Amateur$: An In-Depth Analysis of the History, Evolution, and Future of the NCAA's Amateurism Model

Grant Farmer[1]
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I. Introduction

On June 21, 2021, Justice Neil Gorsuch delivered the Supreme Court's unanimous majority opinion in **NCAA v. Alston**.[2] In this opinion, the Court provided a critical analysis of the National Collegiate Athletics Association's (NCAA's) amateurism concept, finding that the NCAA could no longer restrict education-related benefits to collegiate student-athletes.[3] Although the Supreme Court did not address the legality of the NCAA's ban of pay-for-play in Alston, Justice Brett Kavanaugh wrote, in his concurring opinion, that the "NCAA's business model would be flatly illegal in almost any other industry in America" and that its "price-fixing labor is ordinarily a text-book antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work."[4] Kavanaugh's withering concurrence of the NCAA's amateurism concept could arguably open the floodgates for unionization attempts by collegiate student-athletes and allow for true pay-for-play situations as witnessed in professional sports.

The Supreme Court's decision in Alston is not the first and will likely not be the last court case diminishing the NCAA's concept of amateurism. This comment will begin with a discussion of the NCAA's formation and the factors which distinguish it from other governing sport bodies. It will then discuss the major court cases and unionization attempts which have altered the NCAA's business model and its legal status over the past century. Further, this comment will examine the gray areas brought forth by "Name, Image, and Likeness," conference

realignments, and the revenue disparities across collegiate athletics. Lastly, this comment will make predictions on the future of the NCAA and its role within the context of higher education.

II. Foundation and Formation of the NCAA

(a) Founding

The foundation of the NCAA can be traced back to the 26th President of the United States, Theodore Roosevelt. In 1905 after 18 college football players died while playing the sport, Roosevelt called for a national meeting with the major college football programs in America.[5] Roosevelt's meeting helped later establish the Intercollegiate Athletics Association of the United States, which in 1910, was re-named the NCAA.[6] During the 1920s and 30s, the proliferation of television and radio access increased the popularity and demand for collegiate athletics nationwide.[7] In 1948, following a report by *Time* magazine detailing improper recruiting tactics for college football players, the NCAA passed the Sanity Code, which limited the benefits that student-athletes could receive to free tuition and one meal per day based upon need.[8]

In the early 1950s, the NCAA repealed the Sanity Code, allowing its member institutions to award scholarships and financial aid based upon athletic ability. In response to repealing the Code, the NCAA created its Committee on Infractions to help enforce its policies and punish those schools which did not comply. [9] The Committee on Infractions still exists today and has the "authority to address prehearing procedural matters, set and conduct hearings or reviews, find facts, conclude violations of NCAA legislation, prescribe appropriate penalties and monitor institutions on probation to ensure compliance…"[10]

The Committee on Infractions had its first major case in 1952 with the University of Kentucky (UK) and its men's basketball program.[11] During the 1949 season, UK was involved in

a point shavings scandal and payments to players; as a result, it became the first NCAA school to receive its version of the death penalty.[12] For the 1952-1953 academic year, the NCAA placed UK on academic probation, banned its men's basketball team from competing, and declared all its other student-athletes ineligible for athletic competition. [13] The NCAA's punishment levied on UK as well as its growing television marketplace helped the organization gain more power as a regulatory body. [14] The NCAA later punished the University of Southwestern Louisiana (now referred to as the University of Louisiana at Lafayette) in 1972 and Southern Methodist University (SMU) in 1987 by invoking its death penalty.[15]

The NCAA's power as a governing body increased with national broadcasting deals. In 1951, the NCAA reversed its policy which previously allowed each member school complete control of the marketing and television rights of its games. [16] Beginning in 1952, the NCAA received approximately $1,444,000 for distributing its television rights to one national broadcaster, NBC.[17] Over the next three decades, the NCAA increased its television broadcasting rights immensely by broadcasting its games with multiple networks, culminating in 1983 with $64,000,000 in collective television rights from ABC, CBS, and Turner.[18] However, the NCAA's control over the television rights of its member schools was severely limited following **NCAA v. Board of Regents**.

(b) Evolution through Board of Regents and Tarkanian

In 1977, the College Football Association was formed by schools that wanted to maximize their financial reward and market reach from their respective television broadcasting deals.[19] In 1981, ABC and CBS negotiated with the NCAA so that each could air 14 college football games in exchange for the "minimum aggregate compensation to the participating NCAA member institutions."[20] With those two national broadcasting deals, schools were limited

to appear on television up to six times for every two-year period.[21] In 1981, Regents at the University of Georgia and the University of Oklahoma sought an injunction against the NCAA to eliminate the restrictions on total television broadcasts and national appearances.[22] The District Court for the Western District of Oklahoma and the 10th Circuit Court of Appeals found that the NCAA's television restrictions were unlawful under Section 1 of the Sherman Act.[23] Following the 10th Circuit Court of Appeals' affirmation of the lower court, the NCAA appealed to the Supreme Court.[24]

In his majority opinion, Justice John Paul Stevens wrote that the "the basic policy of the Sherman Act is free competition" and that "the free market should and will resolve the problem."[25] Moreover, the Supreme Court found that the NCAA's control over television rights was "more far-reaching than necessary."[26] Since the Supreme Court concluded that the NCAA's complete control over its member institutions' broadcasting rights resulted in a monopoly, it held that the NCAA committed *per se* violations under Section 1 of the Sherman Act.[27] As a result of the Supreme Court's ruling, its member institutions and conferences gained more power and control over their financial livelihood.

Following Board of Regents, televised collegiate sports games, specifically for college football, have grown exponentially.[28] Almost every college game today is televised, ranging from broadcasts by large national companies (such as ESPN and CBS), to individual athletic conferences (Big Ten Network and SEC Network), to individual universities (The University of Texas' Longhorn Network).[29] Prior to Board of Regents, each NCAA member institution received roughly $130,000 for their television rights.[30] However, since the NCAA lost its ability to control the marketplace for television rights, individual conferences have reaped the benefits, led by the Big Ten (with $759 million in revenue distributed across its 14 members for the 2018

fiscal year) and the Southeastern Conference "SEC" ($720.6 million in revenue distributed across its 14 members for the 2019 fiscal year).[31]

Additionally, subsequent lawsuits have weakened the NCAA's control over its member institutions. After Board of Regents, the NCAA was brought before the Supreme Court in NCAA v. Tarkanian. In Tarkanian, the NCAA found that the University of Nevada, Las Vegas (UNLV) had committed 38 NCAA violations and that its head men's basketball coach, Jerry Tarkanian, committed 10 NCAA violations.[32] Tarkanian wrote a newspaper column claiming that the NCAA ignored the recruiting violations committed by larger schools, focusing on those violations committed by smaller schools, writing that "the University of Kentucky basketball program breaks more rules in a day than Western Kentucky does in a year. The NCAA doesn't want to take on the big boys."[33] Following his column, the NCAA opened an investigation on Tarkanian's former team, Long Beach State, and his then current team, UNLV.[34]

Before the 1976 season, the NCAA charged Tarkanian with scheduling fake classes, providing free clothing, and arranging for free airplane tickets for UNLV's men's basketball players.[35] Although UNLV did not find any evidence that Tarkanian committed NCAA violations, the NCAA pressured UNLV to suspend Tarkanian for two years.[36] In October 1977, Tarkanian sued the NCAA, claiming that his two-year suspension violated his due process rights under the Fourteenth Amendment.[37] The district court found that the NCAA, as a state actor, violated his due process rights; therefore, it granted a permanent injunction in Tarkanian's favor, revoking his two-year suspension.[38]

However, the NCAA petitioned to the Supreme Court to grant review on Tarkanian.[39] Unlike in Board of Regents, the Supreme Court ruled in the NCAA's favor in Tarkanian. Justice Stevens, holding for the majority, ruled that the NCAA was not a state actor whose actions

required due process under the Fourteenth Amendment, writing that "UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law."[40]

After leaving UNLV, Tarkanian once again sued the NCAA, this time for harassment.[41] The NCAA settled Tarkanian's harassment suit with a $2.5 million out of court settlement.[42] Unlike his lawsuit against the NCAA for lack of due process, Tarkanian's lawsuit against the NCAA for harassment had a significant impact on the way that student-athletes, coaches, administrators, and boosters view the NCAA's enforcement policies.[43] As evidenced by University of Kentucky's former offensive coordinator, Tony Franklin, who once said that "many coaches do not fear the NCAA because they know there's no legal recourse for investigators trying to compel the truth from other witnesses."[44] As shown through later lawsuits, unionization attempts, and infractions cases; the NCAA's control over its member institutions weakened through Tarkanian's lawsuits.

III. Subsequent Lawsuits and Unionization Attempts

(a) Law v. NCAA

Following Tarkanian, the NCAA was once again embroiled in a lawsuit after creating its "Restricted Earnings Coaching Rule (REC Rule)."[45] Prior to enacting this rule, the NCAA was concerned with the increasing "costs of maintaining competitive athletic programs, especially in light of the requirements imposed by Title IX of the 1972 Education Amendments Act to increase support for women's athletic programs."[46] In 1991, the NCAA turned the "graduate assistant position--the third assistant in most major programs--into one restricted to [earn] no more than $16,000 a year."[47]

In **Law v. National Collegiate Athletic Ass'n**, those college basketball coaches impacted by the rule argued that the NCAA's REC Rule violated Section 1 of the Sherman Act.[48] In that case, the district court granted a permanent injunction against the NCAA's rule and similar rules which limited the compensation for coaches.[49] After the district court granted a permanent injunction against the NCAA from imposing any other compensation restrictions, the NCAA appealed to the United States Court of Appeals for the 10th Circuit.[50] On appeal, the NCAA pointed to its Raiborn Report, which showed "that in 1982, 42% of NCAA Division I schools reported deficits in their overall athletic program budgets, with the deficit averaging $824,000 per school" and that "51% of Division I schools responding to NCAA inquiries on the subject suffered a net loss in their basketball programs alone that averaged $145,000 per school.[51]

Like the Supreme Court's ruling in Board of Regents, the 10th Circuit Court of Appeals in Law analyzed Section 1 of the Sherman Act to determine if an unreasonable restraint of trade occurred.[52] Under this application of the Sherman Act, the affected college basketball coaches "needed to prove that the NCAA (1) participated in an agreement that (2) unreasonably restrained trade in the relevant market."[53] To determine if the NCAA committed an unreasonable restraint of trade by restricting the salaries of Division I basketball graduate assistants, the 10th Circuit had two analytical approaches from which to choose, "the *per se* rule and the rule of reason."[54] The *per se* rule applies to practices that "are entirely void of redeeming competitive rationales," whereas the rule of reason "requires an analysis of the restraint's effect on competition.[55]

Since the 10th Circuit was analyzing "an industry in which some horizontal restraints are necessary for the availability of a product, even if such restraints involve horizontal price-fixing

agreements," it followed the district court by applying the rule of reason.[56] By applying this analysis, the 10th Circuit evaluated the anticompetitive effects and procompetitive rationales of the NCAA's REC Rule.[57] Ultimately, the 10th Circuit found that the NCAA's arguments regarding the retention rates of graduate assistants, as well as the overall costs of college basketball and collegiate athletics, were not sufficient to outweigh the competing Sherman Act concerns.[58] Thus, the NCAA affirmed the permanent injunction that barred the NCAA from enacting the REC Rule or any other compensation restrictions for college coaches.[59]

Following the 10th Circuit's affirmation of the district court's ruling, the NCAA appealed.[60] Prior to the 10th Circuit's decision, the NCAA had offered those impacted coaches a $44 million settlement, with the coaches requesting $60 million.[61] After the NCAA and the impacted coaches were unsuccessful in reaching an agreement following trial, both parties went to mediation.[62] Following mediation, the NCAA agreed to pay those impacted entry-level and graduate assistant basketball coaches collectively $55 million.[63]

As a result of Law, the NCAA's ability to control the earning potential of its coaches, ranging from entry-level to highly experienced, was severely limited. The salaries of collegiate coaches have recently drawn significant criticism, as the highest paid state employees in forty states are college coaches.[64] As of 2021, Clemson's head football coach, Dabo Swinney, and Kentucky's head basketball coach, John Calipari, both are the two highest-paid college coaches, each with reported salaries of $9.3 million.[65] Calipari's and Swinney's salaries are more than 581 times greater than the salaries the NCAA restricted with its REC Rule.

(b) NCAA v. Smith

On January 20, 1999, the NCAA presented oral arguments before the Supreme Court in **National Collegiate Athletic Association v. Smith**, less than a year from when the 10th Circuit

Court of Appeals affirmed the lower court's decision in Law.[66] Smith involved Renee M. Smith, who enrolled at St. Bonaventure University in the fall of 1991, where she joined its volleyball team and remained on the team through the 1992-1993 athletic season.[67] Smith, "who elected not to play the following year" at St. Bonaventure, graduated from the university in 2 and one-half years.[68]

After graduating from St. Bonaventure, Smith enrolled in a postgraduate program at Hofstra University and later the University of Pittsburgh, where she planned to continue her intercollegiate volleyball career.[69] According to the NCAA's then-postbaccalaureate bylaw, Bylaw 14.1.8.2,

> "A student-athlete who is enrolled in a graduate or professional school of the institution he or she previously attended as an undergraduate (regardless of whether the individual has received a United States baccalaureate degree or its equivalent) …may participate in intercollegiate athletics, provided the student has eligibility remaining, and such participation occurs within the applicable five-year or 10-semester period set forth in 14.2."[70]

Both Hofstra and Pittsburgh petitioned for a waiver on her behalf.[71] However, her desire to play was denied by the NCAA due to its postbaccalaureate exception.[72] Therefore, Smith filed a lawsuit alleging that the NCAA violated Title IX by discriminating against her based on her sex, denying her waivers to continue her volleyball career at Hofstra and Pittsburgh.[73] The district court dismissed Smith's suit, holding "that the alleged connections between the NCAA and federal financial assistance to member institutions were too attenuated to sustain a Title IX claim."[74] However, the Third Circuit Court of Appeals reversed the lower court's holding, finding that Smith's amended complaint "plainly alleges that the NCAA receives dues from member institutions, which receive federal funds," and that this allegation "would be sufficient to

bring the NCAA within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss."[75]

Following the Third Circuit's reversal in favor of Smith, the NCAA petitioned to the Supreme Court for review.[76] In Smith, the Supreme Court analyzed whether its member institutions receiving federal funding subjected the NCAA to Title IX.[77] The Supreme Court found that the NCAA indirectly benefited from its member institutions' federal funding, and that this "showing, without more, is insufficient to trigger Title IX coverage."[78] In the majority opinion written by Justice Ruth Bader Ginsberg, the Supreme Court unanimously agreed that "the Court of Appeals erroneously held that dues payments from recipients of federal funds suffice to subject the NCAA to suit under Title IX."[79] Therefore, the Supreme Court vacated the Third Circuit's judgment and ruled in favor of the NCAA.[80]

Smith serves as an important case for the NCAA, as it established, despite serving as the regulatory body for more than 1,100 institutions and conferences which receive federal funding, such oversight does not, place the NCAA under Title IX restrictions. This designation offered from Smith serves as a significant point of demarcation between the NCAA and its member institutions, holding that regardless of whether the NCAA oversees public or private universities and how much those universities receive in federal funding, the NCAA, itself is still not subject to Title IX. By holding that the NCAA is not subject to the laws under Title IX, Smith could serve as an important precedent for future lawsuits filed by student-athletes regarding the organization's NIL policy.

(c) Unionization Attempts

The NCAA and its view of amateurism faced another inflection point following a unionization attempt by multiple football players at Northwestern University.[81] In 2003, Ramogi

Huma, as President of the National College Players Association (NCPA), supported the Student-Athletes Bill of Rights, a piece of legislation which "prompted the NCAA to lift its prohibition on schools covering medical expenses during summer workouts."[82] In 2008, following a NCPA backed class-action lawsuit filed by former college athletes, the NCAA established a "$10 million trust fund for [the] continuing education of former players."[83] The NCPA supported class-action lawsuit was incredibly important for the future of collegiate athletics and its amateurism model, as it "established a precedent for athletes to file class-action suits."[84]

After the NCAA establishing a trust fund for the continued education of former college athletes, the NCPA published multiple studies regarding collegiate athletics and the exploitation of its athletes.[85] Those studies, which estimated that the "average Football Bowl Subdivision (FBS) player's worth at $121,000 per year," increased the public awareness of the inequities faced by collegiate student-athletes.[86] In 2012, perhaps Huma's most notable legal accomplishment occurred "when California and Connecticut passed the Student-Athletes' Right to Know Act, which mandated large universities be transparent and honest about their policies on scholarship benefits and medical expenses."[87]

In early 2013, Northwestern's starting quarterback Kain Colter contacted Huma, to discuss college athlete rights and a potential unionization attempt with the National Labor Relations Board (NLRB).[88] Colter shared that "one of the biggest issues is that I feel like there needs to be a guarantee that players aren't stuck with medical bills after they leave [college]."[89] Ultimately, Colter and Huma agreed that their attempt at unionization should be focused on athletes receiving medical care after college.[90] To bring attention to their unionization attempt, Colter and his Northwestern teammates wrote "APU," the acronym for All Players United, on their armbands during Northwestern's game against Maine.[91]

However, their attempt was not well received by Northwestern's head football coach, Pat Fitzgerald who was "disappointed" with Colter's actions, and felt it should have been "vetted through the systems we have in place."[92] On March 26, 2014, the NLRB's Chicago district ruled that Northwestern's "football players are employees and can unionize."[93]

In April 2014, Northwestern's football team made history by holding a secret ballot, thereby becoming "the first college athletes to vote on whether they should be represented by a union."[94] On April 24, 2014, the NLRB reviewed Northwestern's unionization attempt.[95]

On August 17, 2015, all five members of the NLRB unanimously agreed to dismiss Northwestern's unionization attempt, holding that "the petition and its potentially wide-ranging impacts on college sports would not have promoted 'stability in labor relations.'"[96] Moreover, the NLRB analogized that even if scholarship student-athletes were similar "to players for professional sports teams, who are considered employees for purposes of collective bargaining, such bargaining has never involved a bargaining unit consisting of a single team's players."[97] Although Northwestern's attempt at unionization was unsuccessful, later that year, the Big Ten (Northwestern's conference affiliation) announced that it would increase scholarships "to cover the full cost of education…[ensure] that scholarships are available for life to those who leave before they complete their degrees, and [improve] medical coverage."[98]

The NLRB's decision to deny Kain Colter's attempt at unionization could serve as precedent to help the NCAA preserve its amateurism model. However, in late May of 2021, Vermont Senator, Bernie Sanders, and Connecticut Senator, Chris Murphy, introduced the College Athlete Right to Organize Act, which "would allow college athletes to unionize, making it possible for students from across universities to band together to form unions within athletic conferences."[99] Senator Sanders' and Murphy's bill would have a significant impact on

collegiate athletics as it "would rewrite federal labor law to define all college athletes receiving scholarships and other pay as employees of both public and private universities."[100] However, their bill presently, "is unlikely to pass in the current Congress, which has shown little appetite for such legislation."[101] If such a Congressional bill is ever likely to gain both House and Senate approval, the NLRB's decision not to support Northwestern's unionization attempt could continue to function as a barrier, separating collegiate from professional athletics.

(d) O'Bannon v. NCAA

Following its appearance before the Supreme Court in Smith, the NCAA was subject to an antitrust lawsuit in **O'Bannon v. NCAA**. In O'Bannon, Ed O'Bannon, a former star basketball player at University of California, Los Angeles (UCLA), noticed "that he was depicted in a college basketball video game produced by Electronic Arts (EA), a software company that produced video games based on college [athletics]."[102] O'Bannon, who never consented nor was compensated for his likeness in the video game franchise filed suit in federal court against "the NCAA and the Collegiate Licensing Company (CLC), the entity which licenses the trademarks of the NCAA and a number of its member schools for commercial use."[103] In his lawsuit against the NCAA and the CLC, O'Bannon argued that the NCAA's amateurism model, which restricted student-athlete compensation, served as "an illegal restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1."[104]

O'Bannon's antitrust lawsuit was later consolidated with Sam Keller's lawsuit which "alleged that EA had impermissibly used student-athletes' NILs in its video games and that the NCAA and CLC had wrongfully turned a blind eye to EA's misappropriation."[105] The district court granted O'Bannon's class certification motion in November of 2013.[106] On May 30, 2013, O'Bannon reached "a $40 million settlement with a video game manufacturer [EA] and the

NCAA's licensing arm [CLC] for improperly using the likenesses of athletes."[107] On June 9, 2014, the NCAA reached a $20 million settlement with "certain Division I men's basketball and Division I Bowl Subdivision football student-athletes who attended certain institutions during the years the games were sold."[108] After settling the misappropriation of NILs, the NCAA still had to address O'Bannon's antitrust claims against the organization.

Judge Claudia Ann Wilken of the District Court for the Northern District of California presided over O'Bannon's suit.[109] The district court identified the college education market and the group licensing market as the two antitrust issues to analyze.[110] It found that the market for Division I basketball players and FBS football players was recognized under antitrust laws since "there are no professional football or basketball leagues capable of supplying a substitute for the bundle of goods and services [provided by] FBS football and Division I basketball schools."[111] The district court divided the group licensing market into the smaller markets, "(1) live game telecasts, (2) sports video games, and (3) game rebroadcasts, advertisements, and other archival footage."[112]

The district court found "that the procompetitive purposes of the rules could be achieved by less restrictive alternative restraints and that the current rules were therefore unlawful."[113] The district court ruled for O'Bannon, finding that the NCAA violated Section 1 of the Sherman Act by prohibiting student-athletes from receiving compensation.[114] After the district ruled that the NCAA violated the Sherman Act, it "permanently enjoined the NCAA from prohibiting its member schools from compensating FBS football and Division I men's basketball players for the use of their NILs" with awards "up to the full cost of attendance at their respective schools."[115] Moreover, the district court no longer allowed the NCAA to prohibit its member schools from "paying up to $5,000 per year in deferred compensation to FBS football and Division I men's

basketball players for the use of their NILs, through a trust fund."[116] Following the district court's ruling for O'Bannon, the NCAA appealed to the United State Court of Appeals for the Ninth Circuit.[117]

On appeal, the NCAA argued that O'Bannon's suit should have been dismissed because of Board of Regents, where the Supreme Court that the NCAA's amateurism model was "valid as a matter of law."[118] Moreover, the NCAA also argued that O'Bannon's suit was "not covered by the Sherman Act at all because they do not regulate commercial activity" and that "the plaintiffs have no standing to sue under the Sherman Act because they have not suffered antitrust injury."[119] However, the Ninth Circuit did not find the NCAA's arguments find to be persuasive; therefore, affirming the lower court's ruling in favor of O'Bannon. Following the Ninth Circuit's affirmation, the NCAA appealed to the Supreme Court.

In October of 2016, the Supreme Court elected to deny certiorari on O'Bannon, which affirmed the Ninth Circuit's ruling that the "NCAA policy of limiting financial support of basketball and football athletes to tuition, room and board did violate the Sherman Anti-Trust Act."[120] By denying review of the Ninth Court's ruling, the Supreme Court effectively held that the NCAA is indeed subject to federal antitrust laws, which fundamentally transformed collegiate sports and its amateurism model. By having their appeal denied in O'Bannon, the NCAA's restriction on student-athlete compensation for their NIL was beginning to fracture. As a result of O'Bannon's lawsuit, EA Sports' incredibly popular *NCAA Football* franchise video games was canceled, as the NCAA elected to "not enter a new contract for the license of its name and logo for the EA Sports NCAA Football video game."[121]

(e) NCAA v. Alston

Following O'Bannon, the NCAA started reviewing its policies and proposals from various states regarding student-athlete compensation.[122] On February 14, 2019, Nancy Skinner, a California state legislator, introduced the "Fair Play to Pay Act," a proposal that would require colleges within the state of California allow their respective student-athletes to receive NIL compensation.[123] On September 30, 2019, California's governor, Gavin Newsom appeared on an episode of HBO's *The Shop* and signed Skinner's proposal into law.[124] Before signing the bill, Governor Newsom said that the bill "is going to initiate dozens of other states to introduce similar legislation…it's going to change college sports for the better."[125] The bill, which is scheduled to become effective on January 1, 2023, will "make it illegal for universities to revoke a student's scholarship for accepting money."[126] Following Newsom's signing of the California bill, the NCAA released the following statement:

> "As a membership organization, the NCAA agrees changes are needed to continue to support student-athletes, but improvement needs to happen on a national level through the NCAA's rules-making process. Unfortunately, this new law already is creating confusion for current and future student-athletes, coaches, administrators, and campuses, and not just in California."[127]

In 2019, Shawne Alston, a former running back at West Virginia University and Justine Hartman, a former center at the University of California, Berkeley filed a class-action lawsuit on behalf of former collegiate student-athletes against the NCAA and 11 major intercollegiate athletic conferences.[128] Their lawsuit, which began in an Oakland federal courthouse, was presided over by Justice Claudia Ann Wilken, who also presided over the NCAA case O'Bannon.[129] In Alston, the plaintiffs argued that by restricting the value of collegiate athletic

scholarships, the NCAA unlawfully prevented the individual colleges and their respective conferences from competition.

Moreover, the plaintiffs argued that the NCAA and its member institutions infused millions of dollars by hiring coaches, renovating stadiums, and constructing training and practice facilities; but they did not pay the actual student-athletes who brought fans to the stadiums and television screens.[130] However, the NCAA argued that student-athletes receiving compensation would damage college sports' popularity, turning it into a professional sport's minor league.[131] Ultimately, after a ten-day trial, Judge Wilken ruled for the student-athletes, holding that the NCAA's limits with "education-related benefits are unreasonable restraints of trade."[132]

Following Judge Wilken's ruling for the plaintiffs, the NCAA appealed to the United States Court of Appeals for the Ninth Circuit.[133] On appeal, the 9th Circuit evaluated whether the lower court properly applied the Rule of Reason analysis in deciding the educational-related benefits issue.[134] The Ninth Circuit found that the plaintiffs correctly applied the first step of a Rule of Reason analysis, by showing that the NCAA's restraints on educational-related benefits resulted in anticompetitive effects for college basketball and football players.[135] The Ninth Circuit also found that the plaintiffs correctly applied the second step of a Rule of Reason analysis, by evidencing that restrictions on non-cash education-related benefits "did nothing to foster or preserve consumer demand."[136] Moreover, the Ninth Circuit found that the plaintiffs showed less restrictive means to achieve legitimate objectives, thereby satisfying the third step of a Rule of Reason analysis.[137] Therefore, the 9th Circuit affirmed the lower court's ruling for the plaintiffs, thereby prohibiting the NCAA from restricting and limiting educational-related benefits for Football Bowl Subdivision football players and Division I basketball players.[138]

Following the 9th Circuit affirming the district court's ruling, the NCAA appealed to the Supreme Court. In Alston, the Supreme Court had to address whether the NCAA's restrictions on education-related benefits for collegiate student-athletes violated federal antitrust law.[139] In the majority's opinion in Alston, Justice Neil Gorsuch opened his analysis with a historical discussion of American collegiate sports relationship with money, writing that "by the late 1880s, the traditional rivalry between Princeton and Yale was attracting 40,000 spectators and generating in excess of $25,000… in gate revenues."[140] However, the revenue brought forth in the opening of Gorsuch's opinion in Alston pales in comparison to the revenues realized in college athletics today, as 37 public American universities achieved revenues more than $100 million from college athletics in 2018-2019, with another three universities crossing the $200 million dollar mark that year.[141]

In the majority's opinion, Gorsuch evaluated the NCAA's argument that Board of Regents "expressly approved its limits on student-athlete compensation—and this approval forecloses any meaningful review of those limits today."[142] The Supreme Court disagreed with the NCAA's position, finding that the holding from Board of Regents does not "suggest that courts must reflexively reject *all* challenges to the NCAA's compensation restriction.[143] Moreover, the Supreme Court found that the market and money surrounding collegiate athletics have changed drastically since Board of Regents, as "in 1985, Division I football and basketball raised approximately $922 million and $41 million respectively... By 2016, NCAA Division I schools raised more than $13.5 billion."[144]

Ultimately, the Supreme Court reached a unanimous 9-0 decision in favor of the plaintiffs, finding that the that the district court's injunction in favor of the plaintiffs was "consistent with established ant-trust principles." As a result of the Supreme Court's decision,

the NCAA is no longer immune when it comes to following principles of fair play and avoiding antitrust. Therefore, for the NCAA to receive "any possible antitrust exemption for NCAA compensation rules, [it] would have to come from Congress."[145]

However, the scope from the Supreme Court's decision is limited, as it "did not wade into the national debate related to amateurism in college sports or so-called pay-for-play."[146] Without an antitrust exemption, the NCAA's outright prohibition on its member institutions and conferences from paying its student-athletes could be the subject of future lawsuits.
For an example, without its antitrust exemption resulting from **Federal Baseball Club v. National League**, Major League Baseball would arguably not be allowed to restrict the salaries and benefits offered to minor baseball teams and its players.[147] Conversely, without an antitrust exemption, the NCAA would be unable to restrict the compensation and benefits to all those involved within the collegiate athletics, including athletic directors, coaches, and student-athletes.

In his concurring opinion in Alston, Justice Kavanaugh took an even more critical view of the NCAA, finding that the majority's opinion regarding the NCAA's restrictions on education-related benefits did not address the "rules [that] generally restrict student-athletes from receiving compensation or benefits from their colleges for playing sports."[148] Moreover, Kavanaugh added "that the NCAA's remaining compensation rules also raise serious questions under the antitrust law.[149] Kavanaugh found that the NCAA couched its decision to not pay student-athletes by using innocuous labels [student-athlete] which do not "disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America."[150]

IV. Name, Image, and Likeness (NIL)

Following Alston, the NCAA's control over its student-athletes and its model of amateurism was irreparably weakened. In June 2021, the NCAA's board of directors ended the association's rules which prohibited student-athletes "from selling the right to their names, images, and likenesses."[151] By allowing student-athletes to profit from their NIL while participating in collegiate athletics, the NCAA shifted to a policy that was previously seen as "antithetical to the nature of college sports."[152]

Moreover, the schools and conferences can longer "limit a student-athlete's ability to be compensated for their NIL."[153] However, the NIL policies imposed by the various schools, conferences, and states are vastly different. The restriction on limiting a student-athlete's ability to be compensated for their NIL does not mean that the student-athlete can promote or endorse any item or service. For instance, according to the University of Oklahoma's *Name Image and Likeness Policy*, "student-athletes are not permitted to use OU or athletics department-related marks and logos in NIL endeavors."[154]

Some states, such as Alabama, Florida, and Tennessee require that the payments made to student-athletes must be commensurate with their market values, while other states do not have this commensurate market value requirement.[155] Most states have certain industries or items that student-athletes are prohibited from endorsing or promoting, such as gambling, tobacco, alcohol, and adult entertainment.[156] Other schools have even more restrictive NIL policies, such as Brigham Young University, which prohibits its student-athletes from endorsing items that would violate its honor code, such as coffee, tea, and grooming products.[157] Following the NCAA's reversal of its student-athlete compensation ban and the establishment of the various NIL policies that student-athletes are required to follow, collegiate athletics is clearly taking a step

closer to professionalization. This collective action to professionalize collegiate sports is plagued with ambiguities, most notably: Title IX, recruiting, visa implications, and agent involvement.

(a) Title IX

As seen by Smith, although the NCAA is comprised of both public and private institutions that receive federal funding, "dues payments from recipients of federal funds do not suffice the NCAA to suit under Title IX."[158] However, those public and private universities and colleges which are members of the NCAA, are required to comply with Title IX, since they "receive federal funding through federal financial aid programs used by their students."[159] Under Title IX, schools are required to "offer equitable treatment of male and female student athletes in the areas of participation, financial aid, and the provision of things such as equipment, travel, facilities, scheduling, recruitment, publicity."[160] Under Title IX, the opportunities offered to student-athletes do not have to be identical, but they must be equitable.[161]

Although under the NCAA's current legislation, schools are prohibited from involvement with third-party payments or endorsements for student-athletes, that separation may not absolve those schools from Title IX liability. For instance, third-party endorsement deals that require approval from the respective student-athlete's institution, may also require a further analysis of Title IX. According to Julie Roe Lach, the current Commissioner of the Horizon League and formerly the Vice President of Enforcement with the NCAA, under an approval process for third-party endorsements, the institution must act "in a way that meets Title IX and NCAA compliance obligations and ensures that there are equal standards set to review opportunities for males and females."[162]

Therefore, under Title IX, the schools must act in ways that are equitable to both male and female student-athletes when it comes to NIL. The schools must not arbitrarily approve certain third-party endorsement deals for male student-athletes, while denying similar third-party endorsement deals for female student-athletes. Rather, schools should have clear and consistent protocols regarding the approval process for third-party endorsement deals for all student-athletes.

(b) Recruiting

Moreover, by allowing collegiate student-athletes to receive compensation for their NIL, the issue of recruiting improprieties is paramount. Roe Lach also pondered the implications when local businesses offer deals to prospects as "there's a question as to whether that school's knowledge creates an obligation to try to ensure similar opportunities are offered for the other gender."[163] According to Jeff Schemmel, former director of athletics at San Diego State University and current President of College Sports Solutions, "It is likely that the new legislation will attempt to keep this out of the coaches' hands relative to recruiting, but the practicality of that is difficult."[164]

Under the NCAA's current NIL policy, schools are prevented from directly paying players.[165] Likewise, compensation offered as a recruiting inducement to student-athletes is not allowed under current NCAA protocols.[166] However, since there is no federal legislation regarding NIL, ambiguities have arisen. According to the University of Georgia's head football coach, Kirby Smart, "Federal legislation would be nice because, if you looked and combed across the country, not everybody's playing by the same rules."[167] Smart also added that "In other words, some schools are allowed to arrange deals. Some schools are not allowed to arrange deals."[168]

However, that restriction on using NIL as a recruiting inducement is hard to enforce. For example, the University of Alabama's head football coach, Nick Saban, said that "Our quarterback [Bryce Young] has approached ungodly numbers, and he hasn't even played yet…If I told you…it's almost seven figures."[169] Moreover, various NCAA member institutions and their respective athletic programs have hired, partnered, or created marketing and branding services to better understand NIL. For example, the University of Southern California (USC) created BLVD Studios to "create content for their student-athletes that will include things such as logos, photos, videos and podcasts."[170] Likewise, Georgia Tech plans on using its proximity to Fortune 500 companies to help its student-athletes receive endorsement deals.[171]

(C) Visa and Implications

By allowing student-athletes to receive compensation for their NIL, the issue of visas comes to the forefront. F1 visas allow foreign student-athletes to enter the United States as full-time students.[172] Although F-1 visas authorize foreign student-athletes to work on their respective campuses, it remains unclear whether that visa clearance allows them to receive NIL compensation.[173] According to Robert Seiger, an immigration attorney and partner at Archer & Greiner P.C.'s Sports Law Group, by allowing student-athletes to receive NIL compensation, those foreign "student-athletes who are enrolled on student visas – the only legal way for a non-US citizen to attend American schools under current immigration laws – could even be at risk of deportation."[174]

Moreover, Seiger believes that NIL compensation would change "a foreign athlete's visa classification from student to paid employee [creating a] huge potential for conflict between students, schools, and the federal government."[175] By allowing those students to receive NIL compensation, federal law would have to cover NIL payments so that international student-

athletes could avoid deportation. According to Michele Forte-Osborne, Florida State's Senior Associate Athletic Director for Governance and Compliance, "federal immigration law will control what our international student-athletes can take advantage of under the new state laws."[176] Given that every state has different policies regarding NIL, Forte-Osborne adds that "federal immigration laws govern immigration and visa matters, and therefore, it is those laws that have to be addressed."[177]

According to the NCAA's data, roughly 13% of the NCAA's Division I 176,000 student-athletes are from foreign countries.[178]. Recently, Senators Chris Murphy and Bernie Sanders submitted, "The College Athletes Right to Organize Bill, revise[s] labor laws to formally make college athletes into employees of their schools and allow them to unionize and qualify for work visas."[179] The NCAA currently opposes Senator Murphy's and Sanders' proposal.[180] Therefore, without federal legislation regarding NIL compensation, more than 22,000 student-athletes could face deportation.

(D) Agent Involvement

Historically, the NCAA has punished student-athletes, coaches, and universities for their involvement with agents. However, due to the recent reform within the NCAA, student-athletes are now allowed to use agents for the solicitation of NIL deals. Currently, there is still much uncertainty regarding student-athletes' relationship with agents. Moreover, the individual regulations governing student-athletes using agents for NIL purposes vary by state. For example, under Florida's Intercollegiate Athlete Compensation and Rights Bill, "student-athletes can be represented by an agent or attorney, but all attorneys must be a member in good standing of The Florida Bar."[181] Whereas with Louisiana's Senate Bill 60, there is no similar requirement that the

attorneys used for NIL services be registered and in good standing with the Louisiana State Bar.[182]

However, there are still ambiguities regarding the relationship between student-athletes and agents. According to Darren Heitner, the founder of Heitner Legal, P.L.L.C., student-athletes are not allowed to receive marketing advances from agents for NIL services, as those advances "would seem to be deemed an inducement for the player to later enter into an [standard representation agreement] SRA with the agent."[183] That restriction on player marketing advances has not stopped collegiate student-athletes from signing with marketing and sports agencies. For example, USC's quarterback, Kedon Slovis, signed with Klutch Sports, and Alabama's quarterback, Bryce Young, signed with Creative Arts Agency (CAA), both for NIL purposes.[184]

Moreover, the NIL reform has brought uncertainty to high school sports as well. According to Dr. Karissa L. Neihoff, the executive director of the National Federation of State High School Associations, the various "state associations have rules in place that prohibit student-athletes from receiving money in any form that is connected to wearing their school uniform."[185] Neihoff's comments reinforce that the various high school associations are following the NCAA's lead by not allowing high school student-athletes to receive compensation for attending a school. However, that does not mean that high school student-athletes are barred from receiving compensation for their NIL.

For example, Mikey Williams, one of the top high school basketball prospects for the class of 2023, has signed with Excel Sports Management for NIL purposes.[186] According to Excel Sports Management's Vice President, Mike Davis, he believes that his agency's relationship "will generate millions of dollars for this young man [Williams]."[187] Prior to the

recent NIL reform, Williams would unquestionably be deemed ineligible to participate in intercollegiate athletics.

V. Conference Realignment and the Future of the NCAA

Due to reported conference realignment, the NCAA's control over its member institutions received an even more impactful blow. On July 25, 2021, The Houston Chronicle's Brent Zwerneman reported that the University of Oklahoma and the University of Texas contacted the SEC to explore joining the conference.[188] By adding both Oklahoma and Texas, the SEC would grow from 14 member institutions to 16, with seven of those ten among the highest earning revenue athletic departments in the country, with Texas (1), Texas A&M (2), Georgia (5), Alabama (7), Florida (9), and LSU (10).[189]

Moreover, according to USA Today, that 16-team SEC conference would have total revenues comparable to the NCAA. Per the NCAA's most recent financial statement, it received roughly $1.12 billion in revenue, with a projected growth bringing the organization's revenue to an estimate of $1.28 billion for 2024-25.[190] In its most recent financial statements, the SEC reported a revenue of $729 million.[191] However, when considering its new television contract with ABC/ESPN, its member institutions appearances in the NCAA men's basketball tournament, an expanded College Football Playoff, and the additions of Texas and Oklahoma; the SEC has a projected revenue of $1.301 billion for 2024-2025.[192]

Given those revenue projections, many pundits have predicted the de-emphasizing of the NCAA. The Associated Press's Ralph Russo predicts that "as the NCAA cedes power to conferences, a bigger, richer SEC led by a policy wonk such as [SEC Commissioner Greg] Sankey has the potential to become the most powerful entity in college sports off the field, too."[193] Moreover, even the President of the NCAA Mark Emmert believes that his

organization's "1,100 [plus] member schools should consider a less homogenous approach to the way sports are governed and re-examine the current three division structure, which includes 355 Division I colleges."[194] Emmert also added that "the NCAA should not shy away from the fact that a small percentage of athletes are using college sports as a path to professional sports."[195] However, Emmert's comments do not address the fact that individual collegiate athletic conferences with less than twenty members already rival his organization and its 1,100 plus members in terms of revenue.

VI. Conclusion

Since its formation in the early twentieth century, the NCAA has undergone numerous transformational changes. A variety of court cases, ranging from Board of Regents to O'Bannon and Alston have changed the NCAA from an organization with complete control over its member institutions to an organization whose own president has pushed for its decreased emphasis. Given that the NCAA is unlikely to receive an antitrust exemption, its restriction to prevent universities from directly paying student-athletes could be the final nail in its coffin. To maintain its status as a regulatory agency, the NCAA must be willing to adapt to the rapidly evolving world of collegiate athletics to survive. Without incorporating more flexibility into its often-archaic structure, the organization created in the early twentieth century may find itself in peril. Justice Kavanaugh's conclusion in his concurring opinion in Alston that "the NCAA is not above the law," could ultimately lead to its dismantling.[196]

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