavanaugh said in no uncertain terms that “[t]he NCAA is not above the law.” In the context of the ever-evolving landscape of student-athlete compensation, this Note examines recent changes to the NCAA compensation model and suggests that antitrust law should be used as a vehicle to change the game by correcting racial inequities perpetuated by this business model. This Note asserts that the ball is now in Congress’s court and advocates for federal legislation and collective bargaining to empower student athletes to seek the full value of their labor.

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“[I]n a time that our nation is going through a racial reckoning, the fact that African-Americans are disproportionately represented in the sports that brings in billions of dollars for what acts like a cartel and yet, [the players] can’t even afford to have meals when they’re hungry, can’t even afford to have their families see their games . . . [is] unacceptable.”

—Senator Cory Booker (D-N.J.)[†]

INTRODUCTION

On the eve of the 2021 March Madness tournament, while many college basketball players were preparing for what could be the biggest game of their career yet, three basketball players took to social media to remind people that they are #NotNCAAProperty.¹ Geo Baker, a Rutgers basketball player,

[†] *Protecting the Integrity of College Athletics: Hearing Before the S. Comm. on the Judiciary*, at 1:37:21–:50, 116th Cong. (July 22, 2020), https://www.judiciary.senate.gov/meetings/protecting-the-integrity-of-college-athletics?fbclid=IwAR2Zv84_ucIhEgmKhrbqyn3ZdFLKyG5MCeCMsjzoC1USYNczs8wft9_X79k [<https://perma.cc/KJ58-UADL>].

¹ See Laurel Wamsley, *Before March Madness, College Athletes Declare They Are #NotNCAAProperty*, NPR (Mar. 18, 2021), <https://www.npr.org/2021/03/18/978829815/before-march-madness-college-athletes-declare-they-are-notncaaproperty> [<https://perma.cc/3VQJ-H3S2>]. Jordan Bohannon, an Iowa basketball player, and Isaiah Livers, a Michigan basketball player, tweeted messages reinforcing that they are not NCAA property immediately after Geo Baker, a Rutgers basketball player, tweeted. See *id.*; Adam Hensley, *#NotNCAAProperty: Iowa Basketball’s Jordan Bohannon, Others Tweet*

tweeted that the National Collegiate Athletic Association (NCAA or Association)—the governing body for college athletics—owns his name, image, and likeness.² Baker argued that while students on music scholarships and academic scholarships can profit by creating albums or offering tutoring services, student athletes’ inability to profit from their labor results in unequal treatment.³ Baker’s tweet sought to draw attention to the fact that, of the nearly \$900 million in revenue generated by the NCAA’s annual basketball tournament, none of it would be used to directly compensate the student athletes playing in the tournament.⁴ The #NotNCAAProperty movement—founded on the viewpoint that “[t]he NCAA too often treats college athletes like dollar signs rather than people”⁵—was another plea for reform during what is arguably the most tumultuous time in the history of college sports.⁶

Two crises in 2020 fueled a debate that has been brewing for years—whether student athletes should be compensated. Specifically, the COVID-19 pandemic coincided with the Black Lives Matter movement and drew unprecedented attention to systemic racism permeating society, highlighting a system that relies heavily on Black men risking physical harm to support an entire industry.⁷ State and city guidelines required people to stay home

Grievances at the NCAA, HAWK CENT. (Mar. 17, 2021, 2:19 PM), <https://www.hawkcentral.com/story/sports/2021/03/17/iowa-basketball-jordan-bohannon-march-madness-ncaa-tournament-2021-twitter-notncaaproperty/4736486001/> [<https://perma.cc/CP3Y-W3DX>].

² Geo Baker (@Geo_Baker_1), TWITTER (Mar. 17, 2021, 12:42 PM), https://twitter.com/Geo_Baker_1/status/1372241981150220290?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1372241981150220290%7Ctwgr%5E%7Ctwcon%5Es1_c10&ref_url=https%3A%2F%2Fwww.npr.org%2F2021%2F03%2F18%2F978829815%2Fbefore-march-madness-college-athletes-declare-they-are-notncaaproperty [<https://perma.cc/6X7Z-T32L>].

³ *See id.*

⁴ *See* Wamsley, *supra* note 1.

⁵ J. Bradley McCollough, *Players Launch #NotNCAAProperty Movement a Day Before March Madness Begins*, L.A. TIMES (Mar. 17, 2021, 8:15 PM), <https://www.latimes.com/sports/story/2021-03-17/players-start-not-ncaa-property-movement-march-madness-tournament> [<https://perma.cc/UP9A-L4JG>]. The #NotNCAAProperty movement began in the summer of 2020 when Baker, Bohannon, and Livers held a Zoom meeting with other players in the Big Ten college sports conference to discuss safety challenges the COVID-19 pandemic presented. *Id.*

⁶ *See* Ralph D. Russo, *College Football 2021: NCAA Reforms and Pandemic Recovery*, AP NEWS (Jan. 8, 2021), <https://apnews.com/article/college-football-alabama-crimson-tide-football-football-coronavirus-pandemic-college-sports-1cab80be0e12e546e41580259b6cbf92> [<https://perma.cc/ED6P-XFSK>] (characterizing the 2020 season as tumultuous because of schedule interruptions, distractions, and a lack of fans present due to the COVID-19 pandemic, all amidst discussions of a proposal that would allow student athletes to be paid for the first time).

⁷ This Note focuses on men’s basketball and football because they are the only two revenue-producing sports across the NCAA. *See, e.g.*, Michael Rosenberg, *It Took a Pandemic to See the Distorted State of College Sports*, SPORTS ILLUSTRATED (Dec. 29, 2020), <https://www.si.com/college/2020/12/29/global-pandemic-exposed-ncaa-inc> [<https://perma.cc/YZ6J-GPYS>] (discussing the NCAA’s reliance on

and avoid nonessential activities, and universities went as far as refusing to allow college students to live on campus, except in exceptional circumstances.⁸ Yet thousands of college football players and basketball players reported for duty, risking exposure to a disease while experts knew little about potential long-term health effects.⁹ Despite being treated as essential workers, these athletes were not eligible to receive compensation.¹⁰ Black student athletes across the country—who make up the majority of football and basketball rosters¹¹—demanded action to combat racial inequity and address concerns regarding health and safety and economic justice,¹²

its two revenue-producing sports that depend heavily on Black players). This Note focuses on Black student athletes because they make up a disproportionately large percentage of these sports' rosters. *See, e.g.*, Christopher Ingraham, *NCAA Rules Allow White Students and Coaches to Profit Off Labor of Black Ones, Study Finds*, WASH. POST (Sept. 7, 2020), <https://www.washingtonpost.com/business/2020/09/07/ncaa-student-athletes-pay-equity/> [<https://perma.cc/G49R-GTNV>].

⁸ *See* Rachel Treisman, *How Is Each State Responding to COVID-19?*, NPR (Dec. 4, 2020, 1:45 PM), <https://www.npr.org/2020/03/12/815200313/what-governors-are-doing-to-tackle-spreading-coronavirus> [<https://perma.cc/5QUX-PVJV>] (providing an overview of restrictions each state implemented during the development of COVID-19). During fall 2020, many universities either had fully remote semesters or significantly limited the number of students allowed on campus. For example, Georgetown University only allowed 2,000 students to return to campus, prioritizing freshmen and allowing some exceptions, such as resident assistants and students unable to pursue remote coursework. *See* Joey Hadden, *What the Top 25 Colleges and Universities in the US Have Said About Their Plans to Reopen in Fall 2020, from Postponing the Semester to Offering More Remote Coursework*, INSIDER (July 28, 2020, 2:11 PM), <https://www.businessinsider.com/how-major-us-colleges-plan-reopen-for-fall-2020-semester-2020-5> [<https://perma.cc/6NX9-G92R>] (describing approaches many universities took regarding on-campus housing and instruction to prevent the spread of COVID-19).

⁹ For example, after an outbreak at the University of North Carolina at Chapel Hill, many students were sent home while student athletes “were instructed to remain on campus if they wanted to play, despite the risks.” Editorial Board, *College Football Is Not Essential*, N.Y. TIMES (Aug. 29, 2020), <https://www.nytimes.com/2020/08/29/opinion/sunday/college-football-covid.html> [<https://perma.cc/SZZ5-7Y9R>] (describing how college football players were expected “to do their job” despite many faculty, administrators, and students planning on a remote semester and pointing out that it was impossible for players to maintain six feet of distance during games). Furthermore, some athletic programs required student athletes to sign liability waivers acknowledging the risk of COVID-19 and waiving the right to pursue litigation in order to participate in team activities. *See* Ross Dellenger, *Coronavirus Liability Waivers Raise Questions as College Athletes Return to Campus*, SPORTS ILLUSTRATED (June 17, 2020), <https://www.si.com/college/2020/06/17/college-athletes-coronavirus-waivers-ohio-state-smu> [<https://perma.cc/J5VM-UB2U>].

¹⁰ Editorial Board, *supra* note 9; *infra* Section I.A (describing the NCAA’s amateur model that prohibits student athletes from receiving compensation).

¹¹ Black student athletes constitute nearly 60% of NCAA football and basketball rosters. *See, e.g.*, Ingraham, *supra* note 7.

¹² Amira Rose Davis, *Black College Athletes Are Rising Up Against the Exploitative System They Labor In*, WASH. POST (Aug. 11, 2020), <https://www.washingtonpost.com/outlook/2020/08/11/black-college-athletes-are-rising-up-against-exploitative-system-they-labor/> [<https://perma.cc/MD7E-MCAL>].

strengthening discussions in Congress.¹³ Although this debate has received renewed attention in the media, courts, and Congress, it is far from novel.

For years, there has been public controversy over whether college athletes should be paid. This controversy is driven by concerns regarding fair compensation of labor; unjust restrictions on student athletes' ability to earn money; and universities, conferences, and organizations taking advantage of underprivileged student athletes.¹⁴ The NCAA's model relies heavily on student athletes not receiving compensation to distinguish them from professional athletes and market college sports as a distinct product.¹⁵ Current and former student athletes who are unhappy with the current compensation model have pushed for reform, challenging existing compensation rules and proposing policies that would allow them to receive additional benefits and compensation for their labor to address the perceived inequities in the current structure.¹⁶

In recent decades, the NCAA has permitted student athletes to receive more education-related funds. In the mid-twentieth century, for example, the NCAA began allowing full grants-in-aid to provide for tuition, room and

¹³ See Sydney Umeri, *How Each NIL Bill in Congress Will Affect Student-Athletes*, SB NATION (June 23, 2021, 6:09 PM), <https://www.sbnation.com/college-basketball/2021/6/23/22545287/college-athletes-name-image-likeness-bills-ncaa> [<https://perma.cc/DXY4-QYSB>] (explaining that seven congressional bills addressing student athletes' name, image, and likeness rights and compensation have been introduced since 2020).

¹⁴ See, e.g., Dave Zirin, *A New Study Exposes Just How Racist College Sports Have Become*, NATION (Sept. 8, 2020), <https://www.thenation.com/article/society/ncaa-revenue-racism/> [<https://perma.cc/LA5W-FXTJ>] (characterizing the college-sports model as "hyper-exploitative and immoral" because it relies on Black players suffering physical pain to produce billions of dollars in revenues used to "support[] the entire athletic department [and] subsidize athletic endeavors dominated by white, economically privileged athletes, like sailing, crew, and tennis"); David Simon, *End NCAA Cheating and Corruption: Just Pay Student Athletes*, WASH. EXAM'R (Aug. 28, 2017, 8:00 AM), <https://www.washingtonexaminer.com/end-ncaa-cheating-and-corruption-just-pay-student-athletes> [<https://perma.cc/59AM-VHDT>] (arguing that elimination of amateurism rules in college sports would put an end to the corruption present in the NCAA); see also Ellie Simpson & Lauren Chaingpradit, *NCAA Says Amateurism Is 'Educational' While Making Millions Off Student-Athletes*, GLOB. SPORT MATTERS (Apr. 9, 2019), <https://globalsportmatters.com/youth/2019/04/09/ncaa-says-amateurism-is-key-while-student-athletes-are-left-without-food/> [<https://perma.cc/ME45-6L46>] (explaining that student athletes receiving stipends "still struggle to make ends meet due to cost of living or their personal situation").

¹⁵ See, e.g., NCAA, 2021-22 NCAA DIVISION I MANUAL arts. 12.01, 12.1.2 (2021) [hereinafter NCAA DIVISION I MANUAL] (explaining that "[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation" and that athletes lose amateur status if they "use[] [their] athletic skill[s] . . . for pay," "accept[] a promise of pay," or accept compensation "from a professional sports organization based on athletics skill or participation"); see also *O'Bannon v. NCAA (O'Bannon II)*, 802 F.3d 1049, 1079 (9th Cir. 2015) (holding that the NCAA's grants-in-aid cap violated antitrust laws); *Alston v. NCAA (In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.) (Alston II)*, 958 F.3d 1239, 1246 (9th Cir. 2020) (reasoning that some aspect of the NCAA's compensation framework violates antitrust laws), *aff'd sub nom. NCAA v. Alston (Alston III)*, 141 S. Ct. 2141 (2021).

¹⁶ See *infra* Section II.A; see also *infra* Section III.B.2.b (discussing the College Athletes Bill of Rights sponsored by Senator Cory Booker (D-N.J.), who played varsity football for Stanford University).

board, fees, books, and a small monthly stipend.¹⁷ In 2015, the NCAA increased the grants-in-aid cap to account for the full cost-of-attendance figure.¹⁸ Yet the NCAA has hesitated to open the floodgates and allow outright compensation, generating a great deal of tension between the Association and players. In several cases addressing student-athlete compensation, courts have given the NCAA considerable authority to maintain rules that cap the value of student athletes' labor, even though such rules would normally constitute a price-fixing scheme that violates antitrust law by unreasonably restraining trade.¹⁹ Historically the NCAA and courts have contended that such restrictions are necessary to preserve the market for college sports and the amateurism of college athletics, but courts have arrived at this reasoning by considering externalities—such as consumer demand, when the relevant market was the college education market—that are not tied to the student-athlete labor market and do not accurately consider the net effects on this market.²⁰

Against this tense background of controversy over student-athlete compensation, the Supreme Court recently handed down a landmark decision stripping the NCAA of the power to cap education-related benefits that member institutions may offer students who play Division I Football Bowl Subdivision (FBS) football and Division I basketball.²¹ *NCAA v. Alston*

¹⁷ See Kristen R. Muenzen, Comment, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 260 (2003).

¹⁸ The increase to the full cost-of-attendance estimate allows student athletes to receive scholarships for transportation, academic-related supplies, and similar expenses, in addition to the tuition, fees, books, and room and board that the previous cap included. See Michelle Brutlag Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships*, NCAA (Jan. 18, 2015), <https://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships> [<https://perma.cc/ZJ9H-XH3J>].

¹⁹ Price-fixing involves agreements among competitors that raise, lower, or otherwise set prices or competitive terms. *Price Fixing*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing> [<https://perma.cc/VEB8-NNKG>] (explaining that a “plain agreement among competitors to fix prices is almost always illegal”). Section 1 of the Sherman Act prohibits unreasonable restraints of trade, which by definition can include a price-fixing scheme. See 15 U.S.C. § 1; see, e.g., *O'Bannon II*, 802 F.3d at 1079 (challenging the NCAA's rules, including the prohibition on student athletes receiving compensation for use of their names, images, and likenesses and the grant-in-aid cap); *Alston II*, 958 F.3d at 1245–46 (challenging the NCAA's compensation framework in general).

²⁰ In *Alston II*, Judge Smith acknowledged that despite confining analysis to one relevant market, courts have not uniformly limited the scope in subsequent steps of the analysis. For example, in one case the relevant market was defined as the college-education market, yet preserving consumer demand for college sports was accepted as a legitimate procompetitive benefit. “Jurists faced with weighing the anticompetitive effects in one market with the procompetitive effects in another cannot simply ‘net them out’ mathematically.” *Alston II*, 958 F.3d at 1268–70 (Smith, J., concurring).

²¹ *Alston III*, 141 S. Ct. 2141, 2164, 2166 (2021). NCAA member institutions are divided into three divisions; Division I is home to “the biggest student bodies, the largest athletic budgets, and the most

opened the door for some athletic conferences to offer unlimited education-related benefits²² and placed a target on the NCAA's business model. *Alston* asserted that the NCAA amateurism model is not exempt from antitrust law,²³ and a scathing concurrence by Justice Brett Kavanaugh said in no uncertain terms that “[t]he NCAA is not above the law.”²⁴ *Alston* and new state legislation allowing student athletes to receive money for their names, images, and likenesses cast doubt on whether amateurism is so indispensable as to necessitate the deference that courts have given the NCAA.²⁵ In addition, *Alston* all but explicitly encourages future litigation against the NCAA. Justice Kavanaugh pointedly stated that because the student athletes did not renew their appeal on certain claims from their initial lawsuit, the Court's scope of review was limited, but that remaining rules “raise serious questions under the antitrust laws.”²⁶

This Note, focused on the ever-evolving field of student-athlete compensation, examines recent changes to the NCAA compensation model and presents suggestions for moving forward. This Note considers current proposals for state and federal legislation regarding student-athlete

athletic scholarships.” Justin Berkman, *What Are NCAA Divisions? Division 1 vs 2 vs 3*, PREPSCHOLAR (Jan. 20, 2020, 11:27 AM), <https://blog.prepscholar.com/what-are-ncaa-divisions-1-vs-2-vs-3> [<https://perma.cc/XR4E-RM8M>]. All five major sports conferences—the Atlantic Coast Conference (ACC), Big Ten Conference (Big Ten), Big 12 Conference (Big 12), Pacific 12 Conference (Pac-12), and Southeastern Conference (SEC), collectively the Power Five—are made up of Division I schools. *See id.* The NCAA further divides Division I schools into FBS teams, which compete in postseason bowl games and the College Football Playoff, and Football Championship Subdivision (FCS) teams. *See* Patrick Pinak, *College Football Trivia: What Does “FBS” and “FCS” Actually Mean?*, FANBUZZ (Aug. 25, 2021, 2:37 PM), <https://fanbuzz.com/college-football/what-does-fbs-stand-for/> [<https://perma.cc/G5WL-658T>].

²² There are several independent FBS programs that do not belong to a conference, including powerhouses such as the University of Notre Dame, the U.S. Military Academy, and Brigham Young University, which are considered among the top fifty college football programs historically. *See, e.g., AP College Football Rankings: Greatest Programs of All-Time*, COLL. FOOTBALL NEWS (Aug. 24, 2020, 2:05 AM), <https://collegefootballnews.com/2020/08/ap-college-football-rankings-greatest-programs-of-all-time> [<https://perma.cc/TAP7-KF58>]; Joe Penkala, *College Football: Power Ranking the Top 50 Programs of All Time*, BLEACHER REPORT (Aug. 16, 2011), <https://bleacherreport.com/articles/805789-college-football-power-ranking-the-top-50-programs-of-all-time> [<https://perma.cc/D5NZ-382P>]. It is unclear whether these schools' primary conferences for other sports would mandate changes to education-related benefits allowed for student athletes in their football programs or whether the individual programs would have the autonomy to enact changes themselves.

²³ *Alston III*, 141 S. Ct. at 2164, 2166.

²⁴ *Id.* at 2169 (Kavanaugh, J., concurring).

²⁵ *See, e.g.,* RAMOGI HUMA, ELLEN J. STAUROWSKY & LUCY MONTGOMERY, NAT'L COLL. PLAYERS ASS'N, *HOW THE NCAA'S EMPIRE ROBS PREDOMINANTLY BLACK ATHLETES OF BILLIONS IN GENERATIONAL WEALTH* 7 (2020), https://drive.google.com/file/d/1z97vhcjErrHivUO3Nu2uWwB690bFKnm_/view [<https://perma.cc/SS4G-Q3JB>] (explaining that the principle of amateurism the NCAA relies on stems from British elites' desire to prevent working-class people from beating them in athletic competition).

²⁶ *Alston III*, 141 S. Ct. at 2166–67 (Kavanaugh, J., concurring).

compensation and ultimately advocates for allowing student athletes to unionize and engage in collective bargaining. Part I walks through the evolution of the NCAA and its compensation model. This Part then describes the concept of amateurism in sports, the NCAA's reliance on amateurism as an integral aspect of its student-athlete compensation model, and concerns about the racial and socioeconomic inequity the NCAA's compensation model perpetuates. Part II discusses *Alston* in greater detail and explains how NCAA rules regarding compensation violate antitrust law. Part III goes on to analyze the impact of *Alston* on student-athlete-compensation litigation and on recent state and federal legislation regarding student-athlete compensation; it then concludes with a proposal for what the ideal federal legislation should look like and suggestions for moving forward. This Note argues that antitrust law should be used as a vehicle to correct racial inequities the NCAA's business model has perpetuated for decades and advocates for implementing a collective bargaining agreement to empower student athletes to seek the full value of their labor.

I. BACKGROUND

A. *The Historical Development of the NCAA and the Need for Student-Athlete Compensation*

While the NCAA was formed to protect the safety of collegiate athletes and “improve intercollegiate athletics programs for student-athletes,”²⁷ today one of its main purposes is to “maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.”²⁸ When the NCAA was formed in 1906,²⁹ collegiate athletes were not allowed to receive financial benefits from any source, including “faculty or university financial aid committees,” to maintain their status as amateur athletes.³⁰ Although the NCAA has not defined “amateur,” amateur athletes are generally considered to be those who compete in events that “do not reward victors with a prize of great value.”³¹ Historically, schools and

²⁷ NCAA DIVISION I MANUAL, *supra* note 15, art. 1.2(a). President Theodore Roosevelt called a meeting to form what would become the NCAA in response to the “increasingly dangerous, and even fatal, state of college football.” See Muenzen, *supra* note 17, at 257.

²⁸ NCAA DIVISION I MANUAL, *supra* note 15, art. 1.3.1.

²⁹ *History*, NCAA, <https://www.ncaa.org/history> [<https://perma.cc/JTD5-3LQQ>]. The NCAA was originally named the Intercollegiate Athletics Association of the United States (IAAUS) and was renamed the National Collegiate Athletic Association in 1912. See Muenzen, *supra* note 17, at 257.

³⁰ ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE OF ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH 34 (1998).

³¹ *Sports Law*, 9 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 283 (2d ed. 2008).

school affiliates—such as boosters,³² alumni, and athletic departments—circumvented this rule against prizes with illicit payments to maintain a competitive advantage.³³ In response, the NCAA attempted to curtail these illicit payments by loosening its restrictions to allow student athletes to receive full athletic scholarships, including tuition, fees, room and board, and books.³⁴ As recently as 2015, the NCAA increased the limit again to equal the estimated full cost of attendance, providing student athletes with a modest living stipend.³⁵

While the restrictions regarding educational benefits were relaxed to allow student athletes to receive aid up to the cost of attendance, student athletes over the years have expressed the need for additional aid.³⁶ Many collegiate athletes, particularly those who participate in football and basketball, come from lower socioeconomic backgrounds and working-class families.³⁷ Without athletic scholarships, these athletes often would not be

³² Boosters are individuals who contribute financially to a sports team in some way, whether through direct donations to a university's athletics department or through financial assistance for players. *See infra* note 207.

³³ It was commonplace to provide student athletes with money, entertainment and travel expenses, services, preferential treatment, and benefits for family members. *See* ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 23–25 (2001). As recently as 2010, a booster for the University of Miami Hurricanes provided “thousands of impermissible benefits” to the university's football players and other athletes, including money, yacht trips, jewelry, televisions, paid trips to nightclubs and high-end restaurants, prostitutes, and an abortion. Charles Robinson, *Renegade Miami Football Booster Spells Out Illicit Benefits to Players*, YAHOO! SPORTS (Aug. 16, 2011), https://sports.yahoo.com/cr-renegade_miami_booster_details_illicit_benefits_081611.html [<https://perma.cc/CN6E-68AP>].

³⁴ In 1956, the NCAA “voted to allow full grants-in-aid (tuition, fees, room and board, books and \$15 a month ‘laundry money’).” Muenzen, *supra* note 17, at 260 (quoting ZIMBALIST, *supra* note 33, at 23–24).

³⁵ In 2015, the NCAA raised the grants-in-aid cap to account for the full cost-of-attendance figure. *See O’Bannon II*, 802 F.3d 1049, 1054–55 (9th Cir. 2015). Cost-of-attendance figures vary from school to school and are determined by each institution.

³⁶ A former University of Washington football player explained: “The stipend money is not enough It is definitely under the poverty line in Seattle [and] forces [student athletes] to make (a lot) of decisions.” Simpson & Chaingpradit, *supra* note 14. A Clemson University football player expressed his gratitude while acknowledging the inadequacy of the stipend, saying “I know, beggars can’t be choosers, but it’s still not enough.” *Id.*

³⁷ A study estimated “that the average football and men’s basketball athlete went to a high school with a median family income at the 49th percentile of all high schools, while for other sports the average athlete’s high school was at the 60th percentile.” Craig Garthwaite, Jordan Keener, Matthew J. Notowidigdo & Nicole F. Ozminowski, *Who Profits from Amateurism? Rent-Sharing in Modern College Sports* 5 (Nat’l Bureau of Econ. Rsch., Working Paper No. 27734, 2020), https://www.nber.org/system/files/working_papers/w27734/w27734.pdf [<https://perma.cc/E8GJ-RCC5>]. The study also found that “football and men’s basketball players come from school districts with a higher fraction of students living in poverty and a higher fraction of students who are black.” *Id.* at 6; Michel Martin & Amanda Morris, *Poor Students More Likely to Play Football, Despite Brain Injury Concerns*, NPR (Feb. 3, 2019,

able to afford to attend college and obtain a higher education without taking on a staggering amount of student-loan debt.³⁸ These student athletes would not have a chance to escape a life of poverty by earning a ticket to the middle class were it not for athletic scholarships.³⁹

Although the current guidelines allow student athletes to receive financial aid covering the cost of attendance, many argue that conservative cost-of-attendance figures do not fully account for the true cost of attending college as a full-time student.⁴⁰ This rings especially true for student athletes from working-class families that cannot provide them with additional money for nonessential expenses, such as personal expenses—as small as money for gas or as large as funds for a trip with friends—that their families cannot afford.⁴¹

While many working-class students would be able to earn additional money beyond any scholarship award through a work-study position or other part-time employment, student athletes are forced to forgo these opportunities because of the time commitment required for their sports.⁴² For many student athletes, securing an internship, even during the summer, can be challenging depending on off-season or preseason practice schedules.⁴³

5:38 PM), <https://www.kcur.org/2019-02-03/poor-students-more-likely-to-play-football-despite-brain-injury-concerns> [<https://perma.cc/2JUG-2A8L>] (explaining that the low barrier to entry for football in particular and the varied positions that rely on differing capabilities add to its popularity among youth from low socioeconomic backgrounds).

³⁸ See Simpson & Chaingpradit, *supra* note 14 (explaining that athletes from families that are below the poverty line rely on athletic scholarships for the opportunity to attend college).

³⁹ See Tom Farrey, *The Gentrification of College Hoops*, UNDEFEATED (2016), <https://theundefeated.com/features/gentrification-of-ncaa-division-1-college-basketball/> [<https://perma.cc/SYA6-K3NX>] (explaining that athletic scholarships provide first-generation students degrees and entry to the middle class, even if they never make it to a professional league).

⁴⁰ See, e.g., Ann Carms, *The “Indirect” Costs at College Can Involve Nasty Surprises*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/your-money/college-costs-tuition.html> [<https://perma.cc/LT3V-6UC3>] (explaining that students from families with lower and middle incomes who borrow the maximum amount of financial aid allowable may face trouble paying for unexpected indirect expenses not included in the cost of attendance).

⁴¹ See Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643> [<https://perma.cc/959V-A92T>] (explaining that “impoverished football players cannot afford movie tickets or bus fare home”).

⁴² See Simpson & Chaingpradit, *supra* note 14 (explaining that because many student athletes devote more than forty hours per week to their sports, they do not have the time necessary to hold a job, making athletic awards their only form of income). A 2019 NCAA study found that FBS football players devote a median of forty hours weekly to football during the season. NCAA, GOALS STUDY: UNDERSTANDING THE STUDENT-ATHLETE EXPERIENCE 19 (2019), https://ncaaorg.s3.amazonaws.com/research/goals/2020AWRES_GOALS2020con.pdf [<https://perma.cc/55YZ-HUJ4>].

⁴³ Student athletes on football, soccer, track and field, and gymnastics teams, among other sports, are often expected to spend their summers on campus training. See Marc Tracy, *How College Sports Killed Summer Vacation*, N.Y. TIMES (July 31, 2018), <https://www.nytimes.com/2018/07/31/sports/college->

Student athletes are left not only with missed income but also with a lack of opportunities to develop marketable skills.⁴⁴ A lack of marketable skills could negatively affect student athletes' job prospects when they enter the workforce, thus worsening the disparity between student athletes from lower socioeconomic backgrounds and their wealthier peers.

Advocates of the NCAA's current model argue that student athletes receive the value of a college degree,⁴⁵ but graduation rates are lowest among student athletes of color in the sports that produce the most revenue—football and men's basketball—meaning these athletes may not even receive that benefit in full.⁴⁶ Because student athletes in these programs are more prone to entering their professional league before graduating, as little as one-fourth of a degree hardly seems like just compensation.⁴⁷

Further, even when scholarship value is taken into consideration, student athletes still do not receive the market value of their labor. For the 2018–2019 academic year, the average fair market value of FBS football players was \$208,208, totaling \$832,832 over all four years of eligibility.⁴⁸ The fair market value of basketball players at these schools was \$370,085 annually, equaling \$1,480,340 over four years.⁴⁹ In contrast, Northwestern University had the highest cost of attendance of the Power Five schools that year: \$75,348, totaling around \$301,392 over four years;⁵⁰ the benefits Northwestern student athletes received to cover their cost of attendance paled in comparison to the fair market value of their labor.

sports-summer.html [https://perma.cc/3TWP-YEK4]. Many student athletes in Division I sports, including FBS football, would like to do internships but cannot because of athletic commitments. *See* NCAA, *supra* note 42, at 49.

⁴⁴ *See Alston II*, 958 F.3d 1239, 1266 (9th Cir. 2020) (Smith, J., concurring), *aff'd*, 141 S. Ct. 2141 (2021).

⁴⁵ *See, e.g.,* Jon Solomon, *The History Behind the Debate over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/> [https://perma.cc/K4E2-4VG8] (“The value of a college degree is viewed very favorably by many Americans, especially as tuition costs continue to skyrocket that causes students to carry college-loan debt well into adulthood.”); Megan James, *NCAA: Why College Athletes Should Not Be Paid*, MEDIUM (Nov. 3, 2019), <https://medium.com/@mjames11/ncaa-why-college-athletes-should-not-be-paid-dc92e73bccd8> [https://perma.cc/BZ4E-QTS2] (arguing that “[m]ost of these athletes receive scholarships that leave[] them paying absolutely nothing to go to a [u]niversity” and that “[i]f you pay college athletes on top of that, it would be too much”).

⁴⁶ A study found that Black male athletes are graduating at lower rates when compared with all athletes and with the overall undergraduate population. Black FBS football players have the lowest graduation rates across the Power Five conferences. *See HUMA ET AL.*, *supra* note 25, at 9–12.

⁴⁷ *See infra* note 95.

⁴⁸ HUMA ET AL., *supra* note 25, at 2.

⁴⁹ *Id.* at 3.

⁵⁰ *See Most Expensive Colleges in America by Out of State Total Cost*, COLLEGE CALC, <https://www.collegecalc.org/lists/america/most-expensive-out-of-state-total/> [https://perma.cc/6NT7-7UEJ].

Student athletes' desire to receive greater compensation comes into conflict with the NCAA's amateurism model, which relies heavily on not compensating student athletes to distinguish them from professional athletes.⁵¹ The next Section describes in greater detail the concept of amateurism the NCAA relies on and how the NCAA's reliance on amateurism impacts student athletes.

B. *The Principle of Amateurism*

Amateurism in sports is a concept referring to any practice of that sport on an unpaid basis for pleasure, rather than a professional basis for profit.⁵² The concept of amateurism is central to any discussion of student-athlete compensation. Because compensation distinguishes amateur sports—including college sports—from professional sports, student athletes are considered amateur athletes since they are not paid. The NCAA relies on the concept of amateurism to defend itself against lawsuits seeking student-athlete compensation.⁵³

Supporters of amateurism contend that amateurism allows student athletes to better integrate into their college communities and be “students first.”⁵⁴ This argument is understandable in light of the fact that the NCAA was originally created to protect student athletes.⁵⁵ Proponents of amateurism argue that if student athletes were treated as professionals, they would be forced to prioritize their sports over their education, which would be antithetical to the purpose of college sports.⁵⁶ However, this concern does not

⁵¹ See, e.g., NCAA DIVISION I MANUAL, *supra* note 15, art. 12.1.2 (listing ways in which student athletes can lose amateur status by accepting various forms of compensation); *O'Bannon II*, 802 F.3d 1049, 1058 (9th Cir. 2015) (“The NCAA argued . . . that restrictions on student-athlete compensation are ‘necessary to preserve the amateur tradition and identity of college sports.’”); *Alston II*, 958 F.3d 1239, 1246 (9th Cir. 2020) (“[C]ollege athletics’ ‘amateur tradition’ helps maintain their popularity as a product distinct from professional sports.” (quoting *O'Bannon v. NCAA (O'Bannon I)*, 7 F. Supp. 3d 955, 999 (N.D. Cal. 2014)), *aff'd*, 141 S. Ct. 2141 (2021)).

⁵² See *Amateurism*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011), <https://www.ahdictionary.com/word/search.html?q=amateurism> [https://perma.cc/4KSX-UEZA]; NCAA DIVISION I MANUAL, *supra* note 15, art. 2.9 (“Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”).

⁵³ See, e.g., *O'Bannon II*, 802 F.3d at 1058 (“The NCAA argued to the district court that restrictions on student-athlete compensation are ‘necessary to preserve the amateur tradition and identity of college sports.’”).

⁵⁴ See *Play Division I Sports*, NCAA, <https://www.ncaa.org/student-athletes/play-division-i-sports> [https://perma.cc/R55U-B7XD] (“The young men and women who compete in college sports are students first, athletes second.”).

⁵⁵ See *supra* note 27 and accompanying text.

⁵⁶ See, e.g., James, *supra* note 45 (“If colleges were to pay student athletes, players would start prioritizing sports over academics.”).

reflect the reality of the student-athlete experience in which student athletes often commit more to their teams than to their studies.⁵⁷ To meet team expectations, student athletes are often “coerced to change majors” so that class meetings do not conflict with practice, placed in “less time-consuming majors” to ensure they remain eligible to play, and generally forced to prioritize athletics over education.⁵⁸ Student athletes are already essentially athletes first, students second.

Supporters of amateurism further argue that amateurism is integral to the demand for college sports because “consumers ‘value amateurism.’”⁵⁹ According to the NCAA, the appeal of college sports stems from nostalgia for college and the campus experience and the fact that players are students.⁶⁰ Alumni typically have a vested interest in the brand and represent a significant portion of a college sport’s fan base⁶¹—and college-sports fans make up the largest fan base in the country.⁶² Because of alumni interests and the financial investment alumni often make in college teams, the NCAA argues that it is imperative that student athletes be perceived as amateur students playing for their schools, not simply professional athletes wearing school uniforms.⁶³

⁵⁷ Jake New, *What Off-Season?*, INSIDE HIGHER ED (May 8, 2015), <https://www.insidehighered.com/news/2015/05/08/college-athletes-say-they-devote-too-much-time-sports-year-round> [<https://perma.cc/7F3F-ANU4>].

⁵⁸ Brief of Amici Curiae African American Antitrust Lawyers in Support of Respondents at 6, 9, 16, *Alston III*, 141 S. Ct. 2141 (2021) (Nos. 20-512, 20-520) [hereinafter Brief of Antitrust Lawyers].

⁵⁹ *Alston II*, 958 F.3d. 1239, 1249 (9th Cir. 2020) (quoting *Alston I*, 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019)), *aff’d*, 141 S. Ct. 2141.

⁶⁰ Hayes Rule, *A Breakdown of Alston v. NCAA: What Is the Future of Paying College Athletes, and What Would It Mean for Athletes to Be Paid?*, MEDIUM: THE BEARFACED TRUTH (May 4, 2019), <https://medium.com/the-bearfaced-truth/a-breakdown-of-alston-v-ncaa-what-is-the-future-of-paying-college-athletes-3483569905b4> [<https://perma.cc/D5BL-NSRC>] (“The NCAA suggested a large draw to the game is because players are viewed as students along with the love for a college and campus experience.”).

⁶¹ See *id.* (arguing that “[t]he love for college sports, at its grassroots, is a love for one’s university competing against others” and that “[p]eople attend these universities and thus have a vested interest in the brand, different from professional teams, as most people have no close tie to professional teams”).

⁶² Collectively, college sports outrank professional sports in popularity, with a greater percentage of fans and “avid fans” than any professional league, and college football and basketball closely trail their professional counterparts. See Kristi Dosh, *New Report Shows How Attractive College Sports Fans Are to Brand Marketers*, FORBES (Aug. 17, 2021, 9:34 AM), <https://www.forbes.com/sites/kristidosh/2021/08/17/new-report-shows-how-attractive-college-sports-fans-are-to-brand-marketers/?sh=214716ca175c> [<https://perma.cc/KLE3-K2J9>].

⁶³ In a brief the NCAA filed in *Alston I*, the NCAA argued that “amateurism is a key part of demand for college sports,” Defendants’ Closing Brief at 7, *Alston I*, 375 F. Supp. 3d 1058 (No. 4:14-md-02541-CW), implying that “if consumers did not believe that student-athletes were amateurs, they would watch fewer games and revenues would decrease as a result,” *Alston I*, 375 F. Supp. 3d at 1070.

However, the NCAA's concept of amateurism is ill-defined.⁶⁴ The NCAA bylaws enumerate events that could cause a student athlete to lose amateur status and forfeit eligibility to participate in NCAA competitions, but they do not define amateurism itself. For example, a student athlete can lose amateur status by accepting a promise of pay (even if the pay will be received after the completion of collegiate athletics participation), competing on a professional athletics team (even if no pay is received), or hiring an agent.⁶⁵ Over the years, this "line of demarcation" has become more blurred as the NCAA has adjusted its rules to account for student athletes' financial needs, shifting from prohibiting all financial aid and compensation to permitting certain types of aid and compensation, including tuition, fees, room and board, and books.⁶⁶ This blurring of the line has led several student athletes to push back on the NCAA's rules by seeking additional compensation, either through an increased cap on financial aid or through alternative sources such as endorsement or sponsorship deals.⁶⁷

Proponents of amateurism are also concerned that if student athletes are no longer perceived as amateurs, this will signal the NCAA's transition to being a minor league.⁶⁸ College football in particular has been described as "a particular brand of football" that draws from "an academic tradition," differentiating it from and making it "more popular than professional sports to which it might otherwise be comparable, such as . . . minor league

⁶⁴ The district court in *Alston I* noted that the NCAA's conception of amateurism has changed steadily over the years and that the NCAA "nowhere define[s] the nature of the amateurism [it] claim[s] consumers insist upon." 375 F. Supp. 3d at 1063–64, 1070, 1072–73; see also *O'Bannon II*, 802 F.3d 1049, 1058–59 (9th Cir. 2015) (explaining that although the district court rejected the NCAA's "longstanding commitment to amateurism" because the definition of amateurism itself is malleable and has changed significantly, "amateurism serves some procompetitive purposes" and "plays some role in preserving 'the popularity of the NCAA's product'" (quoting *O'Bannon I*, 7 F. Supp. 3d 955, 1005 (N.D. Cal. 2014))); *Alston II*, 958 F.3d at 1250 (explaining that although the district court found the NCAA's procompetitive amateur theory "largely unpersuasive, the district court 'credit[ed] the importance to consumer demand of maintaining a distinction between college sports and professional sports'" (alteration in original) (quoting *Alston I*, 375 F. Supp. 3d at 1082)).

⁶⁵ NCAA DIVISION I MANUAL, *supra* note 15, art. 12.1.2.

⁶⁶ In 2015, the Power Five conferences voted to increase the grant-in-aid limit to the full cost of attendance, encompassing "tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution." NCAA DIVISION I MANUAL, *supra* note 15, art. 15.02.2; see also Rule, *supra* note 60 (explaining the history of the NCAA's stance on athletic scholarships and the Power Five vote in 2015).

⁶⁷ See *O'Bannon II*, 802 F.3d at 1079 (challenging the NCAA's prohibition on student athletes receiving compensation for the use of their names, images, and likenesses and the grant-in-aid cap); *Alston II*, 958 F.3d at 1245–46 (challenging the NCAA's compensation framework in general).

⁶⁸ See *O'Bannon II*, 802 F.3d at 1078–79 (suggesting that if compensation not related to education is allowed, student athletes will "continue to challenge the arbitrary limit," forcing the NCAA to "surrender[] its amateurism principles entirely and transition[] from its 'particular brand of football' to minor league status" (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 101–02, 104 (1984))).

baseball.”⁶⁹ This defense of amateurism presents amateurism as a fragile concept unable to withstand the free market that needs special exemptions from federal law, instead of as a core principle of a multibillion-dollar industry.⁷⁰ This argument also paints an unsupported narrative that demand for college sports would significantly shrink if consumers no longer felt the spirit of amateurism.⁷¹ College sports and amateur sports are not naturally synonymous and can exist independently of one another.⁷²

Further, while some trace the origins of amateurism to ancient Greece—the birthplace of the Olympics—the modern concept of amateurism did not exist at all in ancient Greece.⁷³ The origins of amateurism actually stem from the desire of upper-class men to exclude the working class from recreational sports, relying on the so-called “Corinthian spirit” to keep competition artificially low.⁷⁴ British elites, resentful of being beaten in rowing by day laborers who rowed for a living, modified the concept of amateurism to embody being a gentleman and not having to work for a living.⁷⁵ It is this

⁶⁹ *Id.* at 1074 (quoting *Bd. of Regents*, 468 U.S. at 101–02).

⁷⁰ See Andy Schwarz, *The Fallacy of Fragile Demand for “Amateurism,”* ATHLETICDIRECTORU, <https://athleticdirector.com/articles/the-fallacy-of-fragile-demand-for-amateurism/> [https://perma.cc/EWE5-MAU8] (“At the core of its legal arguments, the NCAA argues (without market-based evidence) that amateurism is unable to stand on its own in the marketplace . . . and therefore the NCAA is immune from antitrust scrutiny.”).

⁷¹ *Id.* (highlighting the fact that multiple expert witnesses testified that deferred payments of \$5,000 “would not significantly reduce consumer demand for college sports” and no contradictory evidence was presented (quoting *O’Bannon II*, 802 F.3d at 1082 n.4)).

⁷² *Id.* (explaining that “not all amateur sports are collegiate,” such as youth leagues and recreational leagues, and some collegiate sports not controlled by the NCAA, e.g., cycling, do not prohibit professional athletes as long as they are college students).

⁷³ See HUMA ET AL., *supra* note 25, at 7 (dispelling the notion that modern amateurism originated in ancient Greece). But see Ross Andrews, *Push to Allow Professional Athletes Took Hold in 1968 Olympic Games*, GLOB. SPORT MATTERS (Oct. 15, 2018), <https://globalsportmatters.com/mexico/2018/10/15/professional-athletes-1968-olympic-games/> [https://perma.cc/C6AY-VWXX] (detailing the history of amateurism in the Olympic Games).

⁷⁴ See HUMA ET AL., *supra* note 25, at 7 (describing the origins of amateurism in Victorian England). “Corinthian spirit” is defined as “an approach to sporting encounter rooted in the amateur philosophy of football in late 19th-century England when the Corinthian (Casuals) club was formed [in response] to the emergence and rise of . . . professionalism in the sport.” *Overview: Corinthian Spirit*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095639366> [https://perma.cc/CB8B-XFYE] (quoting ALAN TOMLINSON, *A DICTIONARY OF SPORTS STUDIES* (2010)).

⁷⁵ Olympic historian Bill Mallon explained that

[a]mateurism really started when the people who were rowing boats on the Thames for a living started to beat all the rich British aristocrats. That wasn’t right. So they started a concept of amateurism that didn’t exist in ancient Greece, extending it more and more to the notion of being a gentleman, someone who didn’t work for a living and only did sport as a hobby.

See HUMA ET AL., *supra* note 25, at 7 (quoting Patrick Hruby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, ATLANTIC (July 25, 2012), <https://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/> [https://perma.cc/V58X-SDJG]).

version of amateurism that the Ivy League institutions sought to replicate, and after others witnessed the success of the first intercollegiate sporting event—a rowing match between Harvard and Yale⁷⁶—this version became the model in U.S. higher education.⁷⁷

Other East Coast universities began recruiting lower- and middle-class young men from the South and Midwest to attract top talent; this led to an identity crisis among prestigious universities, who considered their educational mission inseparable from their students' class and race.⁷⁸ The solution they consequently devised was to incorporate intercollegiate athletics into their universities' missions, which allowed universities to prevent the recruitment of lower- and middle-class athletes. By using amateurism as a proxy for “a white and wealthy New England social status,” elite East Coast schools were able to maintain their “mythical prestige.”⁷⁹

Amateurism also became a tool to dismiss complaints of racism during the mid-twentieth century, when the racial integration of college sports accelerated.⁸⁰ When Black players arrived at predominantly white institutions seeking an opportunity for social and economic mobility, they still encountered discrimination and minimal academic support. College sports were framed as a justification for this unequal educational experience because they offered a “unique educational opportunity for lower-class Black men who otherwise would not attend the university.”⁸¹ The tension between the idea of amateurism and the “racialized economic reality of college sports” has continually plagued the NCAA model throughout its history.⁸² In 2022, a system modeled after the British scheme to “preserv[e] sport for a White aristocracy that had access to money and power, and

⁷⁶ See tife, *Rejecting the Myth of Amateurism Beyond NCAA v. Alston*, HARV. C.R.-C.L. L. REV. (Apr. 7, 2021), <https://harvardcrcl.org/rejecting-the-myth-of-amateurism-beyond-ncaa-v-alston/> [https://perma.cc/3Q4J-PJ4Z].

⁷⁷ See Hruby, *supra* note 75 (explaining that Harvard, Yale, and other American schools emulated the English concept of amateurism). Princeton and Harvard were among the first to establish football teams in the history of college football. See Adam Marshall, *The Oldest American College Football Teams*, ATL. RIDE, <https://www.atlanticride.com/the-oldest-american-college-football-teams-top-10/> [https://perma.cc/96AC-BEFU].

⁷⁸ See tife, *supra* note 76.

⁷⁹ *Id.* Alexander Meiklejohn, Dean of Brown University at the turn of the twentieth century, attributed the increasing number of football deaths to men who were “brutal and tricky in character” being hired to play. *Id.* According to Walter Camp, the founder of modern-day football, “[a] Gentleman never compete[d] for money.” *Id.*

⁸⁰ *See id.*

⁸¹ *Id.*

⁸² *Id.*

designed as a means of excluding members of racial and ethnic minorities,” contradicts the NCAA’s stated goal of promoting racial justice.⁸³

The growth of professional sports and the popularity of corporate sponsorships and endorsements throughout the last century muddled the distinction between amateur and professional athletes in most team sports.⁸⁴ Even the Olympics, which were originally only for amateur athletes, adapted.⁸⁵ Toward the end of the twentieth century, the Olympic amateurism rules were relaxed to allow Olympic athletes to accept endorsements and prizes and even to allow professional athletes to compete in almost all sports in the Olympic Games.⁸⁶ If the Olympics have not suffered in popularity since largely abandoning their amateur requirement,⁸⁷ it is unlikely that abandoning amateurism would be the demise of college sports. As an antitrust economist with sports experience noted, “People’s love of competition trumps anybody’s love of athlete poverty.”⁸⁸ The NCAA’s reliance on amateurism presents a weak argument that is further weakened by equity concerns that the refusal to pay student athletes implicates.

C. Equity Concerns

In addition to challenging the weakly supported concept of amateurism, NCAA critics argue that the amateurism model in college athletics implicates several equity concerns because student athletes are not able to share in the profits from the billion-dollar industry that universities, athletic programs, and coaches do share.⁸⁹ Student athletes’ labor generates billions of dollars through multiple avenues, such as ticket sales, television contracts, and

⁸³ HUMA ET AL., *supra* note 25, at 7. In 2020, the NCAA published a number of strategies to address racial injustice and advance racial equity. NCAA OFF. OF INCLUSION, STRATEGIES: ADDRESSING RACIAL INJUSTICE (2020), https://ncaaorg.s3.amazonaws.com/inclusion/ethnic/INC_AddressingRacialInjustice.pdf [<https://perma.cc/TW4L-G8TB>].

⁸⁴ *Can Professional Athletes Compete in Olympic Sports?*, RULES OF SPORT, <https://www.rulesofsport.com/faq/can-professional-athletes-compete-in-the-olympics.html> [<https://perma.cc/YY4T-9834>].

⁸⁵ *Id.*

⁸⁶ Hruby, *supra* note 75; Andrews, *supra* note 73.

⁸⁷ Since loosening their amateur requirements, the Olympic Games have become “more fan-friendly,” driving ratings and revenue up: “[T]he mostly amateur 1980 [Games] earned \$30 million in sponsorship revenue; by contrast, the wholly professional 2002 [Games] cleared \$840 million.” Hruby, *supra* note 75.

⁸⁸ *See id.* (quoting Andy Schwarz’s argument that the market demand for the Olympic Games did not depend on whether athletes received compensation).

⁸⁹ *See Rule*, *supra* note 60.

merchandise.⁹⁰ Coaches at flagship public universities are often the highest paid state employees.⁹¹ NCAA executives, commissioners of the Power Five conferences, and many Power Five athletic directors enjoy million-dollar salaries.⁹² Yet the talent that earns this industry's million-dollar payouts receives no compensation.

One equity concern the amateurism model implicates is that student athletes' careers playing FBS football and Division I basketball often have a short lifespan. The NCAA is the primary route to becoming a professional athlete, and aspiring athletes often have no comparable alternatives immediately after high school.⁹³ Fewer than 2% of student athletes will ever play at a professional level.⁹⁴ Athletics' physical nature limits the length of playing careers; since aspiring professional athletes in football and basketball are required to spend at least one year out of high school before they are eligible to play professionally, most spend at least some of their prime years playing in college at the amateur level.⁹⁵ At the collegiate level, while student athletes have not yet reached the professional level, it is understandable that student athletes want some compensation for playing

⁹⁰ See *Alston II*, 958 F.3d 1239, 1266 (9th Cir. 2020) (Smith, J., concurring), *aff'd*, 141 S. Ct. 2141 (2021). The Department of Education reported that in 2018 college sports generated \$14 billion in revenue. CHRIS MURPHY, MADNESS, INC., HOW EVERYONE IS GETTING RICH OFF COLLEGE SPORTS - EXCEPT THE PLAYERS 3 (2019), https://www.murphy.senate.gov/imo/media/doc/NCAA%20Report_FINAL.pdf [<https://perma.cc/9Y5K-K38H>].

⁹¹ *Alston II*, 958 F.3d at 1266 (Smith, J., concurring). In 2020, the head football or basketball coach at a state college was the highest paid public employee in forty states. Zirin, *supra* note 14. The average salaries of Power Five head football coaches range from \$3,153,713 to \$4,978,859.50. HUMA ET AL., *supra* note 25, at 3–4.

⁹² For the 2017–2018 academic year, the NCAA president received nearly \$4 million in compensation, and commissioners of Power Five conferences received compensation packages ranging from around \$2 million to \$5.5 million. HUMA ET AL., *supra* note 25, at 4. In 2020, the average compensation of athletic directors of Power Five programs was \$1,071,831. *Id.*

⁹³ Although the NBA's G League program allows elite high school players to play professionally for a year and then enter the draft, "there are no professional [or college] football or basketball leagues capable of supplying a substitute for the bundle of goods and services that FBS football and Division I basketball schools provide." *O'Bannon II*, 802 F.3d 1049, 1057 (9th Cir. 2015) (quoting *O'Bannon I*, 7 F. Supp. 3d 955, 968 (N.D. Cal. 2014)).

⁹⁴ See Angela Farmer, *Let's Get Real with College Athletes About Their Chances of Going Pro*, CONVERSATION (Apr. 24, 2019, 6:47 AM), <https://theconversation.com/lets-get-real-with-college-athletes-about-their-chances-of-going-pro-110837> [<https://perma.cc/HPY9-YUDW>] (stating that fewer than 2% of student athletes "play professional sports at any level for any amount of time").

⁹⁵ To be eligible for the NFL draft, athletes must have been out of high school for three years. *The Rules of the Draft*, NFL FOOTBALL OPERATIONS, <https://operations.nfl.com/journey-to-the-nfl/the-nfl-draft/the-rules-of-the-draft/> [<https://perma.cc/N68T-K9EQ>]. To enter the NBA draft, an individual must be at least nineteen years old during the calendar year of the draft and at least one NBA season must have lapsed since their high school graduation. Michael McCann, *Examining What a Change to the NBA's One-and-Done Rule Could Mean for All Involved*, SPORTS ILLUSTRATED (Mar. 3, 2019), <https://www.si.com/nba/2019/03/03/legal-analysis-change-age-eligibility-rule-one-and-done> [<https://perma.cc/VNE6-LXBF>].

during their prime years, especially considering the prevalence of concussions and other injuries that limit their tenure in their sports.⁹⁶

A second, oft-cited equity criticism of college sports is that the NCAA's model relies on Black men to generate revenue that is transferred to white coaches and administrators and reinvested in communities that are predominantly white.⁹⁷ Although schools in the Power Five conferences have an average of twenty different sports, 58% of athletic department revenue comes from football and men's basketball.⁹⁸ Fifty-six percent of NCAA Division I men's basketball players and 49% of Division I football players are Black, while Black men represent only 15% of head football coaches and 28% of head basketball coaches.⁹⁹ In contrast, 82% of Division I head football coaches were white in 2020,¹⁰⁰ and 78% of Division I basketball seasons from 2008 to 2020 were coached by a white head coach.¹⁰¹ Preventing student athletes from profiting from their own labor has transferred approximately \$10 billion in generational wealth from mostly Black football and men's basketball players to mostly white coaches and administrators.¹⁰² Less than 7% of revenue from football and basketball goes to athletes in the form of scholarships, while much of the money is reinvested

⁹⁶ Concerns about football players suffering multiple concussions and their long-term effects have been well documented. Over three football seasons, 500 concussions were reported, and a report by the Centers for Disease Control found that football accounts for the "largest proportions of injuries requiring [at least] seven days before return to full participation, or requiring surgery or emergency transport." Katherine Wiles, *College Football, by the Numbers*, MARKETPLACE (Aug. 29, 2019), <https://www.marketplace.org/2019/08/29/college-football-by-the-numbers/> [<https://perma.cc/AM99-6G96>]; Zachary Y. Kerr, Stephen W. Marshall, Thomas P. Dompier, Jill Corlette, David A. Klossner & Julie Gilchrist, *College Sports-Related Injuries—United States, 2009–10 Through 2013–14 Academic Years*, 64 MORBIDITY & MORTALITY WKLY. REP. 1330, 1332 (2015).

⁹⁷ See, e.g., Zirin, *supra* note 14 (explaining that for years critics of the college sports model have pointed out that football and men's basketball—the two sports that generate revenue used to support athletic departments—rely on Black players who produce billions of dollars in wealth but are unable to receive any income). A Nielsen study also revealed that of the 159 million Americans who watched at least one minute of the 2016 season of college football, less than 24% were Black or Hispanic viewers, moving the revenue generated by Black student athletes further into white communities through television advertisement. HUMA ET AL., *supra* note 25, at 3 n.5.

⁹⁸ Sachin Waikar, *Big-Time College Athletes Don't Get Paid. Here's How This Amplifies Racial Inequities.*, KELLOGGINSIGHT (Feb. 4, 2021), <https://insight.kellogg.northwestern.edu/article/college-athletes-dont-get-paid-racial-inequities> [<https://perma.cc/TG5N-JM6Q>].

⁹⁹ HUMA ET AL., *supra* note 25, at 6.

¹⁰⁰ See Ryan McFadden, *There Are Few Black Coaches in College Football and the NFL. Maryland's Mike Locksley Has Formed a Coalition to Change That*, BALT. SUN (Aug. 17, 2021, 4:34 PM), <https://www.baltimoresun.com/sports/terps/bs-sp-mike-locksley-20210817-37fyejrsozdwtfogz6t6r62ve-story.html> [<https://perma.cc/X8DZ-T9J7>].

¹⁰¹ See Stephen Austin, *The Inequality of Coaching College Basketball*, ATHLETICDIRECTORU, <https://athleticdirectoru.com/articles/the-inequality-of-coaching-college-basketball/> [<https://perma.cc/589Q-MD8S>].

¹⁰² HUMA ET AL., *supra* note 25, at 3.

back into athletic programs to cover facilities expenses and pay coaches, whose salaries have doubled over the last fifteen years.¹⁰³ These revenue-producing sports also subsidize non-revenue-producing sports such as baseball, golf, and soccer, which are played by athletes who tend to be white and come from higher income neighborhoods.¹⁰⁴

Critics of the NCAA's model and the racial and socioeconomic equity concerns of the amateurism approach have used multiple avenues to push for change, including pursuing litigation and lobbying for legislation at the state and federal levels. While some of these bills are more optimal than others, as will be discussed in Part III, the common result is that they represent the mounting pressure that has prompted the NCAA to change some of its rules. In particular, efforts to challenge the NCAA's noncompensation model recently resulted in a landmark decision by the Supreme Court and an even-more-impactful concurrence by Justice Kavanaugh that practically invites future litigation against the NCAA.¹⁰⁵

II. STUDENT-ATHLETE-COMPENSATION LITIGATION

The NCAA's reluctance to modify its rules has led courts to step in and modify the NCAA's rules for it, finding that some restraints were so strict that they constituted violations of antitrust law.¹⁰⁶ This Part provides a background of the relevant antitrust law fundamental to understanding challenges brought against the NCAA, then analyzes the trial and appellate *Alston* decisions, including the Supreme Court opinion issued in June 2021.

A. Antitrust Law in the Context of College Sports

Since 1984, when the Supreme Court announced in *NCAA v. Board of Regents* that the NCAA is not exempt from scrutiny under the Sherman Antitrust Act,¹⁰⁷ several collegiate athletes have challenged the NCAA for

¹⁰³ See Garthwaite et al., *supra* note 37, at 1; Waikar, *supra* note 98; Zirin, *supra* note 14.

¹⁰⁴ See Simpson & Chaingpradit, *supra* note 14; Waikar, *supra* note 98.

¹⁰⁵ *Alston III*, 141 S. Ct. 2141, 2164, 2166 (2021); *id.* at 2166–67 (Kavanaugh, J., concurring).

¹⁰⁶ See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 88 (1984) (holding that the NCAA's television plan violated the Sherman Antitrust Act and was an unreasonable restraint of trade); *Alston II*, 958 F.3d 1239, 1243–44 (9th Cir. 2020) (reasoning that NCAA rules setting a maximum limit on education-related benefits violated antitrust law), *aff'd*, 141 S. Ct. 2141; *O'Bannon II*, 802 F.3d 1049, 1075 (9th Cir. 2015) (concluding that some NCAA compensation rules constituted antitrust violations). A principal objective of antitrust law is to “protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.” *The Antitrust Laws*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [https://perma.cc/7BM3-69MX].

¹⁰⁷ See 468 U.S. at 88.

violations of antitrust law.¹⁰⁸ Section 1 of the Sherman Act technically prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.”¹⁰⁹ But since every contract between parties restricts trade on some level, courts interpret this prohibition to only apply to “unreasonable restraints.”¹¹⁰

Horizontal price-fixing agreements are per se antitrust rule violations that would automatically be deemed illegal.¹¹¹ However, the sports industry is given more leeway because some level of cooperation is necessary.¹¹² For sports competition to exist at all, some coordination is required, such as agreeing to rules of the game and how and where the competitions will be held.¹¹³ Horizontal restraints occur when, for example, NCAA member institutions agree across the board to abide by certain restraints, such as setting a maximum amount of scholarships and benefits that may be awarded to student athletes; these restraints are common in industries in which “some activities can only be carried out jointly,” such as league sports.¹¹⁴ Because many of these mutually agreed-upon restrictions that are necessary to preserve the NCAA’s tradition of amateurism would be illegal per se, the Court in *Board of Regents* determined that a per se rule is inappropriate for the NCAA.¹¹⁵ Instead, the Court announced that the more permissive “rule of reason” analysis is appropriate for “an industry in which horizontal

¹⁰⁸ See, e.g., *Alston II*, 958 F.3d at 1243–44 (determining that rules restricting education-related benefits violated the Sherman Act); *O’ Bannon II*, 802 F.3d at 1079 (reasoning that restraining member institutions from providing student athletes with full cost-of-attendance scholarships was an unreasonable restraint on trade).

¹⁰⁹ 15 U.S.C. § 1.

¹¹⁰ *Bd. of Regents*, 468 U.S. at 98.

¹¹¹ A “horizontal” restraint is an agreement between competitors at the same level of market structure, as opposed to a “vertical” restraint, which involves agreement between entities at different levels of market structure. See 58 C.J.S. *Monopolies* § 72, Westlaw (database updated Feb. 2022). An inherently anticompetitive practice that “facially appears” to “always or almost always tend to restrict competition” is deemed a per se violation of Section 1 of the Sherman Act. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979). Horizontal price-fixing restraints always tend to restrict competition because of the high probability that these restraints are anticompetitive. See *id.* at 23.

¹¹² See Oliver Budzinski & Stefan Szymanski, *Are Restrictions of Competition by Sports Associations Horizontal or Vertical in Nature?*, 11 J. COMPETITION L. & ECON. 409, 411 (2015).

¹¹³ See *id.*

¹¹⁴ *Bd. of Regents*, 468 U.S. at 101. In collegiate sports, for example, horizontal restraints are necessary because institutions that set lower scholarship caps or award fewer benefits than other institutions will automatically be at a disadvantage in recruiting athletes. See *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008) (reasoning that not abiding by restrictions prohibiting “improper inducements” would lead to a “decided competitive advantage in recruiting and retaining highly prized student athletes”).

¹¹⁵ *Bd. of Regents*, 468 U.S. at 100–01.

restraints on competition are essential if the product is to be available at all.”¹¹⁶

The rule of reason is a burden-shifting framework that balances procompetitive and anticompetitive effects of restraints on trade. In context, the rule of reason allows the NCAA to promulgate rules necessary to strike the appropriate balance between procompetitive and anticompetitive effects on the market for amateur athletic competition.¹¹⁷ Critics who have challenged the NCAA in court have sought to show that the anticompetitive effects of NCAA regulations outweigh the procompetitive benefits and that a less restrictive alternative could achieve the same benefits.¹¹⁸ Courts have observed that the rule of reason requires a three-pronged analysis, although the rule is applied in varying formulations.¹¹⁹ Generally, the party challenging an NCAA regulation under the rule of reason must show that the challenged rule produces significant anticompetitive effects in the relevant market; the burden then shifts to the defendant, who must show that the challenged rule promotes procompetitive effects; the third step requires the plaintiff to demonstrate sufficient evidence that legitimate procompetitive goals could be achieved by less restrictive alternatives.¹²⁰ If the procompetitive effects of a relatively restrictive rule are particularly strong—such as enhancing public interest in intercollegiate athletics—then even if the rule produces significant anticompetitive effects, it will still be allowed if the goals could not be achieved by a significantly less restrictive alternative. The Ninth Circuit in *O’Bannon v. NCAA* later clarified that “to be viable under the Rule of Reason[,] an alternative must be ‘virtually as effective’ in serving the procompetitive purposes of the NCAA’s current

¹¹⁶ *Id.* at 101. “[T]he NCAA and its member institutions market . . . competition itself—contests between competing institutions.” *Id.*

¹¹⁷ See *Alston I*, 375 F. Supp. 3d 1058, 1096 (N.D. Cal. 2019) (explaining that courts “must balance the harms and benefits of the challenged conduct to determine whether it is reasonable” (internal quotation marks omitted)), *aff’d*, 958 F.3d 129 (9th Cir. 2020), *aff’d*, 141 S. Ct. 2141 (2021).

¹¹⁸ See *id.* at 1096–98.

¹¹⁹ The rule of reason is often defined as a burden-shifting test under which the burden is originally on the plaintiff, then shifts to the defendant for the second prong, then back to the plaintiff for the third prong; some formulations include balancing the procompetitive and anticompetitive effects after the third prong, contemporaneously with the second prong, or only when the third prong is not met. See *id.* at 1107–08. Some formulations do not mention a burden-shifting test at all. See *id.* at 1108. The *O’Bannon* and *Alston* courts applied the three-step burden-shifting test without necessarily proceeding to the balancing step, so this Note applies that formulation as well.

¹²⁰ *Bd. of Regents*, 468 U.S. at 98, 114, 119; Michael A. Carrier, *The Four-Step Rule of Reason*, ANTITRUST, Spring 2019, at 50, 50, <https://www.antitrustinstitute.org/wp-content/uploads/2019/04/ANTITRUST-4-step-RoR.pdf> [<https://perma.cc/G8N4-AF32>]. The majority of agreements analyzed under antitrust law are considered under the rule of reason analysis.

rules, and ‘without significantly increased cost.’”¹²¹ Ultimately, by applying the rule of reason analysis, the *Board of Regents* Court granted ample latitude to the NCAA to administer college athletics. The Court reasoned that “[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports,” and “the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics.”¹²²

Nevertheless, current and former student athletes have continued challenging the NCAA for violations of the Sherman Act. Following *Board of Regents*, the Third, Fifth, Seventh, and Tenth Circuits repeatedly rejected claims of antitrust violations challenging NCAA compensation rules.¹²³ Then, in 2015, a circuit split emerged as a former UCLA basketball player, joined by thousands of other former Division I football and men’s basketball players, alleged that the NCAA violated antitrust law by preventing former athletes from receiving compensation related to their names, images, and likenesses (NIL) in broadcasts and video games and challenged the grant-in-aid cap.¹²⁴ In *O’Bannon*, the Ninth Circuit did not overturn the NCAA’s rules prohibiting players from receiving compensation for their NIL, but it did hold that the NCAA’s grant-in-aid cap violated antitrust law¹²⁵ and affirmed the district court’s decision to raise the grant-in-aid cap to the full cost of attendance.¹²⁶ *O’Bannon* was “the first [decision] by any federal court to hold that any aspect of the NCAA’s amateurism rules violate[s] the antitrust laws.”¹²⁷

The resulting increase in aid to the full cost-of-attendance amount was a step in the right direction. Nevertheless, current and former student athletes have continued challenging the NCAA for violations of the Sherman Act, including in a landmark Supreme Court case decided in 2021.

¹²¹ 802 F.3d 1049, 1074 (9th Cir. 2015) (quoting *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001)).

¹²² 468 U.S. at 120.

¹²³ These circuits have rejected antitrust challenges to NCAA amateurism rules, often at the motion to dismiss stage. *See, e.g.*, *Depepe v. NCAA*, 893 F.3d 498, 501 (7th Cir. 2018) (stating that “an NCAA bylaw is presumptively procompetitive when it is clearly meant to help maintain the revered tradition of amateurism in college sports or the preservation of the student-athlete in higher education” (internal quotation marks omitted)); *Smith v. NCAA*, 139 F.3d 180, 187 (3d Cir. 1998) (dismissing a complaint challenging an NCAA eligibility rule that “allow[ed] for the survival of the product [and] amateur sports”), *vacated on other grounds*, 525 U.S. 459 (1999); *McCormack v. NCAA*, 845 F.2d 1338, 1343–45 (5th Cir. 1988) (upholding NCAA eligibility rules at the motion to dismiss stage).

¹²⁴ *See O’Bannon II*, 802 F.3d at 1055–56.

¹²⁵ Prior to *O’Bannon*, the grant-in-aid cap covered “the total cost of tuition and fees, room and board, and required course-related books.” *Id.* at 1054 (internal quotation marks omitted). It was then increased to account for full cost-of-attendance estimates. *Id.* at 1054–55.

¹²⁶ *Id.* at 1053.

¹²⁷ *Id.*

B. The Alston Decision

In 2014, Shawne Alston, a former football player at West Virginia University representing a class of former student athletes, filed a class action lawsuit against the NCAA and the Power Five conferences individually.¹²⁸ The plaintiffs alleged that the NCAA and Power Five conferences committed an antitrust violation by setting an artificially low cap on the value of athletic scholarships that was below the value a competitive market would yield.¹²⁹ In 2021, the Supreme Court affirmed a Ninth Circuit ruling enjoining the NCAA from restricting education-related benefits that member institutions may offer students who play FBS football and Division I basketball.¹³⁰ The district court that originally heard *Alston* concluded that limits on education-related benefits essentially constituted a horizontal price-fixing scheme and were unreasonable restraints on trade, and therefore a violation of Section 1 of the Sherman Act.¹³¹

In *Alston*, the district court applied the three-prong rule of reason analysis. The court first accepted that the relevant market was student athletes selling their “labor in the form of athletic services” to schools in exchange for scholarships and payments allowed by the NCAA.¹³² The court then reasoned that the student athletes had satisfied the first prong of the rule of reason analysis by successfully showing that the restraints put in place by the NCAA produced significant anticompetitive effects in the relevant market for student athletes’ labor.¹³³ Because the NCAA capped compensation available to athletes at an artificially low level across all member institutions, student athletes could not test the market by seeking out

¹²⁸ See Justin Sievert, *The Forgotten Antitrust Case: How an NCAA Loss in Alston Could Impact College Athletics*, SPORTING NEWS (Nov. 4, 2015), <https://www.sportingnews.com/us/ncaa-football/news/ncaa-antitrust-case-shawne-alston-effects-college-athletics/1uro6chmw5naj1o6n15opblfmy> [<https://perma.cc/9YWG-4LJN>].

¹²⁹ See *Alston III*, 141 S. Ct. 2141, 2152 (2021). Although the NCAA increased the grant-in-aid cap to the full cost of attendance following *O’Bannon II*, the plaintiffs argued that this new maximum was still below the market value of student athletes’ labor. See *Alston I*, 375 F. Supp. 3d, 1058, 1097–98 (N.D. Cal. 2019), *aff’d*, 958 F.3d 129 (9th Cir. 2020), *aff’d*, 141 S. Ct. 2141.

¹³⁰ *Alston III*, 141 S. Ct. at 2166. The California district court had enjoined the NCAA from enforcing rules restricting education-related benefits, such as scholarships for graduate school, that member institutions may offer students who play FBS football and Division I basketball, and the Ninth Circuit affirmed the district court’s holding. *Alston II*, 958 F.3d at 1243–44.

¹³¹ *Alston II*, 958 F.3d at 1248; see also Robert B. Barnett Jr., *NCAA Found to Be Guilty of a Sherman Act Price-Fixing Scheme but the Remedy Leaves the Rules Mostly in Place*, WOLTERS KLUWER (Mar. 11, 2019) <https://www.vitalaw.com/dashboard/antitrust-competition> [<https://perma.cc/EBF8-RZHX>] (explaining that the district court held that NCAA unreasonably restricted trade by engaging in a horizontal price-fixing scheme, thereby violating Section 1 of the Sherman Act (citing *Alston I*, 375 F. Supp. 3d at 1058, 1109)).

¹³² *Alston II*, 958 F.3d at 1248 (citing *Alston I*, 375 F. Supp. 3d at 1067, 1097).

¹³³ *Alston I*, 375 F. Supp. 3d at 1097–98 (citing *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 (1984)).

schools that would offer greater compensation and, therefore, could not determine the fair market value of their skills or where their skills would receive the most benefits.¹³⁴

The second rule of reason prong required the NCAA to present evidence of the procompetitive effects of the restraints on education-related benefits. The court agreed that many of the restraints, including limits on above-cost-of-attendance payments unrelated to education, the cost-of-attendance cap on athletic scholarships, and restrictions on academic and graduation awards and incentives, served the procompetitive purpose of maintaining a distinction between collegiate and professional sports.¹³⁵ Nonetheless, the district court, relying on NCAA testimony, demand analysis, and survey evidence, concluded that the remaining rules restricting noncash education-related benefits—such as limits on postgraduate scholarships, academic tutoring payments, and post-eligibility internships—did not foster consumer demand.¹³⁶

The court also reasoned that the student athletes satisfied the third rule of reason prong by identifying substantially less restrictive means that could be used to achieve legitimate procompetitive goals.¹³⁷ Specifically, the district court identified the alternative of (1) prohibiting the NCAA from setting a cap on noncash education-related benefits and (2) limiting academic and graduation awards and incentives to below the maximum amount of total compensation that a student athlete may receive as less restrictive means than limiting all education-related benefits.¹³⁸ As part of that alternative, the court permitted individual conferences to set limits on education-related benefits,¹³⁹ reasoning that education-related benefits “cover legitimate education-related costs” and are “easily distinguishable from professional salaries.”¹⁴⁰

While the district court ultimately ruled against the NCAA, the district court’s analysis is premised on flawed reasoning, as Circuit Judge Milan Dale Smith Jr. identified in his concurring opinion to the Ninth Circuit’s decision on appeal. While the first step of the rule of reason analysis is

¹³⁴ See *Alston II*, 958 F.3d at 1248 (explaining that, “but for the challenged restraints, schools would offer recruits compensation that more closely correlates with their talent”).

¹³⁵ *Id.* at 1250–51 (citing *Alston I*, 375 F. Supp. 3d at 1082–83).

¹³⁶ See *id.* at 1249–51, 1257–58 (explaining that after considering evidence from both parties, the district court found the NCAA’s procompetitive theory unpersuasive and found that limits on noncash education-related benefits do not have a procompetitive effect (citing *Alston I*, 375 F. Supp. 3d at 1070–80)).

¹³⁷ *Id.* at 1251–52 (citing *Alston I*, 375 F. Supp. 3d at 1087–88, 1105).

¹³⁸ *Id.* at 1260 (citing *Alston I*, 375 F. Supp. 3d at 1087).

¹³⁹ *Id.* at 1251.

¹⁴⁰ *Id.* at 1260–61 (quoting *Alston I*, 375 F. Supp. 3d at 1105).

confined to the definition of the market in which the challenged restriction occurs, the second prong often goes beyond this market when considering procompetitive effects.¹⁴¹ Although some courts have rejected procompetitive effects outside of the defined market,¹⁴² the courts in both *O'Bannon* and *Alston* included procompetitive benefits not tied to the relevant market in their analyses.¹⁴³ Despite defining the relevant market as student athletes “sell[ing] their ‘labor in the form of athletic services’ to schools in exchange for” permissible scholarships and payments,¹⁴⁴ the courts accepted third-party benefits, such as preserving the amateur nature of collegiate sports to increase demand for consumers.¹⁴⁵ Consumer demand has no effect on the market for student athletes selling their labor since the current model does not allow student athletes to receive any revenue increased consumer demand may drive. If the rule of reason is meant to determine whether a restraint is net procompetitive or net anticompetitive, allowing procompetitive benefits in one market to be weighed against anticompetitive effects in another is illogical and weakens antitrust protections.¹⁴⁶ In other words, the NCAA’s strongest proffered procompetitive justification of maintaining amateurism for the sake of consumer demand should not be accepted in the first place.

Nevertheless, the Ninth Circuit agreed that the district court’s ruling struck an appropriate balance between striking down an antitrust violation and upholding the distinction between collegiate and professional sports and held that the district court did not preempt the NCAA’s role as the administrator of college sports.¹⁴⁷ Because the same judge initially heard both *O'Bannon* and *Alston*, and both subsequently went to the Ninth Circuit on appeal, the NCAA expressed concern about the role a single court has had in shaping collegiate athletics.¹⁴⁸ The NCAA went on to petition the Supreme

¹⁴¹ *Id.* at 1267–69 (Smith, J., concurring).

¹⁴² *E.g.*, *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1186 (D.C. Cir. 1978) (rejecting justifications offered that draft rules “produc[ed] better entertainment for the public, higher salaries for the players, and increased financial security for the clubs,” because these had no procompetitive effects in the relevant market—the market for players’ services).

¹⁴³ *See Alston I*, 375 F. Supp. 3d at 1082–83; *O'Bannon II*, 802 F.3d 1049, 1069–73 (9th Cir. 2015).

¹⁴⁴ *Alston II*, 958 F.3d at 1248 (quoting *Alston I*, 375 F. Supp. 3d at 1067, 1097).

¹⁴⁵ *See Alston I*, 375 F. Supp. 3d at 1082–83; *O'Bannon II*, 802 F.3d at 1069–73; *see also* Brief of Antitrust Lawyers, *supra* note 58, at 11–12 (insisting that because the NCAA and its member institutions are not-for-profit organizations, any procompetitive justification offered must be related to their respective nonprofit missions, not a means of profit generation).

¹⁴⁶ *See Alston II*, 958 F.3d at 1269 (Smith, J., concurring).

¹⁴⁷ *See id.* at 1263–64.

¹⁴⁸ *See* Petition for a Writ of Certiorari at 30–31, *Alston III*, 141 S. Ct. 2141 (2021) (Nos. 20-512, 20-520) (arguing that the *O'Bannon* and *Alston* decisions effectively “install[] a single judge in California

Court, including on this basis, resulting in the Court granting certiorari on a case involving the NCAA for the first time in nearly four decades.¹⁴⁹

C. *The Supreme Court Opinion in Alston*

The Supreme Court granted certiorari on the NCAA’s appeal, but because the student athletes did not renew their “across-the-board challenge to the NCAA’s compensation restrictions” that the district court heard, the Court did not review all challenges; instead, the Court only considered the district court’s injunction against those NCAA rules that restricted education-related benefits.¹⁵⁰ The Court unanimously affirmed the Ninth Circuit’s decision upholding the injunction, reasoning that both the Ninth Circuit and the district court properly scrutinized the NCAA’s compensation restrictions under the antitrust rule of reason analysis.¹⁵¹

The Court contended that the narrow injunction extended the NCAA “considerable leeway” to still define education-related benefits and seek modification of the injunction to reflect that definition.¹⁵² While acknowledging that some would believe “the district court did not go far enough” and would see the injunction as “a poor substitute for fuller relief,”¹⁵³ the Court maintained that resolving the national debate about amateurism in college sports, though important, was not in its wheelhouse.¹⁵⁴ The Court suggested if the NCAA wished to seek an antitrust exemption based on the special characteristics of its industry, the NCAA should address its appeal to Congress.¹⁵⁵

While the *Alston* decision signified the end of the NCAA’s attempt to defend its restrictions on education-related benefits, it symbolizes a much

as the superintendent of college sports eligibility, subject only to deferential review by the Ninth Circuit”). The NCAA stated that it believes the district court decision was inconsistent with *O’ Bannon* and the Ninth Circuit decision was inconsistent with precedent set by the Supreme Court and other circuits. See Donald Remy, *NCAA Statement on Alston Decision*, NCAA (Mar. 9, 2019), <http://www.ncaa.org/about/resources/media-center/news/ncaa-statement-alston-decision> [https://perma.cc/HUC5-ZRM5]; Donald M. Remy, *NCAA Statement Regarding Supreme Court Petition for Alston Case*, NCAA (Oct. 15, 2020), <http://www.ncaa.org/about/resources/media-center/news/ncaa-statement-regarding-supreme-court-petition-alston-case> [https://perma.cc/8WPC-ZCV5].

¹⁴⁹ See Petition for a Writ of Certiorari, *supra* note 148, at 4–6. The Supreme Court heard oral argument on March 31, 2021. Amy Howe, *Justices Announce Low-Key March Argument Session*, SCOTUSBLOG (Feb. 1, 2021, 2:22 PM), <https://www.scotusblog.com/2021/02/justices-announce-low-key-march-argument-session> [https://perma.cc/NE5R-QQEV].

¹⁵⁰ *Alston III*, 141 S. Ct. at 2145.

¹⁵¹ See *id.* at 2160–66 (noting the district court’s proper applications of antitrust scrutiny under a rule of reason analysis to the NCAA’s compensation restrictions).

¹⁵² *Id.* at 2164.

¹⁵³ *Id.* at 2166.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.* at 2160.

greater blow to the NCAA: the Court quashed the NCAA's view that the *Board of Regents* decision approved of the NCAA's restrictions on student-athlete compensation, and that this approval would foreclose any meaningful review of those restrictions.¹⁵⁶ Asserting that the Justices "cannot agree" with the notion that the NCAA enjoys a "judicially ordained immunity" from the Sherman Act, the Court declined to overlook the NCAA's restrictions merely because the restraints at issue fell "at the intersection of higher education, sports, and money."¹⁵⁷ The Court also dismissed the NCAA's argument that amateurism makes college sports immune from Section 1 scrutiny.¹⁵⁸ Instead, the Court emphasized the district court's finding that the NCAA "had not adopted any consistent definition" of amateurism, that the NCAA's rules and restrictions on compensation had changed over time, and that the NCAA adopted restrictions on compensation "without any reference to 'considerations of consumer demand'"; the Court further stated that some of the restrictions were not even "necessary to preserve consumer demand."¹⁵⁹

D. Justice Kavanaugh's Concurrence

While the *Alston* decision itself dealt a blow to the NCAA, Justice Kavanaugh took it one step further in his concurrence, emphasizing that the NCAA's remaining compensation rules "raise serious questions under the antitrust laws."¹⁶⁰ Kavanaugh reiterated that because the student athletes did not renew their across-the-board challenge to the NCAA's compensation restrictions, the Court did not review them. Kavanaugh suggested, however, that the NCAA may lack valid procompetitive justification to "pass muster under ordinary rule of reason scrutiny."¹⁶¹ He stressed that the argument that athlete noncompensation is "the defining feature of college sports" is "circular and unpersuasive."¹⁶² He stated unequivocally that the NCAA is not exempt from antitrust law, because—simply put—"[p]rice-fixing labor is price-fixing labor."¹⁶³

Further, Kavanaugh highlighted the paradox that while student athletes, who are predominantly Black and from lower socioeconomic backgrounds, generate "billions of dollars in revenue" that contribute to "six- and seven-figure salaries" of coaches, NCAA executives, conference commissioners,

¹⁵⁶ See *id.* at 2157–58.

¹⁵⁷ *Id.* at 2159.

¹⁵⁸ See *id.* at 2162–63.

¹⁵⁹ *Id.* at 2163 (quoting *Alston I*, 375 F. Supp. 3d 1058, 1070–75, 1080, 1100, 1104 (N.D. Cal. 2019)).

¹⁶⁰ *Id.* at 2166–67 (Kavanaugh, J., concurring).

¹⁶¹ *Id.* at 2167.

¹⁶² *Id.*

¹⁶³ *Id.*

university presidents, and athletic directors, student athletes themselves receive “little or nothing.”¹⁶⁴ Kavanaugh’s observation bolsters this Note’s suggestion that antitrust law be used to combat the racial inequity the NCAA’s business model has perpetuated for years and empower Black student athletes to seek the full value of their labor. With Kavanaugh’s charge that the “NCAA’s business model would be flatly illegal in almost any other industry in America,” his *Alston* concurrence is likely—and possibly even intended—to encourage more challenges.¹⁶⁵ Kavanaugh’s invitation to litigate against the NCAA creates a new urgency in the landscape of student-athlete-compensation litigation and legislation.

III. THE FUTURE OF STUDENT-ATHLETE COMPENSATION

Because the scope of the Supreme Court’s *Alston* decision was so narrow and only addressed education-related benefits, the holding is unlikely to result in sweeping changes to the landscape of college sports. Athletic programs already provide certain education-related benefits, such as laptops and tablets, to student athletes,¹⁶⁶ so they are still free to provide additional benefits that are arguably related to educational needs without interference from the NCAA.¹⁶⁷ While some schools may use this as an opportunity to find a recruiting advantage, these benefits are unlikely to constitute enough compensation to sway a significant number of students toward one school over another. A school could theoretically attempt to use this as an avenue to offer high-value items loosely related to some educational advantage, such as a stipend for a car service or a car for courses that require off-campus work.¹⁶⁸ In the unlikely event schools do try this, the NCAA reserves the power to define education-related benefits and can curb benefits it perceives

¹⁶⁴ *Id.* at 2168 (emphasis added).

¹⁶⁵ *Id.* at 2167. During oral argument, Justice Kavanaugh was “particularly aggressive” when questioning the NCAA, alleging that schools were conspiring with competitors and characterizing their justifications as “entirely circular and even somewhat disturbing.” Sean Gregory, *Why the NCAA Should Be Terrified of Supreme Court Justice Kavanaugh’s Concurrence*, TIME (June 21, 2021, 6:24 PM), <https://time.com/6074583/ncaa-supreme-court-ruling/> [<https://perma.cc/RG6Y-G6YZ>].

¹⁶⁶ See *Alston I*, 375 F. Supp. 3d 1058, 1088 (N.D. Cal. 2019) (explaining that the NCAA already regulated providing computers to student athletes), *aff’d*, 958 F.3d 129 (9th Cir. 2020), *aff’d*, 141 S. Ct. 2141.

¹⁶⁷ Some courses typically attract more student athletes than others. If it becomes commonplace for student athletes to enroll in photography classes, for example, athletic programs might informally tout professional cameras for this class as a benefit when recruiting prospective student athletes.

¹⁶⁸ Cf. Dennis Dodd, *Breaking Down the NCAA’s Forthcoming Supreme Court Battle with Its Big Brother Status and Amateurism at Stake*, CBS SPORTS (Feb. 3, 2021, 1:45 PM), <https://www.cbssports.com/college-football/news/breaking-down-the-ncaas-forthcoming-supreme-court-battle-with-its-big-brother-status-and-amateurism-at-stake/> [<https://perma.cc/72T7-HDAY>] (“If uncapped benefits are allowed, Alabama could conceivably purchase a new [car] for their top players if they live on campus as transportation would be deemed essential for them to get to class.”).

as crossing the line into pay for play.¹⁶⁹ Even so, although *Alston*'s narrow holding itself will probably not induce comprehensive reform in the realm of student-athlete compensation, the opinion taken as a whole, and Justice Kavanaugh's concurrence in particular, places a target on the NCAA's business model that critics can use to push for reform.

Because the Supreme Court largely dispelled the NCAA's argument that it should be exempt from antitrust law, NCAA compensation rules setting the value of student-athlete labor artificially low are likely to receive less deferential treatment from courts following *Alston*. This presents an opportunity to use antitrust law as a vehicle to correct the NCAA's exploitative model. This Note considers paths forward through both litigation and legislation, ultimately arguing for comprehensive federal legislation that protects student athletes' right to compensation.

A. Litigation

The student athletes' decision not to renew the across-the-board compensation challenge in *Alston* leaves the vast majority of student-athlete compensation regulations still up for judicial review. Although the Supreme Court previously denied certiorari for other NCAA antitrust challenges,¹⁷⁰ *Alston*—and Justice Kavanaugh's concurrence in particular—practically invite further litigation challenging other NCAA compensation regulations. An amended complaint citing *Alston* was filed in an existing class action lawsuit—yet again in the Northern District of California—alleging that the NCAA's prohibition on student-athlete NIL compensation constitutes a conspiracy to prevent student athletes from profiting from endorsement deals.¹⁷¹ While the NCAA issued a temporary policy that allows schools to decide whether their student athletes can receive compensation for their NIL, the plaintiffs here hope to establish precedent that student athletes are entitled to be compensated for their NIL and achieve a policy that allows student athletes across the board to receive such compensation.¹⁷² In the amended complaint, the plaintiffs highlighted the Supreme Court's rejection of the NCAA's position that its amateurism model is not subject to standard

¹⁶⁹ See *Alston III*, 141 S. Ct. at 2164.

¹⁷⁰ See, e.g., *O'Bannon II*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

¹⁷¹ Consolidated Amended Complaint at 5, *In re Coll. Athlete NIL Litig.*, No. 4:20-cv-03919 CW (N.D. Cal. July 26, 2021); see also Michael McCann, *NCAA to Face More Collusion Claims in Wake of Alston NIL Defeats*, SPORTICO (June 28, 2021, 2:15 PM), <https://www.sportico.com/law/analysis/2021/house-v-ncaa-legal-primer-1234632887/> [<https://perma.cc/BN9K-C68N>] (detailing potential future cases that could impact the NCAA).

¹⁷² See Consolidated Amended Complaint, *supra* note 171, at 34.

antitrust analyses.¹⁷³ The consolidated lawsuit originally began as three different lawsuits filed by two current student athletes and one former one,¹⁷⁴ so an uptick in similar suits is likely following *Alston*. Unlike in previous cases, plaintiffs can now rely on the Court's *Alston* decision when arguing that restraints justified by amateurism should not be upheld under a rule of reason analysis.¹⁷⁵ Plaintiffs can also rely on Circuit Judge Smith's reasoning that procompetitive effects outside of the relevant market should not be considered at all.¹⁷⁶

Nevertheless, litigation may not be the most efficient means of reforming the NCAA's business model, as litigation can be remarkably expensive.¹⁷⁷ Under antitrust law, a fee-shifting provision, which mandates that when a plaintiff prevails the defendant pays the legal fees of both parties, could make litigation less prohibitive in cases in which the plaintiff is likely to succeed.¹⁷⁸ Yet cases can still take years to move through litigation, which will delay the effective date of any reform and prevent thousands of student athletes from reaping its benefits while they are still students. Furthermore, the Court has already stated that Congress is the appropriate place for a comprehensive reform of NCAA regulations to occur, so the Court may be hesitant to massively reform the system itself.¹⁷⁹ Instead, legislation may prove the better avenue for student-athlete-compensation reform.

B. Legislation

At the same time as *Alston* was making its way through federal courts, states, Congress, and the NCAA attempted to appease athletes' concerns by enacting a series of name, image, and likeness regulations to increase student-athlete compensation.¹⁸⁰ NIL rules govern a person's ability to

¹⁷³ See *id.* at 10; John Sigety, *Collegiate Athlete Litigation: The Antitrust Class-Action Lawsuit that Could End the NCAA*, KANE RUSSELL COLEMAN LOGAN (Aug. 10, 2021), <https://www.krcl.com/articles/litigation-update/collegiate-athlete-litigation-the-antitrust-class-action-lawsuit-that-could-end-the-ncaa/> [<https://perma.cc/4XY6-HEPA>].

¹⁷⁴ Sigety, *supra* note 173.

¹⁷⁵ See *Alston III*, 141 S. Ct. 2141, 2158 (2021) (reiterating that even if upholding the tradition of amateurism is accepted as a procompetitive benefit, that “do[es] not suggest that courts must reflexively reject all challenges to the NCAA’s compensation restrictions”).

¹⁷⁶ See *Alston II*, 958 F.3d 1239, 1267–69 (9th Cir. 2020) (Smith, J., concurring), *aff’d*, 141 S. Ct. 2141.

¹⁷⁷ See *Litigation Can Be Inefficient and Expensive. Why Litigate?*, PWC, <https://www.pwc.com/gx/en/services/forensics/dispute-services/litigation.html> [<https://perma.cc/44KT-WCCW>].

¹⁷⁸ See 15 U.S.C. § 4304(a).

¹⁷⁹ See *Alston III*, 141 S. Ct. at 2160.

¹⁸⁰ 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://perma.cc/25FG-U2WM>].

capitalize on their publicity and be compensated through avenues such as endorsements, sponsorships, autographs, or lessons.¹⁸¹ Eager to prevent outsiders from commandeering the role of governing college sports, the NCAA agreed to “modernize” its NIL rules prior to the *Alston* decision;¹⁸² the NCAA board of governors directed the three NCAA divisions to suggest new regulations that allow athletes to earn endorsement money while maintaining the collegiate model.¹⁸³ The NCAA later introduced historic rule changes, set for a vote in January 2021, that would uniformly allow student athletes to accept endorsement money without risking their eligibility for competition.¹⁸⁴ However, after the Supreme Court granted certiorari on the NCAA’s appeal of *Alston*, the Department of Justice sent a letter warning the NCAA of possible antitrust implications of any rule changes.¹⁸⁵ Subsequently, the Division I Council—the penultimate stage in the NCAA’s rulemaking procedure—decided to delay its vote on the proposal indefinitely.¹⁸⁶ Because of the Department of Justice warning of potential antitrust violations if the Association sought to restrict NIL rules, the NCAA is unlikely to impose NIL restrictions without congressional input.

Once it became clear that neither a federal NIL law nor new NCAA regulations were imminent, six conferences (including three of the Power Five—the SEC, ACC, and Pac-12) proposed a new plan.¹⁸⁷ The proposal directed schools in states with NIL laws set to go into effect in less than two weeks to follow the laws of their respective states and made schools in states

¹⁸¹ See Katie McInerney, *What Is NIL? NCAA Rules Are Changing Regarding Athlete Pay. Here’s What It Means*, BOS. GLOBE (July 2, 2021, 10:57 AM), <https://www.bostonglobe.com/2021/06/30/sports/ncaa-nil-rules-change/> [<https://perma.cc/GH24-D8TB>].

¹⁸² See Murphy, *supra* note 180.

¹⁸³ See Dan Murphy, *NCAA Clears Way for Athletes to Profit from Names, Images and Likenesses*, ESPN (Oct. 29, 2019), https://www.espn.com/college-sports/story/_/id/27957981/ncaa-clears-way-athletes-profit-names-images-likenesses [<https://perma.cc/B9DW-FKZF>].

¹⁸⁴ See Pat Forde & Ross Dellenger, *NCAA’s Name, Image, Likeness Legislation Proposal Revealed in Documents*, SPORTS ILLUSTRATED (Oct. 12, 2020), <https://www.si.com/college/2020/10/13/ncaa-proposal-athlete-compensation-name-image-likeness> [<https://perma.cc/8WVA-LLWN>] (proposing a bylaw change that would allow student athletes to be compensated for their names, images, and likenesses for private lessons, camps, clinics, endorsements, and autograph sessions).

¹⁸⁵ See Steve Berkowitz & Christine Brennan, *Justice Department Warns NCAA over Transfer and Name, Image, Likeness Rules*, USA TODAY (Jan. 8, 2021, 4:00 PM), <https://www.usatoday.com/story/sports/ncaaf/2021/01/08/justice-department-warns-ncaa-over-transfer-and-money-making-rules/6599747002/> [<https://perma.cc/FT2A-TYR3>].

¹⁸⁶ See Dan Murphy & Adam Rittenberg, *NCAA Delays Vote to Change College Athlete Compensation Rules*, ESPN (Jan. 11, 2021), https://www.espn.com/college-sports/story/_/id/30694073/sources-ncaa-delays-vote-change-college-athlete-compensation-rules [<https://perma.cc/EJL6-KYTQ>].

¹⁸⁷ See Murphy, *supra* note 180.

without NIL laws responsible for developing their own NIL guidelines, with only a couple of restrictions.¹⁸⁸

Following the Supreme Court's *Alston* decision and on the eve—literally—of NIL laws going into effect in twelve states that would make it impossible for schools to comply with both existing NCAA regulations and state law, the NCAA decided to act.¹⁸⁹ The Association adopted a temporary rule urging schools to set their own NIL rules based on minimal guidelines intended to prevent pay-for-play deals and recruiting inducements.¹⁹⁰

Allowing student athletes to seek third-party endorsement deals and profit from their own NIL is a step in the right direction, but it does not address the disparity in the NCAA's business model that redirects billions of dollars from student athletes' labor to university, conference, and NCAA officials.¹⁹¹ The NCAA should not be allowed to punt the responsibility of compensating student athletes to third parties to make up for its own artificially low valuations of student-athlete labor.

Several states took advantage of the new NCAA policy, quickly passing NIL laws.¹⁹² The new NIL rules allowed student athletes to be compensated for these activities for the first time.¹⁹³ Many of these state statutes have already gone into effect, allowing student athletes at schools in those states to sign endorsement deals and begin profiting from their NIL.¹⁹⁴

¹⁸⁸ See Dan Murphy, *College Conference Commissioners Pushing Minimalist Plan to Regulate NIL*, ESPN (June 20, 2021), https://www.espn.com/college-sports/story/_/id/31675595/college-conference-commissioners-pushing-minimalist-plan-regulate-nil [https://perma.cc/4QJK-WJU4].

¹⁸⁹ See Murphy, *supra* note 180. NIL laws went into effect in two additional states later that month. *Id.*

¹⁹⁰ *Id.*; Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy> [https://perma.cc/H6VK-YANL].

¹⁹¹ See Lawrence M. Kahn, *Markets: Cartel Behavior and Amateurism in College Sports*, 21 J. ECON. PERSPS. 209, 219 (2007).

¹⁹² See Murphy, *supra* note 180.

¹⁹³ See, e.g., Associated Press, *The NCAA and the Impact of NIL Compensation, Explained*, DENVER POST (July 1, 2021, 7:23 AM), <https://www.denverpost.com/2021/07/01/ncaa-nil-compensation-impact-explainer/> [https://perma.cc/L8YL-9L6X] (explaining that when NIL laws in several states went into effect on July 1, 2021, “thousands of college athletes [would] be able to earn a form of compensation that has been barred for decades by regulations put in place by the NCAA, conferences, schools, or a combination of all of them”).

¹⁹⁴ As of March 2022, NIL legislation has already gone into effect in twenty-two states. See Thomas Di Biasio, *Most States Pass “Name, Image, and Likeness” Laws for Student Athletes*, MULTISTATE (Sept. 21, 2021), <https://www.multistate.us/insider/2021/9/21/most-states-pass-name-image-and-likeness-laws-for-student-athletes> [https://perma.cc/4Z6A-M8NU]; *NIL Legislation Tracker*, SAUL EWING ARNSTEIN & LEHR LLP, <https://www.saul.com/nil-legislation-tracker> [https://perma.cc/S76U-MH42].

1. State Legislation

State and federal legislation have targeted different aspects of student-athlete compensation. Shortly after the Northern District of California issued its *Alston* ruling in 2019, California passed the Fair Pay to Play Act,¹⁹⁵ prohibiting universities in California from punishing student athletes for accepting endorsement money.¹⁹⁶ Colorado quickly followed suit.¹⁹⁷ While these laws initially were not set to go into effect until 2023, Florida's passage of an NIL law with an effective date of July 1, 2021 accelerated the general timeline.¹⁹⁸ Twenty-nine states in total have passed NIL legislation, and twenty-two states' NIL laws have already gone into effect.¹⁹⁹ In addition, many states without NIL legislation in place are actively pursuing such legislation.²⁰⁰ Twenty-two states that have passed NIL legislation did so during 2021—several of them following either the *Alston* Supreme Court hearing or decision²⁰¹—indicating how much momentum this case has created. The widespread adoption and support also cast doubt on the NCAA's notion that the public holds the tradition of amateurism near and dear and that compensating student athletes would negatively impact consumer demand, further weakening the NCAA's strongest justification for not compensating student athletes.

¹⁹⁵ See S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019); Jack Kelly, *Newly Passed California Fair Pay to Play Act Will Allow Student Athletes to Receive Compensation*, FORBES (Oct. 1, 2019, 12:36 PM), <https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-receive-compensation/> [https://perma.cc/KP43-4ZQ8].

¹⁹⁶ Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12> [https://perma.cc/WW78-D3X9].

¹⁹⁷ Compensation and Representation of Student Athletes Act, S.B. 20-123, 2020 Leg., Reg. Sess. (Colo. 2020); see also Lauren Lyster, Jeffrey Martino & Elizabeth McCurrach, BakerHostetler, *NCAA Moves on Multiple Fronts*, JDSUPRA (July 28, 2020), <https://www.jdsupra.com/legalnews/ncaa-moves-on-multiple-fronts-84084/> [https://perma.cc/644N-8M63] (explaining that some states followed California by passing NIL legislation).

¹⁹⁸ See Lyster et al., *supra* note 197; S.B. 20-123. In June 2021, the effective date of the Compensation and Representation of Student Athletes Act was moved up from January 1, 2023 to July 1, 2021. See H.B. 21-1328, 2021 Leg., Reg. Sess. (Colo. 2021).

¹⁹⁹ See Di Biasio, *supra* note 194. Virginia's NIL law was initially put in place for the 2021–2022 athletics season and set to expire in June 2022. See Ross Broudy, *What Is All the Hype Around Name, Image, and Likeness in Virginia's College Sports?: An Introduction to Virginia NIL Laws*, PENDER & COWARD (Dec. 27, 2021), https://www.pendercoward.com/resources/blog-opinions-and-observations/what-is-all-the-hype-around-name-image-and-likeness-in-virginia-s-college-sports-an-introduction-to-virginia-nil-laws/#_ednref26 [https://perma.cc/D7GL-GGN8].

²⁰⁰ Murphy, *supra* note 180 (noting that Massachusetts, New York, and Rhode Island all have pending legislation originally scheduled to be signed into law in 2021 or 2022).

²⁰¹ See Di Biasio, *supra* note 194.

The problem with these new state laws is that they have created a patchwork system of NIL legislation that allows students at schools in one state to receive endorsement money, while students in a state just across the border may be ineligible to compete if they accept endorsements. NIL laws have already gone into effect in several states that are home to powerhouse institutions that regularly win championships and produce draft picks—such as Alabama, Georgia, Louisiana, Mississippi, Ohio, South Carolina, and Texas—giving schools in these states an edge on recruiting prospective student athletes who are interested in endorsement deals.²⁰² In a conference where schools in states with different rules are competing against each other, the uneven playing field may undermine NCAA regulations intended to support uniformity across the field because the “integrity of the product” can only be preserved through mutual agreement.²⁰³ This is likely to be a short-term problem; as many more states pass NIL legislation, states that have not passed NIL legislation will likely feel pressure from schools worried about being disadvantaged when recruiting. Nonetheless, federal legislation would preempt or displace state legislation and ensure all schools abide by uniform guidelines. Therefore, it is time to pass the baton to Congress.

2. *Federal Legislation*

Given the problems a patchwork of state regulations presents for student athletes, federal legislation would be the best method to ensure student athletes at schools in all states are afforded equal NIL opportunities. Several bills have been introduced in Congress in the past few years designed to address different NCAA regulations, including an explicit antitrust exemption,²⁰⁴ eligibility, NIL rights, student-athlete compensation, and

²⁰² *Id.*

²⁰³ See *O’Bannon II*, 803 F.3d 1049, 1069 (9th Cir. 2015) (asserting that “the integrity of the ‘product’ cannot be preserved except by mutual agreement” (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 102 (1984))).

²⁰⁴ Senator Marco Rubio (R-Fla.) introduced a bill that included this exemption, but it was considered a nonstarter by many in Congress. See Lyster et al., *supra* note 197; Marc Edelman, *Why Congress Would Be Crazy to Grant the NCAA an Antitrust Exemption*, FORBES (May 6, 2020, 9:50 AM), <https://www.forbes.com/sites/marcedelman/2020/05/06/why-congress-would-be-crazy-to-grant-the-ncaa-an-antitrust-exemption> [<https://perma.cc/V8FJ-EYAU>] (noting that removing the threat of antitrust challenges would make “NCAA leaders . . . less likely to make future voluntary concessions to their athlete labor force”); Thaddeus Kennedy, *NCAA and an Antitrust Exemption: The Death of College Athletes’ Rights*, HARV. J. SPORTS & ENT. L. (Aug. 31, 2020), <https://harvardjsel.com/2020/08/ncaa-and-an-antitrust-exemption-the-death-of-college-athletes-rights/> [<https://perma.cc/J5KR-FSLT>] (arguing that an antitrust exemption would remove “the primary avenue through which student-athletes have been able to protest unfair NCAA regulations”).

student athletes' employee classification.²⁰⁵ Multiple bills have been introduced in Congress to varying levels of bipartisan support.²⁰⁶ While some of them have been criticized as “too NCAA-friendly”²⁰⁷ and overly restrictive on student-athlete compensation, three proposals stand out for features that show promise for advancing the efforts to compensate student athletes.

a. The College Athlete Economic Freedom Act

The College Athlete Economic Freedom Act (CAEFA), coauthored by Senator Chris Murphy (D-Conn.) and Representative Lori Trahan (D-Mass.), does not provide for Congress or the NCAA to regulate what products

²⁰⁵ See, e.g., Student Athlete Level Playing Field Act, H.R. 2841, 117th Cong. § 2 (2021) (focusing on NIL regulations and restrictions); Collegiate Athlete Compensation Rights Act, S. 5003, 116th Cong. §§ 3–4 (2020) (focusing on student athletes' rights relating to NIL compensation); College Athlete Economic Freedom Act, S. 238, 117th Cong. § 3 (2021) (proposing a framework that allows student athletes to receive compensation for their NIL with relatively few restrictions).

²⁰⁶ The Student Athlete Level Playing Field Act has received the most bipartisan support so far. Introduced by Representatives Anthony Gonzales (R-Ohio) and Emmanuel Cleaver (D-Mo.), the bill would give student athletes the ability to be compensated for their NIL through endorsements and sponsorship deals but would not entitle student athletes to receive any of the revenues their labor generated. This proposal also seems to be the favorite of the NCAA so far because it would placate critics of the current model by allowing student athletes to earn some money, while not requiring schools, conferences, or coaches to share their salaries. See Dan Murphy, *Bipartisan Federal Bill Introduced for College Sports*, ESPN (Sept. 24, 2020), https://www.espn.com/college-sports/story/_/id/29961059/bipartisan-federal-nil-bill-introduced-college-sports [<https://perma.cc/5R84-NNWG>]; Megin Rubin, *House Bill Would Allow College Athletes to Capitalize on Their Fame*, NAT'L L. REV. (Sept. 29, 2020), <https://www.natlawreview.com/article/house-bill-would-allow-college-athletes-to-capitalize-their-fame> [<https://perma.cc/W3YS-UMZX>]. For its part, the NCAA believes the bill will “strengthen the college athlete experience and support the NCAA and its members to modernize [NIL] rules, but not pay student-athletes or turn them into employees of their colleges and universities.” *NCAA Statement on Gonzalez-Cleaver Bill*, NCAA (Apr. 26, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-statement-gonzalez-cleaver-bill-0> [<https://perma.cc/S6RF-JCF9>].

²⁰⁷ For instance, in December 2020, the Collegiate Athlete Compensation Rights Act was introduced by Senator Roger Wicker (R-Miss.). This bill would give student athletes the ability to be compensated for their NIL without risking eligibility; however, any person defined as a “booster” would not be able to pay to use an athlete's NIL, significantly restricting the market since the definition of booster—an individual or entity that directly or indirectly provides a donation to obtain season tickets for a sport at a university or makes a financial contribution to the athletics department that exceeds a predetermined amount—is so broad. S. 5003 §§ 2(2)(A)–(F). Senator Wicker's bill has received criticism for being too narrow, conservative, and “NCAA-friendly” and is therefore unlikely to become the frontrunner among possible federal legislation. See, e.g., Ross Dellenger, *Latest Congressional NIL Bill Would Allow Athletes to Enter Draft and Return to College*, SPORTS ILLUSTRATED (Feb. 24, 2021) (characterizing Senator Wicker's bill as “restrictive” and “right-leaning”). The Amateur Athletes Protection and Compensation Act, introduced by Senator Jerry Moran (R-Kan.), is designed to protect student athletes from risking their eligibility for entering into endorsement deals or receiving compensation and has received similar criticism for being too narrow. See *id.* It also specifically seeks to ensure student athletes are not considered employees. See Amateur Athletes Protection and Compensation Act of 2021, S. 414, 117th Cong. § 5 (2021).

student athletes endorse.²⁰⁸ Other proposed bills include provisions restricting student athletes from endorsing certain companies and products (such as gambling, adult entertainment, tobacco, and alcohol); prohibiting endorsements of brands that compete with school athletic sponsors; or restricting prospective student athletes from accepting endorsement money.²⁰⁹ The CAEFA’s sponsors intentionally did not include these restrictions in their proposed bill because “[i]f predominantly white coaches and NCAA executives can have unfettered endorsement deals, why shouldn’t predominantly black athletes be afforded the same opportunity?”²¹⁰ The CAEFA would also prohibit the NCAA or conferences from preventing athletes from organizing through collective representation to sell licensing rights as a group,²¹¹ a practice usually employed when bargaining for media rights, video games, and jersey sales.²¹² This bill intentionally aims to correct disparities between the rights afforded to predominantly Black student athletes and those afforded to the predominantly white coaches and administrators who profit from athletes’ labor, making the CAEFA the most appealing proposal from a racial-justice perspective.²¹³ Yet the CAEFA would still require student athletes either to actively seek and negotiate endorsement deals with third parties on an individual or group basis or to rely on their athletic departments to act in their best interests in such negotiations.²¹⁴ These options either prevent student athletes from being empowered to advocate for themselves or force them to individually expend additional efforts to negotiate their own deals, a system that would be replete with inefficiencies. For these reasons, the CAEFA does not achieve the sweeping reform for which advocates are calling.

²⁰⁸ See Press Release, Lori Trahan, House of Representatives, Trahan, Murphy Introduce Legislation to Allow College Athletes to Make Money Off Their Name, Image and Likeness (Feb. 4, 2021) [hereinafter Trahan Press Release], <https://trahan.house.gov/news/documentsingle.aspx?DocumentID=1967> [<https://perma.cc/Q4ZQ-V2VW>]; S. 238.

²⁰⁹ See, e.g., H.R. 2841 § 2(b) (prohibiting endorsement contracts involving tobacco, alcohol, marijuana and other controlled substances, casinos, and “adult entertainment business[es]”).

²¹⁰ Trahan Press Release, *supra* note 208.

²¹¹ S. 238 § 3(a)(3)–(4).

²¹² *NIL FAQs: Group Licensing*, KNIGHT COMM’N ON INTERCOLLEGIATE ATHLETICS, <https://www.knightcommission.org/nil-faqs-group-licensing/> [<https://perma.cc/33AA-TXJZ>].

²¹³ See Trahan Press Release, *supra* note 208.

²¹⁴ Since new NIL legislation went into effect, athletic departments at some universities have negotiated deals available for all members of a team. An assistant athletic director at Georgia Tech helped secure a sponsorship with a technology brand that resulted in the ninety football team members who accepted the offer receiving a prepaid debit card, streaming device, and branded gear in exchange for making two social media posts. Ken Sugiura, *TiVo Signs NIL Deal with 90 Georgia Tech Football Players*, ATLANTA J.-CONST. (Sept. 2, 2021), <https://www.ajc.com/sports/georgia-tech/tivo-signs-nil-deal-with-90-georgia-tech-football-players/4WZOZFYJV5ENDB72LA5SKS7BWU/> [<https://perma.cc/2WUY-GUHX>].

b. The College Athletes Bill of Rights

The College Athletes Bill of Rights (CABR), introduced by Senators Cory Booker (D-N.J.), Richard Blumenthal (D-Conn.), Kirsten Gillibrand (D-N.Y.), and Brian Schatz (D-Haw.), proposes a much broader reform that enables direct compensation to student athletes instead of simply passing the buck to third parties in the form of endorsements.²¹⁵ In addition to allowing student athletes to profit from their NIL rights with minimal restrictions on the types of sponsorship and endorsement agreements, this bill would require schools to share profits with the student athletes who play those sports.²¹⁶ It also includes provisions that would allow for the possibility of group licensing with other student athletes²¹⁷ and extends guaranteed scholarships for the length of a student athlete's undergraduate career.²¹⁸ The bill also proposes reforms that would protect student athletes and provide them with benefits such as healthcare, health and safety standards, athlete-friendly transfer and draft rules, prohibitions on free-speech restrictions, and academic guidelines.²¹⁹ The CABR proposal calls for “sweeping, comprehensive overhaul” of current athlete-compensation regulations and has received support outside of Congress.²²⁰ But this bill has yet to receive bipartisan support, and any version that passes will likely be scaled back in order to drum up enough support from both sides of the aisle.

c. The College Athlete Right to Organize Act

The College Athlete Right to Organize Act (CAROA), introduced by Senators Chris Murphy (D-Conn.) and Bernie Sanders (I-Vt.),²²¹ bypasses the issues of NIL rights and revenue sharing altogether. This bill proposes classifying student athletes as employees and amending the National Labor Relations Act (NLRA) to allow collective bargaining at any college.²²²

²¹⁵ College Athletes Bill of Rights, S. 5062, 116th Cong. § 5(b)(2) (2020).

²¹⁶ See *id.* §§ 3(a), 5(b)(2); Press Release, Cory Booker, Senate, Senators Booker and Blumenthal Introduce College Athletes Bill of Rights (Dec. 17, 2020) [hereinafter Booker Press Release], <https://www.booker.senate.gov/news/press/senators-booker-and-blumenthal-introduce-college-athletes-bill-of-rights> [<https://perma.cc/7KDE-GXDJ>] (“It will also require revenue-generating sports to share 50 percent of their profit with the athletes from that sport after accounting for the cost of scholarships.”).

²¹⁷ College Athletes Bill of Rights, S. 5062 § 3(a)(2).

²¹⁸ *Id.* § 8(a)(1).

²¹⁹ *Id.* §§ 3(d)(1), 3(e), 3(g)(2), 7–8.

²²⁰ When originally introduced in 2020, the Act was endorsed by the National College Players Association, Color of Change, and the University of Baltimore’s Director for the Center of Sports and Law, among others. See Booker Press Release, *supra* note 216.

²²¹ College Athlete Right to Organize Act, H.R. 3895, 117th Cong. § 1 (2021).

²²² *Id.* § 3(a)(2), 3(b); see Molly Hensley-Clancy, *Senate Democrats Introduce Bill to Allow College Athletes to Unionize*, WASH. POST (May 27, 2021, 1:36 PM), <https://www.washingtonpost.com/sports/2021/05/27/college-athletes-unions-legislation-bernie-sanders-chris-murphy/> [<https://perma.cc/LY6F-5VQS>].

Collective bargaining involves a negotiation between an employer and a group of workers to form an agreement that governs the terms of the workers' employment.²²³ Terms negotiated can include mutually agreed-upon conditions of employment, benefits, and wage guidelines.²²⁴

The possibility of collective bargaining for student athletes came to attention recently when Northwestern University football players pushed for unionization to allow collective bargaining in 2015.²²⁵ In response, the National Labor Relations Board (NLRB) refused to take any action, reasoning that because it did not have jurisdiction over all member institutions in the conference, the NLRB could not fashion a remedy that would impact the entire landscape of college sports.²²⁶ However, the NLRB general counsel recently switched course and declared that because student athletes “perform services for their colleges and the NCAA . . . and [are] subject to their control,” student athletes are employees.²²⁷ Despite declining to opine in 2015, the NLRB general counsel reasoned that the “significant developments in the law, NCAA regulations, and the societal landscape . . . demonstrate that traditional notions that [student athletes] are amateurs have changed.”²²⁸ This announcement also specified that the NLRB may decide to assert jurisdiction over the NCAA or athletic conferences, even when a member institution is a public state school.²²⁹ The assertion that “misclassifying such employees as mere ‘student-athletes’, and leading them to believe that they do not have statutory protections is a violation of [the National Labor Relations Act]” indicates that the NLRB would be more inclined to intervene in disputes in the future when allegations of unfair labor practices due to employees not being compensated arise.²³⁰ This would likely

²²³ *Collective Bargaining*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/collective%20bargaining> [https://perma.cc/ML5S-XHYG].

²²⁴ *See id.*

²²⁵ *See Hensley-Clancy, supra* note 222.

²²⁶ *See id.*

²²⁷ Memorandum from Jennifer A. Abruzzo, General Counsel, NLRB, to All Reg'l Dirs., Officers-in-Charge, and Resident Officers 3 (Sept. 29, 2021), <https://apps.nlr.gov/link/document.aspx/09031d458356ec26> [https://perma.cc/4BT8-5DV8].

²²⁸ *Id.* at 5.

²²⁹ *Id.* at 9.

²³⁰ *Id.* at 1. “[T]he [NLRB’s] jurisdiction is very broad and covers the great majority of non-government employers with a workplace in the United States, including non-profits, employee-owned businesses, labor organizations, non-union businesses, and businesses in states with ‘Right to Work’ laws.” *Jurisdictional Standards*, NLRB, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/jurisdictional-standards> [https://perma.cc/QZT7-WANR].

lead to more inefficient, drawn-out, and costly litigation.²³¹ Because collective bargaining gives athletes agency and empowers them to seek just compensation, and because the NLRB Enforcement Agency has been instructed to protect these rights for student athletes, the CAROA is the best and most efficient option available.

There are several arguments for why collective bargaining is the preferred vehicle to achieve student-athlete compensation reform. First, professional leagues—including the NBA and NFL, in which Black athletes make up the majority of the rosters²³²—engage in collective bargaining. The collective bargaining agreement negotiated between the NFL and the National Football League Player Association (NFLPA) establishes the share of league revenue NFL players receive, minimum salaries, and a salary-cap ceiling.²³³ The agreement benefits the league, which can ensure some standardization across teams; benefits teams, which have a greater sense of certainty and maintain flexibility in budget allocation; and benefits individual players, who can guarantee baseline protections.²³⁴ Student athletes already have a players' association similar to professional league players' associations in place. The National College Players Association

²³¹ Since Abruzzo's memorandum, the National College Players Association (NCPA) and a separate student-athlete advocate have filed charges with the NLRB alleging unfair labor practices committed by the NCAA, but many experts anticipate resolution taking a minimum of eighteen months from the filing date because of the "long and winding" nature of the process. *See* Ross Dellenger, *NCPA Takes Next Step Toward College Athletes Being Classified as Employees*, SPORTS ILLUSTRATED (Feb. 8, 2022), <https://www.si.com/college/2022/02/08/ncaa-student-athletes-vs-employees-debate-big-step> [<https://perma.cc/5C2N-TV93>]. Because the NCPA filed charges against a private university (the University of Southern California) and a public university (the University of California, Los Angeles), this would provide the NLRB with the opportunity to assert jurisdiction over a public university, making its decision applicable to colleges nationwide. *See id.*

²³² The Institute for Diversity and Ethics in Sports reported that during each of their respective seasons that began in 2020, 73.2% of NBA players were Black and 57.5% of NFL players were Black. RICHARD E. LAPCHICK, INST. FOR DIVERSITY & ETHICS IN SPORT, THE 2021 RACIAL AND GENDER REPORT CARD: NATIONAL BASKETBALL ASSOCIATION 10 (Aug. 25, 2021), https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/138a69_4b2910360b754662b5f3cb52675d0faf.pdf [<https://perma.cc/AU6D-7VZM>]; RICHARD E. LAPCHICK, INST. FOR DIVERSITY & ETHICS IN SPORT, THE 2020 RACIAL AND GENDER REPORT CARD: NATIONAL FOOTBALL LEAGUE 8 (Dec. 9, 2020), https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/138a69_8715a573a51742ce95dddeb0461cfc82.pdf [<https://perma.cc/HQB6-HBGT>].

²³³ *See* Dan Graziano, *NFL CBA Approved: What Players Get in New Deal, How Expanded Playoffs and Schedule Will Work*, ESPN (Mar. 15, 2020), https://www.espn.com/nfl/story/_/id/28901832/nfl-cba-approved-players-get-new-deal-how-expanded-playoffs-schedule-work [<https://perma.cc/WU7B-39PU>] (discussing in detail the terms of the collective bargaining agreement between the NFL and the NFLPA).

²³⁴ Like in intercollegiate athletics, mutually agreed-upon horizontal restraints are necessary to prevent some teams from gaining an unfair recruiting advantage. *See supra* note 114 and accompanying text. They also provides more predictability for the team, by removing the possibility of labor strikes and allowing them to budget and plan ahead, and ensure uniform salary minimums, benefits, and working conditions for individual players.

(NCPA) is an advocacy group that acts as the voice of student athletes and has actively pursued more protections and rights for student athletes through antitrust litigation involving the NCAA and state legislation.²³⁵ The NCPA could negotiate on behalf of its student-athlete members and achieve the protections the CABR seeks without depending on Congress to overcome partisan disagreement.

Second, as the landscape of college sports continues to rapidly evolve, and with the NLRB's recent announcement, right now is an opportune time for student athletes to unionize and engage in collective bargaining. The SEC—set to expand to sixteen teams in the near future—is poised to become a super conference,²³⁶ which has caused three of the remaining Power Five conferences to form a coalition in response to “stabilize a volatile environment.”²³⁷ These recent developments will undoubtedly affect different aspects of competition and student athletes' experiences and increase media rights revenues.²³⁸ With conferences and schools set to earn even more in the coming years, instituting collective bargaining now can help student athletes ensure that they receive fair compensation for their labor and that the disparity between student athletes and university and conference executives does not continue to grow.

There are concerns that the successful collective bargaining process employed by professional athletes may not transfer to student athletes. One is that professional athletes in the NBA and NFL are highly compensated and can contribute to a players' fund to provide players with a source of funds in the event of a strike, while student athletes do not have the financial

²³⁵ See *NCPA Accomplishments*, NAT'L COLL. PLAYERS ASS'N, <https://www.ncpanow.org/about/accomplishments> [https://perma.cc/M2YD-H9N4].

²³⁶ See Brian Smith, *Conference Realignment, the 'Pact' Against the SEC, and the Group of Five - Part I*, SPORTS ILLUSTRATED (Aug. 14, 2021), <https://www.si.com/college/ucf/university-of-central-florida-football/conference-realignment-and-the-pact> [https://perma.cc/DT9Z-PRKH].

²³⁷ Alan Blinder, A.C.C., *Big Ten and Pac-12 Form Coalition to Counter SEC's Might*, N.Y. TIMES (Aug. 24, 2021), <https://www.nytimes.com/2021/08/24/sports/ncaaf/football/acc-bigten-pac12-sec.html> [https://perma.cc/P8AU-K8A9] (explaining the recent changes within conference structures and the reactive measures taken to combat the SEC's growing power).

²³⁸ See Emily Caron & Michael McCann, *Big Ten, ACC, Pac-12 Align as Alston Antitrust Warning Looms*, SPORTICO (Aug. 24, 2021, 4:48 PM), <https://www.sportico.com/leagues/college-sports/2021/big-ten-acc-pac-12-alliance-1234637751/> [https://perma.cc/DEN6-TVAZ]. Oklahoma and Texas joining the SEC will likely allow the SEC to negotiate a more lucrative media-rights agreement with ESPN, and an alliance between the ACC, Big Ten, and Pac-12 will lead to additional marquee interconference matchups and likely an increase in media-rights revenues for those conferences as well. See *id.* This would result in a larger pool of revenue and more money that players are currently excluded from, making this an opportune time to implement a revenue-sharing model.

ability to contribute to a similar fund.²³⁹ However, this concern should not be alarming for several reasons. First, strikes are extraordinarily rare in intercollegiate athletics, so it is unlikely that a strike would occur.²⁴⁰ In the event there is a strike, student athletes' expenses are very different from those of professional athletes, and comparing student athletes receiving royalties in addition to financial aid to professional athletes' reliance on their salary would be comparing apples to oranges. Another way to sidestep this concern would be to structure the royalty so that it is held in a trust account until the student athlete leaves the university after joining a professional league, transferring to another institution, or graduating.²⁴¹ If student athletes could not access their deferred royalty-based compensation during their collegiate careers, there would be no need for a player fund in the event of a strike. Nonetheless, if student athletes are successfully able to negotiate a compensation agreement, this financial concern may soon be moot because student athletes should be able to build a substantial players' fund with direct compensation and income permitted by new NIL rules.

There is also concern that unionizing would jeopardize antitrust rights, because there is a nonstatutory labor exemption to antitrust law that essentially means labor law trumps antitrust law in the context of collective bargaining agreements.²⁴² While this is a valid concern, there is still an integral role for antitrust in the collective bargaining process. As long as knowledgeable antitrust counsel is involved in negotiations and adequately advises the NCPA of student athletes' rights under antitrust law, the NCPA should not agree to any terms that would disadvantage student athletes and the labor exemption should not negatively affect student athletes' rights. Moreover, not all circuits apply the labor exemption uniformly, and there may be some instances in which it would not apply at all.²⁴³ The line between

²³⁹ See Marc Edelman, *Unionizing College Football Players Represents a Double-Edged Sword*, FORBES (Aug. 10, 2021, 10:18 AM), <https://www.forbes.com/sites/marcedelman/2021/08/10/unionizing-college-football-players-is-a-double-edged-sword/?sh=152579f702d7> [https://perma.cc/MX25-C8ST].

²⁴⁰ See Andy Staples, *Flipping the Script: Missouri Strike Proves that Players, Not the NCAA, Hold the Power in Collegiate Athletics*, SPORTS ILLUSTRATED (Nov. 9, 2015), <https://www.si.com/college/2015/11/09/missouri-footballs-strike-proves-ultimate-power-lies-players> [https://perma.cc/D9JY-C3Y7] (discussing how notable it was that the Missouri football team threatened to boycott a game—but did not follow through—because such boycotts are so uncommon).

²⁴¹ See Charles Grantham, *It Is Time to Share Revenue with Collegiate Athletes*, HARV. J. SPORTS & ENT. L. (Aug. 31, 2020), <https://harvardjse.com/2020/08/it-is-time-to-share-revenue-with-collegiate-athletes/> [https://perma.cc/U6XA-XHKL] (explaining how a deferred-compensation framework could be structured).

²⁴² See Marc Edelman & Joseph A. Wacker, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions?*, 115 PENN ST. L. REV. 341, 365 (2011).

²⁴³ See *id.* at 366.

collegiate athletes and professional athletes has been blurred for years, so a logical next step is applying a process that has proven successful in professional sports to student athletes.

The NCAA has condemned the CAROA, arguing that it would “directly undercut the purpose of college: earning a degree.”²⁴⁴ But it is arguably one of the worst kept secrets in the athletics community that Division I football and basketball players are already treated more like professional athletes than like students.²⁴⁵ Maintaining the myth of amateurism to justify not paying student athletes causes disparate harm to Black student athletes²⁴⁶ and should not continue to be proffered as a procompetitive justification for a primary labor market that does not consider the benefits amateurism allegedly confers, especially since these benefits remain unproven.²⁴⁷ Acknowledging that the landscape of college sports has changed since the NCAA’s inception—becoming a multibillion-dollar industry due to commercialization²⁴⁸—and reclassifying student athletes as employees to reflect these changes is the most equitable solution for students. Any shortsighted solutions that do not admit that this evolution necessitates major changes are simply prolonging the changes that will inevitably come through litigation, student athletes’ activism, or other means.

C. *The Ideal Federal Legislation*

At a time when the landscape of college sports is changing so rapidly, Congress should take the ball and run, using the momentum to accomplish as much positive change as possible. Because some of the bills target different possible avenues for compensating student athletes, the best path forward could involve a combination of the nonoverlapping proposed bills. The CAEFA is the most intentional about correcting the racial injustice that the NCAA’s amateurism model has perpetuated for decades. But the ambitious CABR has the most comprehensive plan for protecting student athletes financially, academically, and physically and is likely to result in the greatest reform. However, because the CABR is so comprehensive, it is likely to receive some pushback from more conservative Congress

²⁴⁴ NCAA Statement on Murphy-Sanders Bill, NCAA (May 27, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-statement-murphy-sanders-bill> [<https://perma.cc/T88L-AJR8>].

²⁴⁵ See Brief of Antitrust Lawyers, *supra* note 58, at 6–9.

²⁴⁶ See *supra* Section I.C.

²⁴⁷ See *Alston III*, 141 S. Ct. 2141, 2162 (2021) (noting that the district court reasoned the NCAA failed to “establish that the challenged compensation rules . . . have any direct connection to consumer demand” (quoting *Alston I*, 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019))); *supra* note 87.

²⁴⁸ See Murphy, *supra* note 90, at 3–4 (explaining the evolution of college sports economics and how revenues had increased to approximately \$14 billion as of 2017).

members,²⁴⁹ so realistically it will probably need to be pared down to receive enough support. Consequently, the CAROA's proposal to classify student athletes as employees would enable student athletes to engage in collective bargaining to achieve the comprehensive reforms the CABR proposes without needing to depend on a divided Congress for further action after enacting the CAROA.

Furthermore, recent changes within conferences have raised the question of whether additional antitrust challenges to the NCAA's regulations will arise. The antitrust exemption may provide the unintended benefit of enticing the NCAA to engage in collective bargaining, as the exemption would grant the greater antitrust protection the NCAA has unsuccessfully lobbied for.²⁵⁰ *Alston* dealt a serious blow to the NCAA's model and all but opened the floodgates of future antitrust litigation. The NCAA may be more willing to negotiate and reach an agreement that satisfies the needs of student athletes if it can avoid future losses in court and, in the absence of further judicial intervention, maintain some control over its business model. With an antitrust exemption for collective bargaining, it would be imperative for the NCPA to work closely with antitrust counsel to ensure student athletes do not forfeit the right to bring important challenges in the future.

D. Remaining Questions

Because the legal landscape surrounding student-athlete compensation is constantly evolving, with new legislation and proposals coming every month,²⁵¹ there are still several questions that need to be answered. These questions include whether compensation would be standardized across all players on a team (i.e., a starting player receiving the same compensation as a walk-on²⁵²) and whether athletes across all sports or only profitable sports would receive the same compensation.²⁵³

²⁴⁹ See *supra* Section III.B.2.b.

²⁵⁰ See Kennedy, *supra* note 204.

²⁵¹ See Murphy, *supra* note 180.

²⁵² "Walk-on" students first matriculate at schools through the normal application and admissions process. Because they are not recruited to those schools to play on specific teams, they generally do not receive full athletic scholarships. See *The Five Most Common College Walk-On Questions*, SPORTS ENGINE (July 10, 2018), <https://www.sportsengine.com/recruiting/five-most-common-college-walk-questions> [<https://perma.cc/TJD7-6MY7>].

²⁵³ The approach proposed in the CABR limits the number of teams eligible to receive compensation to "athletic program[s] that participate[] in a division or subdivision for which 50 percent of the total commercial sports NIL revenue of every institution . . . that participates in the division or subdivision is greater than the total amount of grant-in-aid" provided to student athletes in those athletic programs. College Athletes Bill of Rights, S. 5062, 116th Cong. § 5(a)(3) (2020). Since the vast majority of college

In particular, Title IX mandates that if members of the football and men's basketball teams receive compensation, female student athletes would also need to be compensated, thereby significantly increasing total expenses for university athletics departments.²⁵⁴ This mandate importantly ensures equitable spending across genders, often encouraging a transfer of revenue from men's sports to women's sports.²⁵⁵ The NCAA earns over 80% of its approximately \$1 billion annual revenue from the men's basketball March Madness tournament, and roughly 90% of that is distributed to member institutions to fund scholarships and other expenses.²⁵⁶ Historically, "football has by far been the top-earning sport on American campuses, financing . . . every other sport" and on average will produce more revenue than "the next 35 sports combined."²⁵⁷ However, the cost of this mandate should not be used to prevent the implementation now of a mechanism to address racial inequity that has plagued the NCAA and falls disproportionately on Black male athletes.²⁵⁸ Further, if the compensation is structured as a royalty based on a certain percentage of revenue produced by each program instead of outright predetermined compensation, this could not implicate Title IX; both women's and men's programs would have the opportunity to receive royalties in the event the programs produced revenue. These remaining questions are important to resolve but should not stand in the way of ensuring student athletes are finally compensated for their labor. The NCAA will need to come up with an equitable solution without using these concerns as an excuse to avoid fair compensation.

CONCLUSION

In a turbulent time for college sports, antitrust law could be the key to student athletes successfully reforming a system that has exploited the labor

athletic programs are not profitable, this would only be applicable to a small subset of programs and would not create additional financial expenses for most programs.

²⁵⁴ This does not require the same number of scholarships for men and women or individual scholarships of equal value; rather, the statute requires that if 60% of a university's athletes are men, only 60% of the total amount of financial aid should be awarded to male athletes. 20 U.S.C. § 1681(b).

²⁵⁵ Title IX requires universities to provide financial assistance substantially proportional to the participation rates of men and women in athletic programs. *Id.* Because the largest two revenue-producing sports across the NCAA are men's basketball and football, this results in a transfer of revenue to women's sports that do not produce revenue. See Mark J. Drozdowski, *Do Colleges Make Money from Athletics?*, BEST COLLEGES (Jan. 5, 2022), <https://www.bestcolleges.com/blog/do-college-sports-make-money/> [<https://perma.cc/9DG5-9QAW>].

²⁵⁶ See Drozdowski, *supra* note 255.

²⁵⁷ *Id.*

²⁵⁸ See HUMA ET AL., *supra* note 25, at 2 ("[T]he NCAA has built its enterprise on racial inequality and injustice for decades."). As discussed, preventing student athletes from profiting from their own labor has transferred approximately \$10 billion in generational wealth from football and men's basketball players to coaches and administrators. *Id.* at 3.

of a disproportionately large number of Black student athletes for years and left many of them with little or nothing to show for it. While Justice Kavanaugh got the ball rolling by opening the door for student athletes to continue challenging the NCAA compensation system through antitrust litigation, federal legislation is likely to prove a more efficient avenue for reform and allow more student athletes to receive compensation for their labor sooner. The College Athletes Bill of Rights and College Athlete Economic Freedom Act will lead to the broad reform student athletes have been seeking that will afford them some of the rights NCAA executives have enjoyed for decades. But the College Athlete Right to Organize Act provides the greatest opportunity to accomplish a goal that began years ago: classifying student athletes as employees so that they can engage in collective bargaining and seek the specific rights and protections they want most without needing to rely on the NCAA or universities to advocate on their behalf. Enacting federal legislation that permits student athletes to be compensated for their NIL rights and empowering student athletes through collective bargaining can push this long-needed reform over the goal line and allow student athletes to finally feel like they are not NCAA property.