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The Demise of the Hub-and-Spoke Cartel and the Rise of the Student Athlete: A Significant Step Toward a New Era of Conferences in *NCAA v. Alston*

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The NCAA is not above the law. On June 21, 2021, the Supreme Court unanimously held in NCAA v. Alston that the NCAA's student-athlete compensation restrictions violated § 1 of the Sherman Act, and student athletes may now obtain education-related benefits from their name, image, and likeness (NIL). The Court's holding marked the first time the NCAA's compensation restrictions failed antitrust scrutiny under the Rule of Reason analysis, but by limiting its holding to education-related benefits, the Court refused to open the floodgates to all forms of NIL compensation. Within its holding, the Court notably rejected the NCAA's procompetitive argument of preserving amateur athletics, which had largely withstood judicial pressure for nearly half a century.

While the Court found the NCAA's compensation restrictions amounted to horizontal restraints on the student-athlete cognizable labor market as the NCAA engaged in blatant price fixing, it is the NCAA's enforcement of the restrictions rather than the restrictions themselves that manifests the Sherman Act violation. This Note argues that the NCAA should cede its control over to the conferences comprised of its member institutions, which would remedy the Sherman Act violation as the conferences are in competition with each other, thus making the compensation restrictions a reasonable restraint on trade. Significantly, Justice Kavanaugh's fiery concurrence in Alston implored the Court to expand its holding to other areas of NIL compensation restrictions outside education, which foreshadows that the Court's decision in

Alston may be essentially mark the end of the NCAA's iron grip on student athletes.

INTRODUCTION: TEDDY ROOSEVELT'S ORIGINAL VISION FOR THE NCAA CLOUDED BY ANTITRUST VIOLATIONS UNDER § 1 OF THE SHERMAN ACT

> Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate, and under ordinary principles of antitrust law, it is not evident why college sports should be any different . . . .The NCAA is not above the law.[1]

In *NCAA v. Alston*, the decades-long questions of whether student athletes should receive monetary compensation for competing in their respective collegiate sports and whether the National Collegiate Athletic Association's ("NCAA") reimbursement restrictions for student athletes were justifiably valid under its amateurism infrastructure came before the Supreme Court.[2] Formed in 1906, the NCAA is a non-profit organization that constitutes the major governing body for intercollegiate athletics of over 1,200 colleges and universities around the United States.[3] The NCAA

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[1] NCAA v. Alston, 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring); *see also* Marcia Coyle, *'The NCAA is Not Above the Law': Justice Kavanaugh Invites More Student Athlete Pay Challenges*, THE NATIONAL LAW JOURNAL (June 21, 2021), https://www.law.com/nationallawjournal/2021/06/21/the-ncaa-is-not-above-the-law-justice-kavanaugh-invites-more-student-athlete-pay-challenges/?slreturn=20220523145719; *see also infra* Part V (emphasizing that Justice Kavanaugh in his concurrence to the *Alston* opinion went the furthest of any of his colleagues on the bench in vocalizing that the NCAA's restrictions on student athletes were clear price fixing, a violation of § 1 of the Sherman Act, and the Court's decision should extend past just an application to educational benefits for student athletes); 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/ (emphasizing that Justice Kavanaugh's concurrence serves as somewhat of a rallying cry for student athletes and those who wish to see their NIL rights expanded as well as a possible sign of things to come if another similar case involving NCAA antitrust violations and student athletes NIL rights were to ascend to the Supreme Court level).

[2] *See generally Alston*, 141 S. Ct. at 2141 (noting that not only were the student athletes attempting to claim ownership over their NIL, but the NCAA was also imploring the Court to exempt the organization from antitrust scrutiny due to its status as a joint venture). *See also* Piraino, *infra* note 131 and accompanying text.

[3] Justin Berkman, *What Are NCAA Divisions? Division 1 vs 2 vs 3*, PREPSCHOLAR (Oct. 23, 2021, 11:27 AM), https://blog.prepscholar.com/what-are-ncaa-divisions-1-vs-2-vs-3 (explaining that the majority of NCAA content that is broadcast on television consists of Division I competitions, while Division II and Division III schools have lower athletic budgets and smaller fan bases). Berkman further breaks down the differences between the divisions by noting that the 350 Division I schools that produce more than 6,000 teams consisting of over 170,000 student athletes generally have the largest student bodies, biggest athletic budgets, and the widest range in providing athletic scholarships. *Id.* To this

contains over 1,000 voting members classified into separate and distinct divisions based on their variations in the size and scope of their athletic programs.[4] After establishing its vast intercollegiate infrastructure in the early twentieth century, the NCAA has rapidly grown to implement and enforce its rules for its member institutions carrying over into the twenty-first century.[5] As its rules and infrastructure continued to evolve, the NCAA came to be known by its engagement in two distinct kinds of rulemaking activity in its governance of student athletes, with one type "rooted in the NCAA's concern for the protection of amateurism" and "the other type [] increasingly accompanied by a discernible economic purpose."[6]

Per its 2021 Mission Statement, the NCAA breaks down its mission of "integrat[ing] intercollegiate athletics into higher education so that the educational experience of the student athlete is paramount" into two components: advancing sports and improving lives.[7] This first component

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point, even smaller Division I schools have been able to reach the national spotlight, such as Butler University, a small, relatively unknown school in Indianapolis, Indiana, that rose to fame by reaching the NCAA's men's Division I basketball playoff finals in 2010 and received $639 million from the publicity. *Id.* For Division II, there are approximately 300 schools, which all offer athletic scholarships, but in comparison to Division I, these are usually partial and smaller scholarships due to the small athletic department budgets at schools such as Valdosta State University and University of West Florida. *Id*. Lastly, Division III, which is the largest of all NCAA divisions and contains 444 schools with more than 170,000 student athletes, does not provide any athletic scholarships, while student athletes more commonly receive academic or need-based aid at schools such as Babson College and University of Rochester. *Id.*

4 *See generally Schools*, NCAA.COM, https://www.ncaa.com/schools-index (last visited Oct. 10, 2022) (listing out every NCAA member school across all divisions in an alphabetically organized list); *see also Our Division I Members*, NCAA.ORG, https://www.ncaa.org/sports/2021/5/11/our-division-i-members.aspx (last visited Oct. 10, 2022) (providing a visual map of the location of all 358 Division I member schools, which frequently garner national media attention and mass fandom across the country).

5 *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 90 (1984) (explaining that the NCAA, throughout the course of the twentieth century has continuously tightened its iron grip on student athletes, notable ramping up its restrictions and regulations on student athletes to avoid the designation of a dummy organization with no real enforcement power).

6 Justice v. NCAA, 577 F. Supp. 356, 383 (D. Ariz. 1983) (describing that student-athletes from the University of Arizona brought an antitrust claim under § 1 of the Sherman Act against the NCAA to prevent enforcement of the NCAA's sanctions on the school's football team that made the team ineligible to participate in post-season competition in the 1983 and 1984 seasons or to make television appearances in the 1984 and 1985 seasons). Coming only one year before the Supreme Court's landmark decision in *Board of Regents*, *Justice v. NCAA* is a notable precursor to student athletes' pursuit to hold the NCAA accountable for its antitrust violations in the late twentieth century and twenty-first century. *See generally Bd. of Regents*, 468 U.S. at 89.

7 *NCAA Mission and Vision Statements Analysis*, MISSION STATEMENT, https://mission-statement.com/ncaa/ (last visited Oct. 10, 2022) (noting that the NCAA's core values

of advancing sports focuses on facilitating student athletes' discovery and development of their athletic potential in college with the ultimate goal of students becoming successful individuals either inside or outside the sports world.[8] To this end, the NCAA even boasts the slogan that their student athletes "go pro in something other than sports," as only two percent of student athletes will ascend to professional status.[9] This notion promoted by the NCAA goes hand in hand with their second component of improving lives.[10] In addition to providing the opportunity to expand their athletic horizons, the NCAA strives to prepare its student athletes for future careers that will have a positive social impact on the world, stemming from the skills they learned and honed as student athletes.[11]

As it grew in power and recognition throughout the twentieth century, the NCAA repeatedly set forth a procompetitive "amateurism" argument in response to heavy-bodied blows from challenges brought by student

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consist of "well-being, fairness, integrity, and teamwork" and that to achieve the NCAA's vision and objectives of prioritizing education as well as athletic success, it requires a supportive environment for its student athletes to grow and develop). In addition to its mission statement, the NCAA's vision statement, though not official, revolves around a devotion to the "overall wellness and success of the collegiate athletes," which extends beyond their academic and athletic performance to their overall health and wellness. *Id.* Both the NCAA's mission and vision statements "consider the experiences and opportunities of young athletes [to help them achieve] the most important [] conventional education." *Id.* The NCAA boasts that for over a century, it has demonstrated its corporate capability and precision in organizing ninety championships across approximately twenty-four sports that fall into three distinct divisions. *Id.*

8 *See id.*; *see also* Debbie Morrison, *College-Athletes Under Pressure*, SCHOOL OVER SPORTS (Mar. 3, 2016), https://schooloversports.wordpress.com/category/ncaa/ (explaining that the NCAA attempts to alleviate the major sources of pressure on its student-athletes: pressure from parents, youth sports culture, college teams, coaches, and the media by providing student athletes with necessary resources to develop).

9 Ruth Williams, *What Percentage of College Basketball Players Go Pro?*, BASKETBALL CLASSIC, https://surreybasketballclassic.info/interesting/what-percentage-of-college-basketball-players-go-pro.html (breaking down the two percent of the more than 460,000 NCAA student athletes moving on to play at the professional level in their respective sport, and highlighting that only 1.2% of the 18,816 men's college basketball players, 0.8% of the 16,509 women's college basketball players, and 1.6% of the 73,712 college football players will move on to play professionally at the next level).

10 *See NCAA Mission and Vision Statements Analysis*, *supra* note 7 (touching on the importance of the NCAA proliferating its message of improving student athlete's lives on and off the field to show the general public that the organization works outside of the athletic realm as well).

11 *See* Williams, supra note 9 (furthering, again, the NCAA's slogan of its student athletes "go[ing] pro in something other than sports" and showing the rest of the nation that the NCAA's organizational motivation is to produce productive and well-rounded citizens in society beyond any athletic benefit that student athletes receive while playing collegiate sports).

athletes seeking monetary compensation for their play.[12] Despite never sustaining an officially recognized definition for "amateur," the NCAA's amateurism argument largely survived judicial scrutiny until *NCAA v. Alston*.[13] Lead by former West Virginia University running back Shawne Alston and University of California, Berkeley center Justine Hartman as lead plaintiffs, a class of former male and female student athletes filed their original complaint in 2014 challenging the NCAA's restriction on student athletes monetizing their NIL.[14] Almost seven years later in 2021, the Supreme Court unanimously found for Alston, Hartman, and their fellow former student athlete plaintiffs in a 9-0 decision, which signified the culmination of strenuous years of antitrust litigation by the NCAA and a fervent push for the expansion of economic rights for student athletes.[15]

This Note argues that the Court's narrow holding in *Alston*—the only ruling on the NCAA's restriction on student athletes' education-related benefits such as post-eligibility scholarships at graduate or vocational schools—should be expanded to eliminate the NCAA's overarching restraints on student athletes profiting from their NIL.[16] This expansion excludes illegal activities such as bribery or intentionally throwing a game for profit and falls in accordance with Justice Kavanaugh's vehement

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12 *See* discussion *infra* Part II.A (laying out the string of important cases leading up to the Court's decision in *Alston* and emphasizing that the NCAA repeatedly has used its amateurism argument throughout the twentieth and twenty-first centuries to defend against antitrust actions from student athletes).

13 *See* discussion *infra* Part III.A (highlighting that unlike the International Olympic Committee, the NCAA's definition of amateur has continued to evolve and does not have a recognizable or discernible definition for the term).

14 *See* Hannah Holmes, NCAA v. Alston *at the Supreme Court*, HARV. J. SPORTS & ENT. L.: HIGHLIGHTS (Apr. 20, 2021), https://harvardjsel.com/2021/04/ncaa-v-alston-at-the-supreme-court/ (dissecting the circumstances leading to the *Alston* decision, the arguments of both the NCAA and student athletes, the nine Supreme Court Justices' questions to each side, and an overview of each side's argument before the Justices).

15 *See* Michael Smith, *U.S. Supreme Court Issues Unanimous Decision Against NCAA*, SPORTS BUS. J. (June 21, 2021), https://news.sportsbusinessjournal.com/Daily/Issues/2021/06/21/Colleges/Alston.aspx (noting that the Supreme Court's narrow decision involving the education-related benefits of student athletes may possibly "come in the form of postgraduate scholarships, financial awards for academic achievements, paid internships, study abroad and laptops or other education-related items, any of which could be used in the recruiting process to attract prospective college athletes"); *see also* Caroline Rice, *Supreme Court Unanimously Rules Against NCAA in* NCAA v. Alston, THE OZONE (Jun. 21, 2021), https://theozone.net/2021/06/supreme-court-unanimously-rules-ncaa-ncaa-v-alston/ (clarifying that student athletes will not automatically receive monetary compensation as a result of the *Alston* decision but rather that "[i]nstitutions can [now] decide how much they want to give student-athletes beyond their athletic scholarships").

16 *See* discussion *infra* Part III.B (explaining that while the Court decided to construe its holding narrowly, the *Alston* decision now serves as a beacon for student athletes to continue submitting antitrust claims against the NCAA to further expand their NIL rights).

argument in his *Alston* concurrence for an expansion of the majority's holding past education-related benefits for student athletes.[17] To clarify, the NCAA itself, rather than its compensation restraints on student athletes, is the source of the antitrust violation via § 1 of the Sherman Act[18], and this Note sets forth the argument that the conferences are better suited to set such restraints on student athletes rather than the NCAA.[19]

The overarching antitrust question from *Alston* Court concerned whether, under § 1 of the Sherman Act, the NCAA's compensation restrictions on student athletes amounted to an unreasonable restraint on trade.[20] The Court's focus on the NCAA's antitrust violations does not extend to the conferences because the student athletes are a product of the universities and their respective conferences, not the NCAA itself.[21] The Court did not want to blow up the entire dam of the NCAA's constraints over student-athlete compensation in its *Alston* decision; instead, it drilled a hole in the dam by focusing the decision solely on education-related benefits.[22] But the dam should be blown up altogether, and the NCAA should cede its control over compensation restraints to the conferences.[23] The conferences that comprise the NCAA[24] are in direct competition with each other in a cognizable labor market, which wards off the antitrust violations that the NCAA is currently committing as a hub-and-spoke

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17 *See* discussion *infra* Part III.C (emphasizing that Justice Kavanaugh took the most aggressive approach of his colleagues on the bench against the NCAA and noted in his concurrence that the Court should extend student athletes' NIL benefits past the education realm, which the Court ultimately settled on).

18 15 U.S.C. § 1 [hereinafter § 1 of the Sherman Act] (prohibiting "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce").

19 *See* discussion *infra* Part VI.

20 *See* discussion *infra* Part VI.

21 *See* discussion *infra* Part VI.

22 *See* discussion *infra* Part III.A.

23 *See* discussion *infra* Part VI.

24 *List of NCAA Conferences*, AM. FOOTBALL DATABASE, https://americanfootballdatabase.fandom.com/wiki/List_of_NCAA_conferences (last visited Oct. 10, 2022) (listing out the twelve FBS conferences, including the four schools designated in the FBS Independent category that are not a member of any specific FBS conference and noting that the Big East Conference (Big East) transitioned into the American Athletic Conference (AAC) in 2013, as well as the fourteen FCS conferences, including the two schools designated as FCS Independents).

cartel[25].[26] Conferences should each be able to set their own rules absent NCAA restrictions or oversight with the exception of the collective decision making necessary for deciding scheduling and broadcasting rights.[27]

Part II.A provides an overview of the NCAA antitrust case precedent from the past half-century, and Part II.B discusses the numerous states which have passed "Fair Pay to Play Acts"[28] through their respective legislatures leading up to the *Alston* decision.[29] Part III.A offers an in-depth dive into *Alston*'s facts and the Rule of Reason analysis at the district court level, and Part III.B delves into the Court's stout rejection of the NCAA's amateurism argument. The Court debunks the argument as a justification for the NCAA's hub-and-spoke cartel operation and highlighting that its unique infrastructure has survived on an ambiguous model unsupported in any other business or industry.[30] Part III.C further explores the Court's rejection of the NCAA's viewership argument through Justice Kavanaugh's fiery concurrence attacking the NCAA head-on for its NCAA's antitrust violations under § 1 of the Sherman Act.[31] Part IV explores the Rule of Reason analysis and why *American Needle, Inc. v. National Football League* exposes the NCAA's price fixing and horizontal restraints on competition by restricting the quantity of its

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[25] *See generally Aditya Goyal & Shreya Chandhok, Hub and Spoke Cartels: A Perspective on Future Investigations*, INDIACORPLAW (*July 10, 2020),* https://indiacorplaw.in/2020/07/hub-and-spoke-cartels-a-perspective-on-future-investigations.html *(*defining a hub-and-spoke cartel as one where "market players at the horizontal level (spokes) enter into an agreement, tacit or explicit, to share sensitive information through a vertical common player, referred to as 'hub'. Although not directly involved in its activities, the hub act as a medium to facilitate the cartel. There are transfers of information from the spokes to the hub, which is then used by the other spokes; hence, an information exchange mechanism is formed which facilitates cartel formation.").

[26] *See generally* JANE E. RUSEKI, ET AL., COMPETITION AMONG ATHLETIC CONFERENCES FOR NEW MEMBERS: EVIDENCE FROM NCAA SPORTS (2018), https://web.holycross.edu/REPEc/fek/Session04.3-Reilly.pdf (examining how NCAA conferences value their respective program rankings and program popularity when deciding whether to add a new member to their conference).

[27] *See* discussion *infra* Part VI.

[28] Jenna West, *What Is the Proposed Calif. Bill to Pay NCAA Athletes? Fair Pay to Play Act Explained.*, SPORTS ILLUSTRATED (Sept. 10, 2019), https://www.si.com/college/2019/09/10/fair-pay-play-act-california-bill-ncaa-background-explainer (explaining that the California State Assembly unanimously voted the Fair Pay to Play Act into law, which made it illegal for California Universities to revoke an athlete's scholarship or eligibility for taking money). The phrase "Fair Pay to Play" was subsequently applied to other states' NIL-based legislation as a slogan representative of the student athletes' movement against the NCAA to remove its compensation restrictions.

[29] *See* discussion *infra* Part II.A. and Part II.B.

[30] *See* discussion *infra* Part III.A and Part III.B.

[31] *See* discussion *infra* Part III.C.

product within a cognizable labor market to raise the price and show market power over its product.[32] Part V analyzes the societal impact and significance of a new conference-driven competitive model absent the NCAA in expanding upon Justice Kavanaugh's concurrence in *Alston* to eliminate all restrictions for student athletes profiting off their NIL.[33] Part VI summarizes and concludes.[34]

I. THE CONJUNCTIVE LEGISLATIVE AND JUDICIAL PUSH THROUGH ANTITRUST LITIGATION AND FAIR PAY TO PLAY LEGISLATION THAT LEAD TO THE *ALSTON* DECISION

A. The Antitrust War That Waged for Decades Before the Alston *Decision*

At the beginning of the twentieth century, President Theodore Roosevelt, a Harvard University football fan and graduate, convened a meeting to review the rules of college football with Harvard, Princeton, and Yale as a result of an increasing number of on-field player deaths due to the violence and brutality of the sport as well as inadequate safety gear.[35] The meeting saw the inception of the NCAA as the standard-setting body of collegiate sports, which in addition to increasing the health and safety of players, set out that no student shall represent a college or university in intercollegiate contests who is monetarily compensated.[36] Yet this admonition did little to prevent the commercialism of collegiate football and the intervention of affluent alumni in paying athletes to play

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32 *See* discussion *infra* Part IV.

33 *See* discussion *infra* Part V.

34 *See* discussion *infra* Part VI.

35 *See* NCAA v. Alston, 141 S. Ct. 2141, 2148 (2021) (explaining that in addition to discussing player safety, President Roosevelt wanted to maintain the purity of college football, which was falling victim to schools hiring players outside their college or university as "ringers" to play for their team on the field).

36 *Id.* at 2149–50 (quoting Intercollegiate Athletic Association of the United States Constitution By-Laws, Art. VII, § 3 (1906)) (noting the pure intentions behind the inception of the NCAA at its origin in attempting to dispel the corruption and bribery that plagued collegiate football in the early twentieth century); *see also* Christopher Klein, *How Teddy Roosevelt Saved Football*, HISTORY, https://www.history.com/news/how-teddy-roosevelt-saved-football (last updated July 21, 2019) (elaborating on the content of the meeting between President Teddy Roosevelt and Harvard, Princeton, and Yale where a representative from each school agreed to draft an agreement stating they would "play by the letter and the spirit of the established rules of football," which eventually lead to the creation of the NCAA as a regulatory body for collegiate athletics).

their respective sport.[37] Colleges and universities also began competing to provide the highest pecuniary incentives[38] to entice players to attend their institutions and wear their colors.[39]

After more than four decades of this commercialism and blatant disregard for the NCAA's compensation admonition, the NCAA adopted the "Sanity Code" in 1948, which set out two clear-cut, important points; first, the NCAA committed to opposing "promised pay in any form" to student athletes, and second, it authorized colleges and universities to pay student athlete's tuition in the form of a grant-in-aid scholarship.[40] Since its codification, the Sanity Code has evolved over time by "expand[ing] the scope of allowable payments to room, board, books, fees, and 'cash for incidental expenses such as laundry'[41]; permitting paid professionals in one sport to compete on an amateur basis in another sport;[42] and most recently, allowing "athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance."[43]

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[37] *See Alston*, 141 S. Ct. at 2149-50 (noting the pure intentions behind the inception of the NCAA at its origin in attempting to dispel the corruption and bribery that plagued collegiate football in the early twentieth century).

[38] *See, e.g.,* Kelly Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 STAN. L. & POL'Y REV. 181, 190 (2017) (noting that in 1939, due to a discrepancy in the money they were receiving from the school, freshmen student athletes at the University of Pittsburgh decided to go on strike because they were angered that their upperclassmen teammates were reportedly earning more money than them for playing in games).

[39] *See Alston*, 141 S. Ct. at 2149 (noting the threat of the wealthy schools dominating collegiate sports simply because they could afford to pay their players more than other schools and entice more recruits to attend their college or university with the promise of significant pecuniary benefits).

[40] *Id.*; *see also* Lee VanHorn, *When the Sanity Code Becomes the Insanity Code: Following O'Bannon's Lead is the Key to Solving Group Licensing for NCAA Student-Athletes*, 74 ARK. L. REV. 117, 127 (2021) (quoting NCAA, Division I Manual § 12.1.2 (2020)) (elaborating on the strictness of the Sanity Code as the NCAA dictated that student athletes would forfeit their eligibility if they "[u]se[d] [their] athletics skill (directly or indirectly) for pay in any form in th[eir] sport," or "[e]nter[ed] into an agreement with an agent").

[41] *Alston*, 141 S. Ct. at 2149 (quoting *In re*. NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1063 (N.D. Cal. 2019)) (explaining the practicality of the NCAA's leniency over time on this specific point to maintain the image in the public eye that it is still promoting the welfare of student athletes by helping them paying for their own laundry).

[42] *See id.* (citing Brief for Historians as *Amici Curiae* Supporting Respondent at 10, *Alston*, 141 S. Ct. 2141 (No. 20-152)) (noting the difference between professionals in one sport playing on an amateur or recreational basis in another sport and schools bringing in "ringers" in the early twentieth century to boost their team's chances of winning on the football field).

[43] *Alston*, 141 S. Ct. at 2150 (quoting O'Bannon v. NCAA, 802 F.3d 1049, 1054–1055 (9th Cir. 2015)) (emphasizing the more recent development of schools covering the full cost of grant-in-aid tuition for student athletes, which allowed student athletes from poorer backgrounds to attend schools they normally would not be able to afford on their own).

Before delving into the trajectory of cases analyzing the NCAA's alleged violations of the Sherman Act that ultimately culminated with the *Alston* decision, it is first important to explain the relevance of the Sherman Act to the issue of student athletes' NIL.[44] The Sherman Act—Congress' first antitrust law in 1890—was designed to be a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[45] In determining the scope of the Sherman Act, the Supreme Court made clear that the legislation does not prohibit *every* restraint of trade but rather those restraints that are deemed *unreasonable* upon inspection and analysis.[46] The Supreme Court further clarified the Act's reach by opining that there are certain types of acts that are considered to be so harmful to competition that they are *per se* violations, including, but not limited to, plain arrangements between competing entities or individuals to fix prices, rig bids, or divide markets.[47] Paralleling the severity of an action that is deemed a per se Sherman Act violation, the accompanying penalties are also severe when competitors fix prices or engage in horizontal restraints on power, which are the specific Sherman Act violations at issue in the *Alston* decision and its progeny.[48]

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[44] *See The Antitrust Laws*, *infra* note 45 and accompanying text (explaining the importance and relevance of the Sherman Act to prevent the monopolization of key industries and business sectors with one corporation bullying its competitors into compliance merely because it possessed the capital liquidity and ability to do so).

[45] *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Oct. 10, 2022) (explaining that the Sherman Act and the other core antitrust laws, the FTC Act and the Clayton Act, have possessed the same basic objective for over 100 years since they were enacted by Congress: "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").

[46] *Id.* (clarifying the Supreme Court's stance on Sherman Act violations was important for businesses and corporate entities to understand the boundaries and restrictions on their ability to restrain trade and what may be considered "unreasonable" in a specific circumstance).

[47] *See generally* United States v. Socony-Vaccum Oil Co., 310 U.S. 150, 213 (1940) (quoting United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927)); *The Sherman Antitrust Act*, GIBBS LAW GROUP LLP, https://www.classlawgroup.com/antitrust/federal-laws/sherman-act (last visited Oct. 10, 2022) (listing examples of per se Sherman Act violations as monopolies, tying, exclusive dealings, and price discrimination that all amount to unreasonable restraints on trade).

[48] *See id.* (applying the Sherman Act violation of fixing prices and horizontally restraining trade to the student athlete context with the NCAA as the NCAA is unreasonably restricting the cognizable labor market of student athletes by not paying them for their performance on the field). *See generally* Judy Beckner Sloan, *Antitrust: Shared Information Between the FTC and the Department of Justice*, 1979 BYU L. REV. 883, 885.

While the Supreme Court's decision in *Alston* validated the decades-long struggle for student athletes in their war against the NCAA for monetizing their NIL, this dispute first ascended to national recognition in 1984 in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma* (*NCAA v. Board of Regents*).[49] There, the Court sustained an antitrust challenge brought by the University of Oklahoma and University of Georgia to the NCAA's restraints on televising collegiate games.[50] In the early 1980s, the NCAA monopolized college football TV contracts, controlling the number of times a school's football games could be televised nationally and regionally in addition to the amount of revenue the school would receive from each NCAA broadcast.[51] The NCAA implemented a stringent restriction that no school was eligible to appear on a televised broadcast exceeding a maximum of four times nationally and six times in total over a two-year term.[52]

While the NCAA justified its broadcasting restrictions by claiming reduced adverse effects of live television upon football game attendance, the universities claimed the NCAA's restrictions violated § 1 of the Sherman Act through horizontal price fixing and output limitation.[53] The

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[49] *NCAA v. Bd. Of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984). The University of Oklahoma and University of Georgia's eventual victory in *Board of Regents* set into motion a series of antitrust suits by student athletes over the coming decades once the world saw that the NCAA was not immune to judicial oversight. *See generally id.* at 88–89.

[50] *Id.* at 88 (noting that the University of Oklahoma and the University of Georgia were both powerhouse competitive football schools who were negatively impacted by the NCAA's broadcasting restraints and who would stand to benefit significantly from more nationally televised games absent such restraints).

[51] *See Seven Cases That Shaped Sports Since 1977*, ATHLETIC BUS. (Apr. 13, 2017), https://www.athleticbusiness.com/operations/legal/article/15149636/seven-cases-that-shaped-sports-since-1977 (describing that *NCAA v. Board of Regents* is one of the most significant sports-related cases to ever make it to the Supreme Court level where student athletes were able to secure a victory as its impact on the broadcasting rights of collegiate sports still reverberates into the twenty-first century). Similarly, the second case on the list is *O'Bannon v. NCAA*, which became one of the most important antitrust class action suits challenging the NCAA's amateurism model in the twentieth century. *See id; supra* Part II.A.

[52] *Seven Cases That Shaped Sports Since 1977*, *supra* note 51.; *see also* Thomas Scully, NCAA v. Board of Regents of the University of Oklahoma*: The NCAA's Television Plan is Sacked by the Sherman Act*, 34 CATH. U. L. REV. 857, 870 (1985) (relaying that within the Court's decision to invalidate the NCAA's television practices as horizontal restraints on competition, the Court found that the NCAA had "established an artificial limit on output and had unreasonably restricted trade" in setting its cap on the number of games available to be televised and its limitations on broadcasting). Moreover, "the NCAA "had effectively eliminated any broadcaster-institution negotiation" with its minimum aggregate price, which lead the Court to find the NCAA's actions as blatant price-fixing. *Id.*

[53] *See* Scully, *supra* note 52, at 870; *see also* Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 627 (2009) (describing that the Court in *Board of Regents* significantly did not hold that

Supreme Court agreed with the universities, finding that the NCAA's broadcasting restrictions constituted an unlawful restraint on free market operations that violated § 1 of the Sherman Act.[54]

In applying the Rule of Reason analysis, there is a four step burden-shifting framework.[55] First, a plaintiff must show a significant anticompetitive effect.[56] Second, the defendant must "demonstrate a legitimate procompetitive justification."[57] Third, the plaintiff must "demonstrate that the restraint is not reasonably necessary to achieve the restraint's objectives."[58] Fourth, "the court [must] balance[] the restraint's anticompetitive and procompetitive effects."[59] Applying the Rule of Reason analysis in *Board of Regents*, the Court struck down the NCAA's television broadcasting rules because they did not serve any legitimate procompetitive purpose, noting that "consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role."[60] Although

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the NCAA's television plan was illegal because of the existence of potential less restrictive alternatives, but the Court did make clear that the presence of such alternatives provided proof that the NCAA's procompetitive justifications for its restrictions were merely pretext while the real purpose and intent behind the restrictions was to notably raise prices and reduce output while still turning a notable profit).

54 *See Bd. of Regents*, 468 U.S. 85 at 120 (discussing that the Court focused heavily on the procompetitive factor of the Rule of Reason analysis to assess whether the NCAA could offset the anticompetitive limitation on price and output caused by their broadcasting restrictions that the Court identified under the anticompetitive factor).

55 *See* Michael A. Carrier, *The Four-Step Rule of Reason*, ANTITRUST 50 (Spring 2019), (explaining that the Rule of Reason analysis is used as the primary framework in the majority of antitrust cases where the courts employ a four-step test to assess the effects of a particular individual or corporation's restraint on competition).

56 *Id.* at 50 (explaining that the initial burden of proof is logically placed on the plaintiff to essentially show the basis for their claim in bringing forth the harmful anticompetitive effects resulting from the defendant's actions or policies).

57 *Id.* (illustrating that the burden of proof then shifts from the plaintiff to the defendant for the second Rule of Reason factor as the defendant is afforded the opportunity to show that despite any potential anticompetitive effects, its procompetitive justifications make their actions proper and in compliance with federal antitrust law).

58 *Id.* at 50-51 (noting that the burden of proof once again shifts back to the plaintiff for the third Rule of Reason factor where the plaintiff has the opportunity to present the court with less restrictive alternatives that the defendant would have been able to take that could have mitigated or eliminated its anticompetitive effects on the relevant labor market).

59 *Id.* at 51 (explaining that the final step of the Rule of Reason analysis, the balancing portion, is where the Court assesses the first three factors holistically and provides a determination as to whether the defendant's procompetitive justifications outweigh the plaintiff's harm from the defendant's anticompetitive effects).

60 NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984) (expanding upon its analysis in regard to the other Rule of Reason factors, the Court noted the NCAA' naked restriction on broadcasting rights operated to raise price and reduce output, which were both unresponsive to consumer preference). The Court rejected the NCAA's argument that its television plan did not have a significant anticompetitive effect since the

the Court did not delve into the lawfulness of the NCAA's restrictions on student-athlete compensation or rule on the merits of the NCAA's amateurism rules as they were not relevant to the Court's antitrust analysis, it did explain why the NCAA's amateurism rules "should be analyzed under the Rule of Reason, rather than held to be illegal per se."[61]

From a macro perspective, the impact of the *Board of Regents* Court stripping the NCAA of a major funding source in its broadcasting rights and supplying it to the universities sent a reverberating impact throughout college sports that would change the trajectory of the NCAA's relationship with its member institutions.[62] In the wake of the *Board of Regents* decision, universities entered into their own television contracts.[63] Some universities switched conferences, conferences created their own branded television networks, salaries increased for coaches and administrators, and the Bowl Championship Series and the College Football Playoff eventually emerged.[64] But one phrase buried deep within the dicta of

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organization has no market power and found substantial evidence to the contrary. *Id.* at 94. The Court similarly struck down the NCAA's justification that the broadcasting plan protected live attendance at NCAA sporting events and noted that "by seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to draw live attendance when faced with competition from televised games," the NCAA's argument goes sits inconsistent with the basic tenets of the Sherman Act. *Id.*

61 O'Bannon v. NCAA, 802 F.3d 1049, 1063 (9th Cir. 2015) (describing the Ninth Circuit's response and ultimate rejection of the NCAA's claims that under the *Board of Regents* decision, the NCAA amateurism rules in their entirety were deemed "valid as a matter of law" and that any challenge brought under § 1 of the Sherman Act must fail as a matter of law because the Court held in *Board of Regents* that they were presumptively valid).

62 *See Mary H. Tolbert & D. Kent Meyers, The Lasting Impact of NCAA v. Bd. of Regents of the University of Oklahoma: The Football Fan Wins*, OKLA. BAR J. 22, 25 (Oct. 2018), (explaining that with universities winning their own television contracts and the NCAA relinquishing its broadcasting rights, the impact of the *Board of Regents* decision "has resulted in more improvement for consumer welfare than any other privately brought antitrust case").

63 *See e.g. Longhorn Network*, WIKIPEDIA, https://en.wikipedia.org/wiki/Longhorn_ Network (Sept. 26, 2022, 11:13 PM) (providing an example of a prominent university, the University of Texas at Austin, who owns a highly-viewed multinational regional sports network—the Longhorn Network (LHN)—as a joint venture with ESPN and IMG College); Dennis Brown, *Notre Dame and NBC Extend Football Contract to 2025*, NOTRE DAME NEWS (Apr. 18, 2013), https://news.nd.edu/news/notre-dame-and-nbc-extend-football-contract-to-2025/ (illustrating that the University of Notre Dame, which is an FBS Independent school that does not belong to any one conference, and NBC Sports agreed to a ten-year contract extension that gave NBC Sports the rights to televise Notre Dame home football games from 2016 through 2025, which built upon the already existing partnership that Notre Dame and NBC Sports first cultivated in 1991).

64 *See generally* Jon Solomon, *NCAA Supreme Court Ruling Felt at O'Bannon Trial 30 Years Later*, CBS SPORTS (June 26, 2014, 7:12 AM), https://www.cbssports.com/college-football/news/ncaa-supreme-court-ruling-felt-at-obannon-trial-30-years-later/

Board of Regents would haunt opponents of the NCAA's student-athlete compensation regulations for the next few decades: "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid."[65]

Fifteen years later, in *Law v. NCAA*, the Tenth Circuit built upon *Board of Regents* and further opined that the NCAA had engaged in a horizontal agreement to fix prices, which has obvious anticompetitive effects, and per the Rule of Reason analysis, the NCAA was unable to meet its burden in showing that its restraint on college coaches' pay reasonably enhances competition.[66] Judge Ebel of the Tenth Circuit summarily rejected the NCAA's justification that the price fixing will allow younger, less experienced coaches to break into Division I coaching openings.[67] Judge Ebel further rejected the NCAA's additional justifications of cutting overall coaching costs and maintaining competitive equity by preventing schools with larger endowments from placing a more experienced coach in an entry-level position.[68] Ultimately, the NCAA settled with the collection of college coaches to the tune of $67 million in back pay, serving as another important chink in the NCAA's armor that eventually lead up to the Court's eventual decision in *Alston*.[69]

(emphasizing that the late Supreme Court Justice White, a former NFL player, predicted the NCAA's commercialization, defections for television cash, and its mighty struggle to protect student athlete amateurism in his dissent in the *Board of Regents* case where he famously stated "[b]y mitigating what appears to be a clear failure of the free market to serve the ends and goals of higher education, the NCAA ensures the continued availability of a unique and valuable product, the very existence of which might well be threatened by unbridled competition in the economic sphere" (quoting *Bd. of Regents*, 468 U.S. at 122 (White, J., dissenting))).

65 *Bd. of Regents*, 468 U.S. 85 at 102 (discussing that the NCAA relied on this specific quoted language in the Court's dicta). This language would later be used by the NCAA in antitrust litigation to come in the twentieth and twenty-first century, including eventually in *Alston*.

66 Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998).

67 *See id*. at 1021–24. Judge Ebel's overall rejection of the NCAA's price fixing justification set the tone for the remainder of the opinion as Judge Ebel went on to reject the NCAA's additional justifications, which eventually pushed the NCAA to agree to a substantial multi-million-dollar settlement with the collection of coaches. *See id.* at 1021-22.

68 *See id.* at 1022-23. It is significant that Judge Ebel not only rejected the NCAA's main argument of price fixing allowing younger coaches to enter Division I, but also rejected the NCAA's ancillary arguments because it emphasizes that the NCAA found itself essentially on the losing side of major antitrust litigation for the first time since the *Board of Regents* decision in 1984. *See id.*

69 *See NCAA Restricted Earning Coaches Rule*, COLLEGE SPORTS SCHOLARSHIPS, https://www.collegesportsscholarships.com/ncaa-coach-restricted-earnings.htm (last visited Oct. 10, 2022) (noting that the NCAA's settlement with the collection of college coaches in *Law* would serve as a dark mark on the NCAA's record for decades to come as antitrust litigation from student athletes continued to pour in throughout the twenty-first century).

Eight years later in 2006, the issue of student-athlete compensation rose to the national stage once again.[70] In *White v. NCAA*, a collection of student athletes challenged the NCAA on antitrust grounds to recover damages for the difference between the full cost of their attendance and the NCAA's athletic scholarships (i.e. tuition, fees, room and board, and books).[71] The NCAA limited its definition of a "full grant-in-aid athletic scholarship" to tuition, mandatory fees, room, board, and required books—which cumulatively was less than the cost of attendance due to optional fees, school supplies, and other miscellaneous expenses.[72] For many student athletes, the pecuniary difference between the full cost of attendance and full grant-in-aid scholarship money provided by the school ranged from $1,500-$6,000 depending on the school's geographic location.[73]

The student athletes in *White* alleged that the NCAA and its member institutions were parties to a horizontal agreement,[74] limiting student-athlete compensation to grant-in aid scholarships and denying them of their legitimate shares of the financial benefits in the labor markets of college football and basketball.[75] With the NCAA mandating these grant-in-aid limitations on their compensation, the student athletes argued that this "unreasonably restrained trade through the imposition of a cap on

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70 *See* White v. NCAA, No. CV 06-0999, 2006 WL 8066802 (C.D. Cal. Sept. 21, 2006) (describing that *White v. NCAA* marked the first major antitrust push by student athletes against the NCAA in the twenty-first century and focused on a subset of different issues and grievances related to a discrepancy in grant-in-aid tuition money for student athletes).

71 *See id*.

72 *See* Courtney O'Brien, *Change of Pace for Grants-in-Aid*: Why the Former NCAA Scholarship Bylaw Violated Antitrust and Student Athletes Should Be Able to Recover 25 (2013) (Article, Seton Hall Law) (available at https://scholarship.shu.edu/student_scholarship/76/).

73 *See* Alston v. NCAA*: The Reincarnation of* White v. NCAA, BARLOW, GARSEK & SIMON, LLP (Mar. 13, 2014), https://bgsfirm.com/alston-v-ncaa-the-reincarnation-of-white-v-ncaa/ (highlighting that since the 2008 settlement between the student-athlete plaintiffs and the NCAA in *White* that resulted in student athletes receiving access to funds for educational purposes past the money they receive for a grant-in-aid scholarship, the *Alston* case represents the reincarnation of *White* and signifies the continuous push by student athletes to fight for compensation for their NIL after earning a notable victory in the *White* settlement).

74 *See generally* Joel I. Klein, Acting Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., A Stepwise Approach to Antitrust Review of Horizontal Restraints, Address Before the American Bar Association's Antitrust Section Semi-Annual Fall Policy Program (Nov. 7, 1996), https://www.justice.gov/atr/speech/stepwise-approach-anitrust-review-horizontal-agreements (explaining that a "horizontal agreement" is one made among economic competitors on the same level of production or distribution that results in price fixing in that particular economic sphere).

75 *See* Thomas Baker II et al., White v. NCAA*: A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS SPORT 75, 76 (2011).

athletic-based financial aid in violation of § 1 of the Sherman Act" because the cap prevented them from covering the complete cost of their attendance.[76] The student athletes requested the court enjoin the NCAA from enforcing its grant-in-aid policy to allow the student athletes to meet their full cost of attendance burden, including their extra expenses not covered by financial aid.[77] Whether the grant-in-aid limits were enough to constitute an antitrust violation was never actually determined by the court, as the parties ultimately settled before trial.[78] Under the settlement, the NCAA permitted schools to purchase health insurance for student athletes and established a $10 million fund for past athletes to receive a cash payment or additional money to further their education.[79] This victory for student athletes led to a broadening of future suits against the NCAA on antitrust grounds, perhaps most notably in *O'Bannon v. NCAA*.[80]

In *O'Bannon*, a group of former student athletes sued the NCAA arguing that the NCAA and EA Sports' use of their NIL in video games and in media broadcasts constituted an antitrust violation under § I of the Sherman Act.[81] Brought by Edward O'Bannon, a former All-American

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[76] Id.; *see generally* Lois Elfman, *NCAA to Provide Former Student-Athletes with Benefits*, DIVERSE (Aug. 7, 2008), https://www.diverseeducation.com/sports/article/15087519/ncaa-to-provide-former-student-athletes-with-benefits.

[77] *See generally* Daniel E. Lazaroff, *The NCAA in its Second Century: Defender of Amateurism or Antitrust Recidivist?,* 86 OR. L. REV. 329, 336 (2007) (explaining that the NCAA's limitations on the number of financial aid awards each school may provide to its student athletes in addition to the NCAA's bar on donors contributing funds to finance a student athlete's scholarship or grant-in-aid "operate to diminish or eliminate potential economic competition for players in major NCAA sports such as . . . football and Division I basketball, despite the fact that revenues from those sports may generate millions of dollars for the institutions involved").

[78] Baker et al., *supra* note 75, at 77; Drew N. Goodwin, *Not Quite Filling the Gap: Why the Miscellaneous Expense Allowance Leaves the NCAA Vulnerable to Antitrust Litigation*, 54 B.C. L. REV. 1277, 1300–01, 1280 (2013) (noting that despite settling before trial, *White v. NCAA* "provided future litigants with a blueprint for an antitrust suit against the NCAA that would at least survive a motion to dismiss").

[79] *See* Important NCAA Lawsuits, ATHNET, https://www.athleticscholarships.net/important-ncaa-lawsuits.htm (last visited Oct. 10, 2022) (laying out the terms of the NCAA's ultimate settlement with the group of student athlete plaintiffs in *White* and noting that in addition to the schools now being able to purchase health insurance for its student athletes, they also provided two separate funds that were combined together into one to further benefit student athletes for purposes other than health insurance, including student athletes receiving additional money in their academic pursuits); 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/.

[80] *See O'Bannon* v. NCAA, 802 F.3d 1049 (9th Cir. 2015) and accompanying text, *supra* note 61.

[81] *Id.* at 1055; *see also* Samuel Draper, *The Ed O'Bannon Case: How It Has Affected the NCAA and the Future Prospects of Paying Student-Athletes*, UNIV. OF BALT. L. REV.

basketball player and 1995 National Championship winner at the University of California, Los Angeles (UCLA), and other former college basketball and football athletes, the student-athlete plaintiffs argued that by using college athletes' NIL in various EA Sports video games without their express consent or compensation, the NCAA illegally restrained trade under § 1 of the Sherman Act.[82]

The case came before Judge Claudia Wilken of the United States District Court for the Northern District of California—who also presided over the district-level proceedings in *Alston* in 2021[83]—as the district court applied the Rule of Reason analysis[84] in assessing whether the NCAA's compensation restraints violated § 1 of the Sherman Act.[85] For the first step of anticompetitive effects, the district court found that the NCAA's compensation restraints had an anticompetitive effect on the college education market, discerning its agreement with its member institutions to

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(Mar. 24, 2017), https://ubaltlawreview.com/2017/03/24/the-ed-obannon-case-how-it-has-affected-the-ncaa-and-the-future-prospects-of-paying-student-athletes/ (citing Matt Simenstad, *The Ed O'Bannon Class Action Lawsuit–A New Paradigm for College Sports*, 45 COLO. L. REV. 31, 31 (2016)) (describing that O'Bannon led the UCLA basketball team to a 31-2 regular season record as well as a national championship in 1995, earning the Most Outstanding Player award and the John R. Wooden Award for being the best college basketball player in NCAA Division I). After O'Bannon ascended to the professional level, the NCAA continued to benefit from his college play by re-broadcasting his impressive 1995 season and licensing the right to video games that encompassed features of his Bruins' team in their national championship run in 1995. *Id.*

82 *See* Michael Steele, O'Bannon v. NCAA*: The Beginning of the End of the Amateurism Justification for the NCAA in Antitrust Litigation*, 99 MARQ. L. REV. 511, 537 (2015) (emphasizing that when the College Football Playoff structure was born in 2011, the Power Five Conferences still retained a large swath of power despite the NCAA's amateurism rules). Further, the NCAA Board of Directors in 2014 voted to allows the Power Five Conferences or the "five richest leagues" to write some of their own rules, but this is in direct contradiction to the NCAA's own amateurism argument made in *O'Bannon*. *Id.* at 537- 38 (first citing Brian Bennett, *NCAA Board Votes to Allow Autonomy*, ESPN (Aug. 7, 2014), https://www.espn.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences; then citing O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1003–04 (N.D. Cal. 2014)). Not only did the NCAA afford the Power Five Conferences this wide autonomy, but also the vote to do so was overwhelming, which again spotlights the shaky ground on which the NCAA has planted its amateurism flag. *Id.* (citing Bennett, *supra*).

83 Steve Berkowitz, *NCAA Takes Legal Hit Again: Judge Refuses to End Case That Could Bring TV Money to Athletes*, USA TODAY (June 24, 2021, 2:30 PM), https://www.usatoday.com/story/sports/college/2021/06/24/name-image-and-likeness-lawsuit-moves-forward-ncaa-loses-again/7777027002/.

84 *See generally* Carrier, *supra* note 55, at 50-51 (laying out the four-step framework employed by Judge Wilken at the district court level in *Alston* despite the NCAA's argument against being subjected to antitrust scrutiny).

85 *See generally O'Bannon*, 802 F. 3d at 1057 (explaining that the district court conducted the Rule of Reason analysis in response to the rise of companies such as EA Sports using student athletes NIL in video games during the social media age).

be a price-fixing agreement as the member institutions acted as the spokes of a hub-and-spoke cartel that colluded to fix the price of their product.[86]

The district court further explained that absent the NCAA rules related to NIL, its member institutions would be able to compete with each other by offering high school recruits monetary compensation that exceeded the cost of attendance, thereby "effectively lower[ing] the price that the recruits must pay for the combination of educational and athletic opportunities that the schools provide."[87] Thus, the NCAA's rules prohibiting student athletes from receiving compensation for the use of their NIL in the EA Sports video games result in a price-fixing agreement.[88] The recruits "pay for the bundles of services provided by colleges with their labor and their NILs, but the 'sellers' of these bundles—the colleges—collectively 'agree to value [NILs] at zero.'"[89] In doing so, the member institutions of the NCAA are acting as a cohort of sellers colluding to fix the price of their product—student athletes' NIL—and behaving like a cartel.[90]

For the second step of procompetitive purposes, the NCAA put forth four arguments to justify its compensation restraints: (1) protecting the "amateur" tradition and identity of college sports; (2) promoting a competitive balance in FBS[91] football and Division I basketball; (3) linking academics with athletics; and (4) increasing the output of the college education market.[92] The district court partially accepted the first

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86 *See id.* at 1057–58; Marc Edelman, *The District Court Decision in* O'Bannon v. National Collegiate Athletic Association*: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2331-32 (2014).

87 *See generally O'Bannon*, 7 F. Supp. 3d 972 (touching on the benefit specifically to high school recruits from lower-income backgrounds as the financial considerations of attending a university and participating in collegiate athletics are a large contributory factor in the university in which they choose to commit).

88 *See id.* at 973 (proposing the notion that the colleges and universities recruiting student athletes unanimously agreed to fix the price of student athletes NIL at zero to benefit from their on-field performance while restricting them from profiting off their own NIL).

89 *O'Bannon*, 802 F. 3d at 1058 (quoting *O'Bannon*, 7 F. Supp. at 973 (N.D. Cal. 2014)).

90 *See id.*; Matthew N. Korenoski, O'Bannon v. NCAA*: An Antitrust Assault on the NCAA's Dying Amateurism Principle*, 54 DUQ. L. REV. 493, 515 (2016).

91 *See generally* Patrick Pinak, *College Football Trivia: What Does 'FBS' and 'FCS' Actually Mean?*, FANBUZZ, https://fanbuzz.com/college-football/what-does-fbs-stand-for/ (July 29, 2022) (explaining that the NCAA's Division I football is divided into two categories: the Football Bowl Subdivision (FBS) and Football Championship Subdivision (FCS) and that the FBS derives its name for the numerous bowl games that its teams participate in at the close of each college football season that generate hundreds of millions of dollars).

92 *O'Bannon*, 802 F. 3d at 1058 (illustrating that each of these four procompetitive purposes brought by the NCAA were reminiscent of the procompetitive arguments that it

and third justifications while rejecting the second and fourth.[93] The Court carried both procompetitive arguments into the third step of the Rule of Reason, where it considered whether the NCAA possessed a "substantially less restrictive alternative to a total ban on student-athlete compensation."[94] The district court answered in the affirmative, finding the NCAA possessed two legitimate, less restrictive alternatives: (1) allowing schools to award student-athlete stipends up to the full cost of the school's attendance, which compensated them for deficiencies in their grants-in-aid; and (2) permitting schools to set aside a part of their licensing revenues in trusts that would be distributed to student athletes in equal shares after they leave their college or university.[95]

On appeal to the Ninth Circuit, the court largely agreed with the district court on its analysis of the anticompetitive and procompetitive Rule of Reason factors, finding: (1) a cognizable "college education market" exists as colleges compete for athletic recruits by offering scholarships and other amenities, (2) absent the NCAA's compensation rules, universities would compete to offer recruits compensation, and (3) the NCAA's compensation rules have a significant anticompetitive effect on the college education market by fixing the price that recruits pay to attend college.[96] The Ninth Circuit further held that the district court

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brought in the landmark *Board of Regents* case with particular emphasis on its "amateurism" argument).

93 *See id.* (explaining that the first procompetitive justification of the NCAA protecting the "amateur" tradition and identity of collegiate athletics was at the center of the district court's analysis as it remained a recurring argument for the NCAA since the Court's *Board of Regents* decision in 1984).

94 *See id*. at 1058, 1060 (quoting *O'Bannon*, 7 F. Supp. 3d at 1004–05); *see also* Marc Edelman, *A Prelude to* Jenkins v. NCAA*: Amateurism, Antitrust Law, and the Role of Consumer Demand in a Proper Rule of Reason Analysis*, 78 LA. L. REV. 227, 236 (2018) (explaining that the district court enjoined the NCAA from enforcing any rules that "would prohibit its member schools and conferences from offering their FBS football and Division I [men's] basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses, in addition to a full grant-in-aid," marking the first ruling of this kind in sports-antitrust jurisprudence). But Judge Wilken's order only forbade the NCAA from restricting payments to student athletes that exceeded their full cost of attendance at their respective college or university plus a deferred compensation of $5,000 per year, which fell well short of establishing an absolutely free market for student athlete services. *See id.*

95 *O'Bannon*, 802 F. 3d at 1060–61. Both of these less restrictive alternatives would particularly benefit student athletes from lower income backgrounds seeking to attend schools with above average tuition costs in affluent geographical locations who may not be able to attend the school without stipends to supplement grant-in-aid money. *See id.*

96 *See id*. at 1070; *see also* Stephen F. Ross & Wayne S. DeSarbo, *A Rapid Reaction to* O'Bannon: *The Need for Analytics in Applying the Sherman Act to Overly Restrictive Joint Venture Schemes*, 119 PENN ST. L. REV. PEN STATIM. 43, 46 (2014) (noting that under the Court's application of the Rule of Reason analysis and finding that O'Bannon had successfully shown anticompetitive effects in the relevant economic market, the court

clearly erred in analyzing the third Rule of Reason factor because "an alternative must be 'virtually as effective' in serving the procompetitive purposes of the NCAA's current rules, and 'without significantly increased cost'" but that "allowing students to be paid compensation for their NILs is virtually as effective as the NCAA's current amateur-status rule."[97] Although the Supreme Court later denied a certiorari petition to hear this case in October 2016, the *O'Bannon* decision still marked an important victory for student athletes: the Ninth Circuit recognized and defined the student athletes' cognizable labor market, which the NCAA had vehemently opposed as a lynchpin of its argument for the necessity of its compensation restraints.[98]

B. State Legislatures Passing Fair Pay to Play Legislation to Pave a Path for the Supreme Court's Decision in Alston

Two years prior to the Supreme Court's decision in *Alston*, student athletes gained a notable NIL victory as the California Legislature passed Senate Bill 206 (SB 206)—later named the "Fair Pay to Play Act"—in late 2019, which prohibited California colleges and universities from revoking a student athlete's scholarship or eligibility for receiving money for their NIL.[99] SB 206 passed the California Legislature with overwhelming

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credited persuasive testimony from Roger G. Noll, a leading sports economist, as he testified that "those student-athletes seeking to play football after high school found no reasonable substitute for college football programs participating in the Football Bowl Subdivision (FBS), and those seeking to pursue a post-secondary basketball career found no reasonable substitute for Division I college basketball").

97 *O'Bannon*, 802 F. 3d at 1074 (quoting Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1159 (9th Cir. 2001)).

98 *See generally Still No NCAA Pay for Play—Supreme Court Denies Cert. in* O'Bannon v. NCAA, OGLETREE DEAKINS (Oct. 3, 2016), https://ogletree.com/insights/still-no-ncaa-pay-for-play-supreme-court-denies-cert-in-obannon-v-ncaa/ (noting specifically that the Ninth Circuit panel, after rejecting many of the NCAA's arguments, focused on the third step of the Rule of Reason analysis for whether there were substantially less restrictive alternatives to the NCAA's rules that were "virtually as effective . . . without significant increased cost"). While Judge Wilken in the district court proceedings found that paying student athletes compensation promoted amateurism as effectively as not paying them in the first place, the Ninth Circuit noted that this decision was made in clear error because the district court ignored the basic principle that paying refraining from paying student athletes for their athletic performance is precisely what provides them the "amateur" status. *See id.*

99 *See* West, *supra* note 28 and accompanying text; *see also Governor Newsom Signs SB 206, Taking on Long-Standing Power Imbalance in College Sports*, CA.GOV (Sept. 30, 2019), https://www.gov.ca.gov/2019/09/30/governor-newsom-signs-sb-206-taking-on-long-standing-power-imbalance-in-college-sports/ (explaining that Governor Newson singed SB 206 alongside notable co-sponsors of the bill including Los Angeles Lakers small forward LeBron James, Senator Nancy Skinner of California, UCLA gymnast

bipartisan support—despite strong opposition from the University of Southern California (USC), Stanford University, the University of California system, and California State University schools for fear of NCAA retribution[100]—making California the first state in the nation to recognize official support for allowing student athletes to profit off their NIL.[101] Taking effect on January 1, 2021, SB 206 allows all student athletes enrolled in both public and private four-year universities in California to earn money from their NIL.[102] Further, SB 206 restricts California colleges and universities from enforcing NCAA rules that prevent student athletes from earning compensation and will prevent the NCAA from banning California universities from intercollegiate sports should their athletes decide to sign sponsorship deals."[103] Washington was the only other state in 2019 to attempt to follow in California's footsteps with HB 1084, but it was ultimately rejected out of uncertainty surrounding whether other states would join California and stand up to the NCAA on the NIL front.[104]

In 2020, ten states attempted to pass similar Fair Pay to Play legislation as the topic of student-athlete compensation began to draw

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Katelyn Ohashi, former UCLA national champion power forward Edward O'Bannon, Phoenix Mercury guard Diana Taurasi, and founder of Klutch Sports Group Rich Paul).

100 *See* J. Brady McCollough, *News Analysis: What's Next for NCAA and College Athletics Now That SB 206 is Law?*, L.A. TIMES (Sept. 30, 2019, 5:40 PM), https://www.latimes.com/sports/story/2019-09-30/what-next-for-ncaa-college-athletics-now-that-sb-206-is-law (noting that the final vote for SB 206 was a unanimous 73-0 in favor of passing the bill).

101 *See Governor Newsom Signs SB 206, Taking on Long-Standing Power Imbalance in College Sports*, *supra* note 99 (illustrating that California's choice to pass SB 206 despite opposition from prominent universities and school systems within the state served as an example for other states contemplating Fair Pay to Play legislation in their respective legislatures).

102 *See generally* William B. Gould IV, *American Amateur Players Arise: You Have Nothing to Lose but Your Amateurism*, 61 SANTA CLARA L. REV. 159, 160 (2020) (noting that with the high cost of tuition in many California schools and universities both inside and outside of the UC and Cal State systems, SB 206 provided a significant monetary incentive for recruits to attend a California college or university as SB 206 spearheaded the legislative push for student athletes' NIL rights).

103 *See generally* Neal Newman, *Let's Get Serious – The Clear Case for Compensating the Student Athlete – By the Numbers*, 51 N.M. L. REV. 37, 66–68 (2021) (discussing California's unique position of leverage as one of the main state markets that is integral to the NCAA's continued viability, allowing California to stave off the NCAA's threats and become the pioneer in Fair Pay to Play legislation).

104 *See generally* Andrew Smalley, *Student Athlete Compensation Legislation*, NAT'L CONF. OF STATE LEGISLATURES (July 2, 2021), https://app.powerbi.com/view?r=eyJrIjoiZTM5OTI1YmEtZWVkZC00M2ZhLTlmZWYtMTdlYzIwNmYxZjA3IiwidCI6IjM4MmZiOGIwLTRkYzMtNDEwNy04MGJkLTM1OTViMjQzMmZhZSIsImMiOjZ9&pageName=ReportSection (providing a map of student-athlete compensation legislation across the United States with a table noting each state's Fair Pay to Play legislation and the stage of the legislative process for each state's bill).

increasing media popularity, with Colorado, Florida, Michigan, New Jersey, and Nebraska all becoming successful in passing such legislation.[105] In 2021, as the Supreme Court's ruling in *Alston* drew near, the NIL issue exploded in state legislatures, with seventeen states passing Fair Pay to Play Acts and two states passing executive orders—bringing the total number of states to pass such legislation up to twenty-seven—and eleven states pending approval on their Fair Pay to Play proposals.[106] With the recent surge of state legislatures passing Fair Pay to Play Acts in 2021, 94% of all NCAA member institutions now reside in a state that has either enacted or introduced a Fair Pay to Play Act or an equivalent piece of legislation.[107] As a possible motivation for this rapid increase and proliferation of state legislation, some states cited their "need to remain relevant for recruiting" as a strong contributing factor in their decision to pass Fair Pay to Play legislation in 2021.[108] Nine states have yet to introduce any Fair Pay to Play legislation, but only four Power Five schools[109] reside in these states, "with their total NCAA membership impact accounting for roughly 6%."[110]

In addition to state legislatures acting quickly in the wake of *Alston*, bipartisan members at the federal level engaged in their own separate effort to address the student-athlete compensation issue, proposing several

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[105] *See id.* (illustrating that within each of these states, there is a school that is a member of a major athletic conference, which likely served as a contributing factor in these specific states following California's lead with their own Fair Pay to Play legislation).

[106] *See* Andrew Smalley, *Student Athlete Compensation*, NAT'L CONF. STATE LEGISLATURE (Mar. 16, 2022), https://www.ncsl.org/research/education/student-athlete-compensation.aspx (noting that Fair Pay to Play Acts in fourteen states—Alabama, Arizona, Connecticut, Florida, Georgia, Kentucky, Louisiana, Mississippi, New Mexico, Ohio, Oregon, Pennsylvania, South Carolina, and Texas—took effect on July 1, 2021 to be followed by a handful of other states in 2022).

[107] Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, OPENDORSE (July 16, 2021), https://opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/.

[108] Smalley, *supra* note 106 (emphasizing the logical prospect that a high school recruit is more likely to be drawn to a school in a state where he or she can profit off their NIL rather than a state without Fair Pay to Play legislation).

[109] *See generally, Power Five Conferences*, WIKIPEDIA (Sept. 25, 2022), https://en.wikipedia.org/wiki/Power_Five_conferences (defining "Power Five conferences" as the "five athletic conferences which are considered elite in college football" —one of which generally harbors the winner of the College Football Playoff in January—including the Atlantic Coast Conference (ACC), the BIG 12 Conference (BIG 12), the BIG Ten Conference (BIG 10), the Pacific 12 Conference (PAC-12), and the Southeastern Conference (SEC)).

[110] *See* Keller, *supra* note 107 (highlighting the correlation between states with a multitude of colleges and universities in major competitive athletic conferences passing Fair Pay to Play legislation much quicker than states with fewer competitive schools in major athletic conferences).

bills in Congress which built upon the work of the states.[111] Notably in April 2021, U.S. Representatives Emanuel Cleaver II, a Missouri Democrat, and Anthony Gonzalez, an Ohio Republican, reintroduced the Student Athlete Level Playing Field Act, which seeks to "establish a federal standard for student-athlete compensation, create congressional oversight, and amend federal law to protect the recruiting process."[112] Earlier, in February 2021, U.S. Representatives Lori Trahan, a Massachusetts Democrat, and Chris Murphy, a Connecticut Democrat, introduced the College Athlete Economic Freedom Act in an attempt to "codify the right of college athletes to market the use of their names, images, likenesses and athletic reputations across the country" and permit student athletes using "collective representation and retain legal representation to fully exercise these rights."[113]

A former Division I student athlete, Congresswoman Trahan, noted that she's "all too familiar with the NCAA's business model that for decades has utilized the guise of amateurism to justify obscene profitability while student athletes have struggled to get by," and that it is vital "Congress enact reforms to establish and protect student athletes' right to be compensated for the use of their name, image, likeness, or athletic association."[114] Senator Murphy added that "[b]ig time college

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111 *See* Andrew Smalley, *Student-Athlete "Pay for Play" Gets Lawmakers' Attention*, NAT'L CONF. STATE LEGISLATURES (May 24, 2021), https://www.ncsl.org/research/education/student-athlete-pay-to-play-gets-lawmakers-attention-magazine2021.aspx (explaining that the specific provisions of Fair Pay to Play legislation vary by state although each state generally includes some form of language that prevents the NCAA, conferences, and schools from barring student athletes from obtaining compensation from their NIL). Further, many states in their Fair Pay to Play legislation "also allow [student] athletes to hire agents and require advertising and endorsement deals to be reported to schools" while other states have created unique provisions and payment structures regarding student-athlete compensation for NIL rights. Smalley, *supra* note 106.

112 Smalley, *supra* note 106; *see also Reps. Cleaver, Gonzalez Unveil Bipartisan Bill to Grant NIL Rights to College Athletes*, CONGRESSIONAL EMANUEL CLEAVER (Sept. 24, 2020), https://cleaver.house.gov/media-center/press-releases/reps-cleaver-gonzalez-unveil-bipartisan-bill-to-grant-name-image-and (noting that Representative Cleaver II and Representative Anthony Gonzalez, who were both former collegiate athletes, were joined by Representative Colin Allred, a Democrat from Texas; Rodney Davis, a Republic from Illinois; Josh Gottheimer, a Democrat from New Jersey; Jeff Duncan, a Republican from South Carolina; Marcia Fudge, a Democrat from Ohio; and Steve Stivers, a Republican from Ohio).

113 Smalley, *supra* note 111; *see also The "College Athlete Economic Freedom Act" is a Step Forward*, THE DRAKE GROUP, https://www.thedrakegroup.org/2021/02/11/the-college-athlete-freedom-act-is-a-step-forward/ (finding that the College Athlete Economic Freedom Act "goes well beyond existing proposed legislation at the federal and state level," and "there are no guardrails to constrain [student] athlete NIL income" pertaining to compensation rights for student athletes).

114 *Trahan, Murphy Introduce Legislation to Allow College Athletes to Make Money Off Their Name, Image and Likeness*, UNITED STATES CONGRESSWOMAN LORI TRAHAN (Feb.

athletics look no different than professional leagues, and it's time for us to stop denying the right of college athletes to make money off their talents . . . this is about restoring athletes' ownership over the use of their own names and likeness."[115]

And finally, Senator Jerry Moran, a Republican from Kansas, introduced the Amateur Athletes Protection and Compensation Act of 2021 in an effort to prohibit the NCAA and its member institutions from making a student athlete ineligible if the student athlete is receiving monetary compensation.[116] This legislation, which is still being considered in Congress, set a floor in furthering the purpose of antitrust law in the student athletes' long and hard-fought battle against the NCAA: Congress will "protect competition, not the competitors," and the NCAA's conferences are better decision-makers than the NCAA to enforce relevant compensation restraints because directly compete with each other.[117]

With both state and federal legislation trending toward following California's lead with its 2019 Fair Pay to Play Act, the national landscape became a competitive battlefield in which the states who have passed Fair Pay to Play legislation have given the colleges and universities in their

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4, 2021), https://trahan.house.gov/news/documentsingle.aspx?DocumentID=1967 (stating that among other benefits, the College Athlete Economic Freedom Act will "[e]stablish a federal right for college athletes to market the use of their name, image, likeness, or athletic reputation . . . by prohibiting colleges, conferences, and the NCAA from setting or enforcing rules that restrict this right or otherwise colluding to limit how athletes can use their NIL, including by setting rules restricting this right for prospective college athletes").

115 *Id.*; *see also* Andrew Zimbalist, *The College Athlete Economic Freedom Act Proposed in Congress is a Step Forward on NIL Rights*, UNITED STATES CONGRESSWOMAN LORI TRAHAN (Feb. 7, 2021), https://trahan.house.gov/news/documentsingle.aspx?DocumentID=1983 (noting that the College Athlete Economic Freedom Act goes well beyond other bills of its kind at the state and federal level and will likely open up long needed discussion on the necessary scope of an equitable system for college athletes).

116 *See Sen. Moran Introduces Bill to Establish a Federal Standard for Student Athletes to Receive Compensation for Their Name, Image and Likeness*, UNITED STATES SENATOR FOR KANSAS JERRY MORAN (Feb. 24, 2021), https://www.moran.senate.gov/public/index.cfm/2021/2/sen-moran-introduces-bill-to-establish-a-federal-standard-for-student-athletes-to-receive-compensation-for-their-name-image-and-likeness (explaining the benefits of the Act including, but not limited to, allowing student athletes to transfer schools at least once without being penalized, establishing one set of rules to govern all college athletics, and protecting student athletes' status as a student by not considering them as employees of their institutions).

117 *See generally* William J. Kolasky, Deputy Assistant Att'y Gen. for Int'l Enf't, Antitrust Div., U.S. Dep't of Just, What is Competition?, Address Before the Seminar on Convergence (Oct. 28, 2002), https://www.justice.gov/atr/speech/what-competition (reflecting the views of William J. Kolasky, Deputy Assistant Attorney General for International Enforcement of the Antitrust Division of the U.S. Department of Justice, as he explains that the conferences comprised of NCAA member institutions are better suited to govern the labor market of student athletes and avoid the antitrust pitfalls that the NCAA has fallen into).

states a distinct recruiting advantage, while the states who have held out are potentially losing key athletic recruits.[118] The opportunity for a high school recruit to earn income from their NIL that surpasses that of the traditional grant-in aid tuition cap—for example, possibly from a local restaurant chain or sporting goods store in the state—may likely steer that recruit toward a state with Fair Pay to Play legislation.[119] While there is little empirical evidence thus far of recruiting advantages or disadvantages based on NIL at the college or high school level, the possibility of such a recruiting advantage in the future inherently provides states with multiple NCAA schools within their borders ample incentive to follow their counterparts that have already passed such legislation, while states such as Wyoming, with only one Division I university in their entire state, may not feel such pressure.[120] Seemingly, a nationwide NIL policy applicable to all student athletes regardless of the state in which they choose to attend college, would solve the discrepancies and recruiting advantages and disadvantages between the states, but the NCAA appears "willing to abdicate this responsibility to Congress should lawmakers be willing to take it on."[121]

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[118] *See* Justin Casey, *The Landscape for College Athletes' Commercial Rights is Changing*, SPORTBUSINESS (Nov. 23, 2020), https://www.sportbusiness.com/2020/11/justin-casey-the-landscape-for-college-athletes-commercial-rights-is-changing/ (illustrating the effect of New Jersey Governor Phil Murphy signing the New Jersey Fair Pay to Play Act into law by stating that a football player at a university in a state without NIL legislation would "have his earning potential capped at the amount of grant-in-aid he receives from the University, whereas at Rutgers [University] that same player might receive both grant-in-aid and additional income in the form of a fair market value endorsement deal with a local restaurant chain" in New Jersey).

[119] *See id.* (highlighting a distinct recruiting advantage for schools that are able to offer students NIL rights based on their state's legislation and based on the plethora of local and chain establishments waiting to sign endorsement deals with the school's student athletes).

[120] *See generally List of NCAA Division I Schools*, 1KEYDATA https://state.1keydata.com/ncaa-division-1-schools-by-state.php (last visited Oct. 10, 2022) (breaking down the amount of Division I schools in each state as a visual representation of which states are likely to be more affected in their NCAA recruiting efforts with or without the presence of Fair Pay to Play legislation passed in their respective state and listing Wyoming as tied for the lowest amount of Division I schools in its state with one school, the University of Wyoming, which competes in the Mountain West Conference (MWC)).

[121] Casey, *supra* note 118 (noting that since the NCAA has ceded the prospect of a nationwide NIL policy to Congress, there has been a greater focus on individual states' Fair Pay to Play legislation in the meantime while Congress contemplates such a policy).

II. THE COURT'S REJECTION OF THE NCAA'S AMATEURISM AND VIEWERSHIP PROCOMPETITIVE ARGUMENTS THROUGH THE RULE OF REASON ANALYSIS

A. District Court Proceedings in Alston: Judge Wilken Summarily Rejected the NCAA's Plea for Antitrust Immunity and Procompetitive Justification Under the Rule of Reason Analysis

A notably substantial portion of the *Alston* majority opinion authored by Justice Gorsuch is dedicated to analyzing whether the district court erred in subjecting the NCAA's compensation restraints to the Rule of Reason analysis and if the district court's factual findings at each step of the analysis were sound.[122] Delving into Shawne Alston and Justine Hartman's fellow male and female student-athlete plaintiffs' antitrust challenge alleging the NCAA and its member institutions violated § 1 of the Sherman Act by restricting compensation for student athletes, U.S. District Judge Claudia Wilken "refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance."[123] But in her holding, Judge Wilken did strike down the NCAA's rules limiting the education-related benefits available to student athletes at their respective colleges and universities, which included prohibiting colleges and universities from offering graduate or vocational school scholarships to student athletes.[124] In response, the NCAA contended that the district court should have approved its restraints in their entirety, in essence seeking "immunity from the normal operation of the antitrust laws."[125]

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[122] *See* NCAA v. Alston, 141 S. Ct. 2141, 2155-57 (2021) (explaining that because Justice Gorsuch and the Supreme Court largely agreed with the application of the Rule of Reason as well as the district court's factual findings, the majority of the Court's opinion in *Alston* recounted and broke down the district court's opinion).

[123] *Id.*, at 2147; *see also* Kord Wilkerson, NCAA v. Alston*: Tackling College Athlete Compensation*, MISS. COLL. L. REV.: BLOG (Sept. 3, 2021), https://mclawreview.org/2021/09/03/ncaa-v-alston-tackling-college-athlete-compensation/ (explaining that the student athlete plaintiffs felt that the district court did not go *far enough* and that the court's injunction should have extended past simply educational benefits to the NCAA's compensation limits in all other areas while the NCAA felt that the district court went *too far* by weakening its compensation limits and educational limitations with the injunction).

[124] *Alston*, 141 S. Ct. at 2153 (noting that Judge Wilken's ruling included affording collegiate athletes $5,000 per year in deferred compensation for their NIL).

[125] *Id.* at 2147. *See generally* William F. Murphy II, *Antitrust Law-Immunity-Anticompetitive Activities Required of State-Regulated Public Utility Not Immune from Antitrust Attack*, 62 CORNELL L. REV. 628, 640 (1977) (explaining that certain state-sanctioned anticompetitive activities that are considered "comparably imperative" or are deemed "crucial" to the integrity and "operation of an otherwise valid regulatory scheme

The district court applied the Rule of Reason analysis to assess the NCAA's compensation restraints despite the NCAA's vigorous objections that it should be held to "an abbreviated deferential review"[126] in lieu of antitrust scrutiny.[127] The NCAA chose not to contest evidence at the district court level illustrating that the organization and its members "agreed to compensation limits on student-athletes; the NCAA and its conferences enforce these limits by punishing violations; and these limits 'affect interstate commerce.'"[128] The NCAA further acknowledged the Court already reviewed and ultimately struck down a handful of its restraints as being anticompetitive in the 1984 *Board of Regents* decision.[129] The NCAA similarly recognized that the Court previously observed the Sherman Act's application to multiple other nonprofit organizations and "'the economic significance of the NCAA's nonprofit character is questionable at best' given that 'the NCAA and its member institutions are in fact organized to maximize revenues.'"[130]

However, the NCAA did not concede without a vigorous fight, vehemently arguing it should be exempted from the Rule of Reason analysis because of its classification as a joint venture[131].[132] Rejecting this

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remain immune from attack, while the ancillary activities of a regulated firm are granted no immunity").

126 *Alston*, 141 S. Ct. at 2155; *see also* Texaco, Inc. v. Dagher, 547 U.S. 1, 7 n.3 (2006) (explaining that circumstances in antitrust litigation sometimes allow a court to forgo a full Rule of Reason analysis in favor of determining the anticompetitive effects of a challenged restraint under an abbreviated or "quick look" analysis to assess potential Sherman Act violations).

127 Brief for Petitioner at 14, *Alston*, 141 S. Ct. 2141 (No. 20-512).

128 *Alston*, 141 S. Ct. at 2151 (citing *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1066 (N.D. Cal. 2019)).

129 *Id.*, at 2159 (marking one of many times that the Court took a firm stance against the NCAA attempting to revive its old arguments from past antitrust litigation in the twentieth and twenty-first centuries).

130 *See Alston*, 141 S. Ct. at 2159 (citing NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100–101 n. 22 (1984)).

131 *See generally* Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, MINN. L. REV. 1, 20 (1991) (explaining that there is a long history of joint ventures being exempted from antitrust scrutiny under the Rule of Reason analysis, including the Export Trading Company Act of 1982, which grant firms an exemption from antitrust liability if their joint export activities do not adversely affect competition within the United States).

132 *See Alston*, 141 S. Ct. at 2155. *But see* Jack Marshall, *Law vs. Ethics #2: The Supreme Court Unanimously Says Colleges Can Use Tuition to Run a Professional Sports Business*, ETHICS ALARMS (June 22, 2021), https://ethicsalarms.com/2021/06/22/law-vs-ethics-2-the-supreme-court-unanimously-says-colleges-can-use-tuition-to-run-a-professional-sports-business/ (opining that from an ethical perspective, the Court's decision to subject the NCAA to antitrust scrutiny and eventually grant student athletes education-related benefits will result in non-athlete students revolting against their universities for bearing the "uniformly inflated tuition" while student athletes profit off of their NIL).

argument, Judge Wilken found that "the NCAA's status as a particular type of venture [does not] categorically exempt its restraints from ordinary rule of reason review."[133] Still, the NCAA resisted the Rule of Reason application, arguing as a last ditch effort that the analysis was inappropriate because the organization and its member institutions are not "'commercial enterprises' and instead oversee intercollegiate athletics 'as an integral part of the undergraduate experience.'"[134] One by one, Judge Wilken struck down each of the NCAA's arguments and despite the NCAA's fervor in attempting to avoid antitrust scrutiny, decided to apply the Rule of Reason analysis in this case.[135]

In justifying its application of the Rule of Reason analysis to *Alston*, the district court harkened back to the pivotal 2010 Supreme Court decision in *American Needle v. National Football League*, where the Court found that while "*some* restraints are necessary to create or maintain a league sport, [it] does not mean *all* 'aspects of elaborate interleague cooperation are.'"[136] Building upon *American Needle*'s jurisprudence, the district court in *Alston* found holistically that the NCAA and its multitude of member colleges and universities essentially possessed the "power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance."[137]

For the first step of its Rule of Reason analysis, the district court highlighted that the NCAA's compensation restrictions on student athletes

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[133] *See Alston*, 141 S. Ct. at 2156; *see* Gregg E. Clifton, NCAA v. Alston – *The Wait is Over . . . What's Next for the NCAA*, NAT'L L. REV. (Jun. 22, 2021), https://www.natlawreview.com/article/ncaa-v-alston-wait-overwhat-s-next-ncaa (noting that Judge Wilken, despite agreeing in large part with the student-athlete plaintiff, "rejected th[eir] extreme position . . . when she ruled and the Ninth Circuit affirmed that while the NCAA can lawfully restrict athletics-related expenses, the NCAA violates the law by restricting expenses that are 'tethered' to academics").

[134] *Alston*, 141 S. Ct. at 2158 (quoting Brief for Petitioner, *supra* note 127, at 31).

[135] *See id.* at 2151; *see also* Sandeep Vaheesan, *Challenging the NCAA Cartel: When Consumer Welfare Equals Worker Exploitation*, HARV. L. REV.: BLOG (June 9, 2020), https://blog.harvardlawreview.org/challenging-the-ncaa-cartel-when-consumer-welfare-equals-worker-exploitation/ (adding that on top of Judge Wilken's biting district court opinion, Judge Milan Smith, Jr. wrote a powerful concurrence at the Ninth Circuit stating that "the court, in its antitrust analysis, made a serious error in weighing the real harms to the players from the NCAA's restraints against their purported benefits to fans").

[136] *Alston*, 141 S. Ct. at 2156 (citing Am. Needle, Inc. v. NFL, 560 U.S. 183, 199 n.7 (2010)).

[137] *Id.* at 2152 (quoting *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019)). *See generally* Colin P. Ahler & Mary Colleen Fowler, *U.S. Supreme Court Unanimously Rules Against NCAA in Antitrust Case, Providing Valuable Insights on the Rule of Reason Standard*, SNELL & WILMER (June 22, 2021), https://www.swlaw.com/publications/legal-alerts/2975.

"produce significant anticompetitive effects in the relevant market"[138] because student athletes are prohibited from accruing more than the full-cost of their school's tuition with a grant-in-aid scholarship.[139] Further, in a market absent challenged restraints, "competition among schools would increase in terms of the compensation they would offer to recruits," resulting in student athletes being compensated nearer to their athletic service value.[140] Neither party disputed these findings, and the NCAA specifically acknowledges that its "no-pay-for-play rule" establishes a significant restraint on the cognizable student athlete antitrust labor market as well as the monopsony power that its over 1,100 member institutions enjoy over that labor market.[141] In other words, the *Alston* litigation involves the NCAA "admitt[ing] [to] horizontal price fixing in a market where [it] exercise[s] monopoly control."[142]

Moving to the second part of the Rule of Reason analysis, the NCAA argued the district court erred in finding its procompetitive amateurism argument and desire to preserve the unique nature of its "amateur" product as an insufficient justification for its restraints on student-athlete

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[138] *Alston*, 141 S. Ct. at 2152 (quoting *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d at 1067). *See generally* Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 537, 569–70 (2018) (explaining that antitrust litigation based on anticompetitive behavior by employers in labor markets has historically been infrequent, but sports leagues and organizations are a common setting for such issues to arise).

[139] *See Alston*, 141 S. Ct. at 2153; Michael S. McLeran, *Playing for Peanuts: Determining Fair Compensation for NCAA Student-Athletes*, 65 DRAKE. L. REV. 255, 274 (2017) (citing Michael T. Jones, Comment, *Real Accountability: The NCAA Can No Longer Evade Antitrust Liability Through Amateurism After* O'Bannon v. NCAA, 56 B.C. L. REV. E. SUPP. 79, 81 (2015)).

[140] *Alston*, 141 S. Ct. at 215 (quoting *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d at 1068); Herbert J. Hovenkamp, *The NCAA and the Rule of Reason*, FAC. SCHOLARSHIP AT U. PENN. L. REV. 5–7 (2017).

[141] *See Alston*, 141 S. Ct. at 2152 (quoting Transcript of Oral Argument at 31, *Alston* 141 S. Ct. 2141 (No. 20–512)); Greg Andrews, *After NCAA Legal Setbacks, 'Pay to Play' No Longer Far-Fetched*, LAW.COM (Nov. 12, 2021, 4:24 PM), https://www.law.com/corpcounsel/2021/11/12/after-ncaa-legal-setbacks-pay-to-play-no-longer-far-fetched/.

[142] Ilya Somin, *NCAA Gets Blown Out in Major Supreme Court Antitrust Decision*, REASON (June 21, 2021, 2:36 PM), https://reason.com/volokh/2021/06/21/ncaa-gets-blown-out-in-major-supreme-court-antitrust-decision/ (quoting *Alston*, 141 S. Ct. at 2154) (explaining that the *Alston* decision "dealt the NCAA cartel a serious blow" that may prove to be fatal in time but that even if NCAA restrictions on paying student athletes were abolished completely in the future, many college sports such as lacrosse, wrestling, and rugby would likely see few to no changes since they produce a low level of revenue and publicity for the vast majority of NCAA schools compared to powerhouse revenue-earning sports such as Division I football and basketball).

compensation.[143] The NCAA proffered that what makes collegiate sports unique and desirable is the "amateur" element of young student athletes competing with each other, which starkly differentiates them from grown men and women competing with each other in the professional sports world.[144] At the foundation of the NCAA's amateurism procompetitive justification, the district court noted two significant points: the NCAA's understanding of amateurism has itself evolved over time, and nowhere does the NCAA explicitly define the nature of amateurism that it argues so vehemently for.[145] Other organizations and institutions that use the term "amateur" in their modeled infrastructure, such as the International Olympic Committee (IOC), offer a clearer definition[146] and understanding of the capabilities and responsibilities of "amateurs" within their unique models.[147]

With no clear definition or traceable original understanding of *amateurism* to justify the procompetitive argument, the district court turned to the NCAA's viewership argument that its compensation

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[143] *See Alston*, 141 S. Ct. at 2152; Mitchell Pollard, Amateurism and the NCAA: The Controversy (A Legal Review), 16-17 (Apr. 2017) (undergraduate thesis, University of Dayton) (on file with University of Dayton eCommons).

[144] *See Alston*, 141 S. Ct. at 2152; Alexander Knuth, *Lane Violation: Why the NCAA's Amateurism Rules Have Overstepped Antitrust Protection & How to Correct*, 95 NOTRE DAME L. REV. REFLECTION 74, 78, 85– 86 (2019).

[145] *Alston*, 141 S. Ct. at 2152. *See generally* Robert Litan, *The NCAA's "Amateurism" Rules: What's in a Name?*, MILKEN INST. REV. (Oct. 28, 2019), https://www.milkenreview.org/articles/the-ncaas-amateurism-rules (explaining that "[u]nder the NCAA's convoluted rules, college athletes on scholarship are 'amateurs' only when playing the sports for which they were recruited . . . .mean[ing] a college football player can still be an 'amateur' while being compensated for playing another sport as a pro").

[146] *See* INT'L OLYMPIC COMM., ELIGIBILITY RULES OF THE INTERNATIONAL OLYMPIC COMMITTEE, art. 26 (1964), https://stillmed.olympic.org/Documents/Olympic%20Charter/Olympic_Charter_through_time/1964-Olympic_Charter_Eligibility_Rules_of_the_IOC.pdf (explaining that the IOC's definition of "amateur" which was codified in Article 26 of the 1964 Eligibility Rules of the International Olympic Committee and remains intact today is "one who participates and always has participated in sports as an avocation without material gain of any kind").

[147] *See* Bill Connelly, *As Commissioner, I Will . . . 2. Enable Players to Use the Olympic Model of Amateurism.*, SB NATION, https://www.sbnation.com/a/college-football-commissioner/olympic-model (last visited Oct. 10, 2022) (noting that the IOC, under its international definition of the term "amateur," allows its athletes to have access to the commercial free market; secure endorsement deals; and profit monetarily from their NIL). The article raises a very intriguing point in highlighting that University of Michigan Head Coach Jim Harbaugh garners a substantial amount from company endorsement deals on top of his $7 million salary, yet players are not paid at all. *See id.* Before answering this question, the article proposes an interesting hypothetical situation. *See id.* If a student-athlete appears in a State Farm advertisement on television, "is he or she [able] to wear an official school uniform?" *Id.* Would the school be eligible for a cut of the profits and how might this money be disseminated? *Id.*

restrictions directly correlate to consumer demand in individuals watching collegiate sports in person and on television.[148] The viewership argument in and of itself raises questions about the NCAA's motivations, as its goal as an institution is not to put eyeballs on the screen or bodies in the seats at games but rather to "integrate intercollegiate athletics into higher education" to enhance the educational experience of the student athlete.[149] But in taking the argument at face value, it proved wholly incorrect throughout the beginning of the 2021 college football season, the first full major Division I sports season since the Supreme Court released its decision in *Alston*.[150] At the start of the 2022 college football season, overall viewership—especially in large regular season rivalry games such as Ohio State University v. University of Michigan—saw a notable increase in viewership from previous seasons.[151]

For the third part of the Rule of Reason analysis, student athletes have no "viable substitutes" to the NCAA[152] and its rules if they seek to play professionally unless they choose to forgo their collegiate career and enter

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148 *See Alston*, 141 S. Ct. at 2152–53 (noting the apparent discrepancy that the NCAA, a nonprofit organization, appeared more concerned with how many individuals it could get to watch and attend its member universities' games rather than the betterment of the student athlete).

149 *NCAA Mission and Vision Statements Analysis, supra* note 7 (illustrating that the NCAA's viewership argument is wholly incompatible with its desire to enhance the educational experience of the student athlete and showing the lack of credibility in such an argument by the NCAA).

150 *See* Jon Lewis, *Five Week One College Football Games Top Five Million Viewers*, SPORTS MEDIA WATCH (Sept. 2021), https://www.sportsmediawatch.com/2021/09/college-football-ratings-week-one-clemson-georgia-notre-dame-fsu/; *see also 2021 College Football TV Ratings*, SPORTS MEDIA WATCH, https://www.sportsmediawatch.com/2021-college-football-tv-ratings-page/ (last visited Oct. 10, 2022) (highlighting that the 2021 regular season matchup between Ohio State University and the University of Michigan, a historic college football rivalry dating back approximately a century, notched the highest college football regular season audience in more than two years with above an 8.0 overall rating and fifteen million viewers as Michigan ultimately triumphed in the game for the first time since 2011).

151 *See id.* (emphasizing that such rivalry games are a strong barometer to assess fan engagement and interest throughout the college football season).

152 *Alston*, 141 S. Ct. at 2152 (quoting *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1067 (N.D. Cal. 2019)); *see, e.g.* Darryn Albert, *LaMelo Ball Does Not Regret Skipping College One Bit*, LARRY BROWN SPORTS (Aug. 17, 2021), https://larrybrownsports.com/basketball/lamelo-ball-not-regret-skipping-college/582721 (explaining that LaMelo Ball chose to forgo a collegiate basketball career in the NCAA after previously committing to UCLA and instead played overseas in both Lithuania and Australia after finishing high school before joining the NBA, which is an unconventional and rare path for an aspiring professional athlete to take).

the respective professional draft for their sport out of high school.[153] While in recent years alternatives to the NCAA have arisen such as the eXtreme Football League (XFL)[154], the National Basketball Association (NBA) G League (G League)[155], the United Soccer League Championship (USLC)[156], and the American Association of Professional Baseball (AAPB)[157], "elite student athletes [still] lack any viable alternatives to Division I, [and] they are forced to accept, to the extent they want to attend college and play sports at an elite level after high school, whatever compensation is offered to them by Division I schools."[158]

The district court noted that the student athletes shouldered the burden of proof to demonstrate that substantially less restrictive alternative rules instituted by the NCAA could achieve the same procompetitive effect as the NCAA's current compensation restraints, which provide the NCAA significant leeway in running its enterprise and controlling student

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[153] *See Alston*, 141 S. Ct. at 2152 (noting that the NCAA provides high school athletes the clearest path to a professional athletic career) This is contrasted with a career playing overseas or playing professionally out of high school.

[154] *See generally* Les Carpenter, *What Is the XFL? The Newest Professional Football League, Explained*, WASH. POST (Feb. 6, 2020, 9:16 AM), https://www.washingtonpost.com/sports/2020/02/06/what-is-xfl/ (illustrating that the XFL is composed of eight teams that play a ten game season with a mid-April championship as an attempt to give football fans a dose of spring football while the NFL lies dormant).

[155] *See generally What You Need to Know About the NBA G League*, NBA G LEAGUE, https://gleague.nba.com/about/ (last visited Oct. 10, 2022) (describing the G League as "the NBA's official minor league" that features twenty-nine teams and focuses on developing young players and foreign players to prepare them for potential NBA careers).

[156] *See generally, About,* USL, https://www.uslchampionship.com/about (last visited Oct. 10, 2022) (explaining that the USL Championship is a premier Division II North American soccer league behind the popular Division I Major League Soccer (MLS) where young players and foreign players can develop their skills to possibly ascend to a higher level in the United States or for an opportunity to join a foreign club).

[157] *See generally* Kevin Reichard, *American Association, Frontier League Now MLB Partner Leagues*, BALLPARK DIG. (Sept. 24, 2020), https://ballparkdigest.com/2020/09/24/american-association-frontier-league-now-mlb-partner-leagues/ (noting that the AAPB, a leading independent league along with the Frontier League and Atlantic League, recently became an official MLB partner league in 2020 and currently serves as a league for undrafted and foreign players to improve their game and ascend to the MLB).

[158] 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 (May 4, 2019), https://medium.com/the-bearfaced-truth/a-breakdown-of-alston-v-ncaa-what-is-the-future-of-paying-college-athletes-3483569905b4; *see also* Jeré Longman & Alanis Thames, *Forget Friday Night Lights: High School Stars Seek a Better Deal*, THE N.Y. TIMES (Aug. 16, 2021), https://www.nytimes.com/2021/08/13/sports/ncaa-high-school-sports-endorsements.html (noting that in the wake of the *Alston* decision, it is likely that all states will spend time contemplating whether to adequately reassess their rules, "in light of what Robert Zayas, the executive director of the New York State Public High School Athletic Association, describes as increasing difficulty of differentiating 'between a student capitalizing on their athletic fame and being a social media influencer'").

athletes.[159] Moreover, the district court upheld the NCAA's compensation rules, which limited grant-in-aid athletic scholarships to the full cost of attendance for the respective college or university and compensation restrictions unrelated to education in the hopes of avoiding further blurring the line between collegiate and professional sports.[160] However, the district court found that education benefits—rules "limit[ing] scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships"—were easily distinguishable from a professional athlete's salary and thus enjoined the NCAA's restrictions on education-related benefits for student athletes.[161]

After the district court enjoined certain NCAA rules limiting the education-related benefits that schools could provide to student-athletes, both parties appealed to the Ninth Circuit.**[162]** The Ninth Circuit affirmed the district court's holding in full, ruling that the district court "struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-athletes while serving the procompetitive purpose of preserving the popularity of college sports."**[163]** The NCAA was again dissatisfied and filed a certiorari petition, which the Supreme Court granted in part to consider the subset of NCAA rules restricting education-related benefits that the district court enjoined.[164]

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159 *See Alston*, 141 S. Ct. at 2153 (describing that the student athletes were substantially able to meet this burden of proof by showing that the NCAA did not need to have such airtight restrictions on student athletes' monetary compensation ability to achieve their desire of preserving the academic and athletic benefits it boasts in its Mission Statement).

160 *See id.* at 2153-54 (placing an emphasis on drawing the line between education-related and non-education-related benefits for student athletes to avoid opening Pandora's Box to all the possibilities, some of which may be potentially unsavory, of non-education-related benefits for student athletes).

161 *Id.* at 2153; *see also* Brett Friedlander, *New NCAA Athlete Compensation Rules: What is and isn't Allowed*, THE NORTH STATE JOURNAL (Apr. 30, 2020), https://nsjonline.com/article/2020/04/new-ncaa-athlete-compensation-rules-what-is-and-isnt-allowed/ (noting that while the NIL landscape is largely unsettled and much like the wild west, it is foreseeable that the NCAA will prohibit student athletes from promoting alcohol, tobacco, sports gambling, and other areas of possible disrepute to preserve the image of the NCAA, their conference, and their school).

162 *See* Alston, 141 S. Ct. at 2144 (noting that the NCAA challenged the district court enjoining its rules and implementing education-related NIL compensation benefits while the student athletes appealed the decision for not going far enough, seeking NIL compensation benefits in other areas past the realm of education).

163 *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1263 (9th Cir. 2020).

164 *See* Alston, 141 S. Ct. at 2144 (Noting that in granting the NCAA's certiorari petition, the Court made clear that it would only be assessing the narrow issue of the NCAA's rules restricting student athletes' education-related benefits from their NIL).

B. Supreme Court Proceedings in Alston: Justice Gorsuch's Agreement with the District Court's Rule of Reason Analysis and Condemnation of the NCAA's Compensation Restraints

Authoring the majority opinion in *Alston*, Justice Gorsuch first emphasized the fact that the NCAA is "a massive commercial enterprise" rather than simply a "nonprofit entity upholding educational ideals and high-minded conceptions of amateurism."[165] Justice Gorsuch explicitly noted that at its core, the leaders of the NCAA "profit in a very different way than the student-athletes whose activities they oversee," with NCAA President Mark Emmert earning almost $4 million annually.[166] Justice Gorsuch further notes that the commissioners of the top conferences such as the Southeastern Conference (SEC), Atlantic Coast Conference (ACC), PAC 12, BIG 10, and BIG 12 earn between $2 million and $5 million annually, and college athletic directors bring home more than $1 million per year.[167] For the NCAA as a whole, the numbers are even more staggering—and continue to consistently increase by the year—with its current broadcast contract for the March Madness basketball tournament reaching $1.1 billion annually, its television deal for the FBS College Football Playoff (CFP) ascending to $470 million per year, and Division I conferences such as the SEC earning more than $650 million in 2017.[168]

In the first weekend of the 2021 FBS season, five college football games averaged at least five million viewers, which was the most in the opening week of FBS football since 2016.[169] Further, FBS broadcasting ratings were up 16% and viewership was up 29% from the comparable 2019 window while the ratings for out-of-home viewership—watching a game live in the stadium or at a recreational viewing venue outside the

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[165] Somin, *supra* note 142 (highlighting the unique nature of the NCAA's organizational structure and its designation as a non-profit that emphasizes student athlete education while grossing over $1 billion dollars each year in college basketball alone with the NCAA Tournament); *see also Alston*, 141 S. Ct. at 2150-51..

[166] *Alston*, 141 S. Ct. at 2151. This fact of Emmert's notable salary while many student athletes are not even able to accept a free meal from a donor to the school demonstrates the wealth disparity inherent to the NCAA's organizational structure as well as the misnomer that the NCAA is a nonprofit solely focused on the wellbeing of its student athletes. *Id.*

[167] *See id*. (noting that even the heads of each major NCAA conference and the athletic directors at more competitive schools significant outpace the monetary gains of the majority of Division I college coaches in the nation while the student athletes cannot profit off their own NIL).

[168] *See id.* at 2150–51 (emphasizing that the NCAA has a consistent revenue stream from the major events in its highest revenue grossing sports that provides predictability and stability to its financial infrastructure).

[169] *See Paulsen*, *supra* note 150 (noting that in the first weekend of the first major sporting event since the *Alston* decision was released by the Supreme Court, college football recorded certain viewership statistics that were the highest in half a decade); *see generally Alston*, 141 S. Ct.

home—also increased by 11%.[170] This empirical data lines up substantially with the expert testimony and other relevant evidence brought by the student athletes in *Alston*, highlighting that "consumer demand has increased markedly despite the new types of compensation the NCAA has allowed in recent decades" and that "further increases in student-athlete compensation would 'not negatively affect consumer demand.'"[171]

While accounting for the COVID-19 pandemic's potential effect on viewership statistics, this trend in viewership continued strongly throughout the entirety of the 2021 college football season as each of the six bowl games that annually take place on New Year's Eve surpassed 7.5 million viewers for just the third time in the CFP era.[172] Moreover, 25.9 million viewers tuned in to the two CFP Semifinal games on the ESPN networks, which marked the highest total since the first year of the CFP era in 2014, and the Capital One Orange Bowl between the University of Georgia and the University of Michigan was dubbed "the most-viewed non-NFL sporting event across any network, and top telecast across ABC and ESPN networks since last year's CFP National Championship game."[173] Additionally, this increase in viewership applies across other collegiate sports, notably in college basketball with several all-time milestones in First Four—the four teams that play against each other to

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[170] *See* Paulsen, *supra* note 150 (supporting the student athletes and refuting the NCAA's viewership argument by breaking the relevant statistics down further to illustrate that even the out-of-home viewership for college football increased after the *Alston* decision as well); *see generally Alston*, 141 S. Ct.

[171] *Alston*, 141 S. Ct. at 2153; *see also* Ross, *supra* note 96 (referencing the research of Robert G. Noll whose expert testimony specifically on the NCAA's viewership statistics runs contrary to the NCAA's proffered argument as viewership has continued to increase despite student athletes being afforded education-related NIL benefits).

[172] *See* Amanda Brooks, *New Year's Six Delivers Multi-Year Viewership Highs, Second-Most-Watched Non-Semifinal Rose Bowl Game of College Football Playoff Era*, ESPN PRESS ROOM (Jan. 4, 2022), https://espnpressroom.com/us/press-releases/2022/01/new-years-six-delivers-multi-year-viewership-highs-second-most-watched-non-semifinal-rose-bowl-game-of-college-football-playoff-era/. Brooks interestingly notes that even the non-Semifinal New Year's Six bowl games, which are outside of the College Football Playoff four-team structure, averaged approximately 11 million viewers and ranked third out of the eight years the College Football Playoff has been in existence. *Id.* Brooks further breaks down the viewership statistics the Rose Bowl Game Presented by Capital One Venture X between the University of Utah and Ohio State University logged 16.6 million viewers, which was the second-most viewed non-Semifinal New Year's Six bowl game of the CFP Era behind the 2019 clash between Ohio State University and the University of Washington, which recorded 16.9 million viewers. *See also id.*

[173] *See id.* (highlighting that at the most crucial time of the college football season, the CFP, the fans set the highest mark in the CFP era, showing that the *Alston* decision unequivocally did not have an adverse effect on viewership); *see generally Alston*, 141 S. Ct. at 2141.

begin the annual NCAA college basketball tournament—coverage that included a gross audience of 7.6 million viewers, which beat the previous record by 24%.[174]

After analyzing the NCAA's anticompetitive effects on the student-athlete labor market under the Rule of Reason and rejecting the NCAA's amateurism and viewership procompetitive arguments, the Court recognized an antitrust remedy was necessary for the student athletes but also acknowledged that "in fashioning an antitrust remedy . . . caution is key."[175] Justice Gorsuch notes that the district court resisted the temptation that befalls antitrust judges "to require that enterprises employ the least restrictive means of achieving their legitimate business objectives" while also "remain[ing] aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare."[176] Justice Gorsuch further opined that the district court's Rule of Reason analysis exhausted the factual record through a thorough legal analysis consistent with antitrust principles and correctly identified the NCAA's violation of § 1 of the Sherman Act.[177] Despite recognizing that "[s]ome [individuals] will think the district court did not go far enough" in limiting the student athletes' remedy to education-related benefits, Justice Gorsuch concludes the opinion by agreeing with the Ninth Circuit in that the Court's task "is simply to review the district court judgment through the appropriate lens of antitrust law."[178]

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[174] *See 2021 NCAA First Four on TBS and truTV is Most-Watched Ever, Including Gross Audience of 7.6 Million Cross-Platform Viewers*, NCAA.COM (Mar. 19, 2021), https://www.ncaa.com/news/basketball-men/article/2021-03-19/2021-ncaa-first-four-tbs-and-trutv-most-watched-ever-including-gross-audience-76 (noting that in addition to a 36% increase in viewership for TBS and truTV's live game coverage compared to 2019's comparable telecasts, the UCLA v. Michigan State University game became the most-watched First Four game since its inception in 2011 with an average of nearly three million viewers).

[175] *Alston*, 141 S. Ct. at 2166 (explaining that assigning an antitrust remedy following a Rule of Reason analysis for a corporation is a nuanced process due to the potential ramifications on a variety of parties, here the parties being the conferences, schools, and student athletes,).

[176] *Id.* at 2165-66 (Justice Gorsuch highlighting the challenge the Court faced in determining a remedy for student athletes despite its unanimous decision in *Alston* that the NCAA's compensation restraints violated § 1 of the Sherman Act).

[177] *See id.* at 2166 (emphasizing again the reliance of the Supreme Court on Judge Wilken's district court Rule of Reason analysis and review of the relevant facts to explain why the Court spent the majority of its opinion recounting the district court's analysis).

[178] *See id.* (quoting *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1265 (9th Cir. 2020) (explaining Justice Gorsuch's emphasis on the duty to review district court judgments in antitrust cases).

C. Justice Kavanaugh's Fiery Concurrence in Alston*: Attacking and Disproving the NCAA's Procompetitive Viewership Justification*

Analogously, Justice Kavanaugh in his concurrence drew several examples to rebut the NCAA's viewership argument:

> The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a 'purer' form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition' of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a 'spirit of amateurism.'[179]

As indicated by this quote, Justice Kavanaugh "took a sharp turn from the measured approach in criticizing the NCAA arguments offered in the principal opinion penned by Justice Neil Gorsuch," and his words serve as a somewhat ominous rallying cry to supporters of the student-athlete plaintiffs in *Alston* following the Court's decision.[180] This flows naturally from Justice Kavanaugh's aggressive approach during oral arguments in questioning the NCAA lawyers on March 31, 2021, where he stated, "It does seem . . . schools are conspiring with competitors—agreeing with competitors, let's say that—to pay no salaries for the workers who are making the school billions of dollars on the theory that consumers want the schools to pay their workers nothing."[181] Justice Kavanaugh digs even deeper, citing a brief, filed by a group of African-American antitrust lawyers illustrating that while colleges have the luxury of building lavish new buildings and facilities based on the income that the student athletes, many of these student athletes come from lower-income African-

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179 NCAA v. Alston, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring).

180 Gregory, *supra* note 1 (explaining that Justice Kavanaugh's quotes regarding *Alston* are often referred to in both scholarly and non-scholarly articles on education-related NIL benefits).

181 *See Alston*, 141 S. Ct. at 2149 (citing Tr. of Oral Arg. 35).

American backgrounds and are left with no monetary compensation for their efforts on the court, field, ice, or in the pool.[182]

It is illogical to argue that an individual enjoys frequenting an upscale, high-class restaurant particularly because the cooks who prepare the food at that restaurant are not being compensated for their service in cooking the patrons' food.[183] The NCAA attempts to use the same logic to argue that fans of collegiate athletics specifically enjoy watching student athletes participate in NCAA athletics because the student athletes are not being paid to play in the games, but this argument is unsupported by common-sense logic and falls flat.[184] The NCAA does not have any credible empirical data to support the claim that collegiate sports fans choose to watch NCAA athletes compete due to the fact that the student athletes are not paid, and there is similarly a lack of empirical evidence suggesting that these collegiate sports fans will cease to watch NCAA games if student athletes are compensated for their performance.[185]

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[182] *See id.*; *see also* Patrick A. Bradford et al., *March Madness Exploits Black Athletes. The Supreme Court Should End This Injustice Now*, TIME (Mar. 30, 2021, 2:19 PM), https://time.com/5951097/ncaa-v-alston-march-madness-exploitation/; *see also* Akuoma C. Nwadike et al., *Racism in the NCAA and the Racial Implications of the "2.3 or Take a Knee" Legislation*, 26 MARQ. SPORTS L. REV. 523, 538 (2016) (describing that the NCAA has failed one of its main contemporary goals of "maximize[ing] academic success and minimiz[ing] [the] adverse impact on low-income and minority student-athletes").

[183] *See Alston*, 141 s. Ct. at 2167 (Kavanaugh, J., concurring) (analogizing the NCAA's argument in layman's terms and grabbing the attention of the general public in contemplating the student athlete NIL issue).

[184] *See id.*; Eric Boehm, *NCAA Can't Ban Colleges from Compensating Athletes, Supreme Court Says*, REASON.COM (Jun. 21, 2021, 4:00 PM), https://reason.com/2021/06/21/ncaa-cant-ban-schools-from-compensating-college-athletes-supreme-court-says/ (noting that amidst its arguments at the Supreme Court level, the NCAA stated that the lower court's ruling in Alston's favor would "fundamentally transform the century-old institution of NCAA sports, blurring the traditional line between college and professional athletes" should the ruling stand).

[185] *See Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring). *But see* Brian Welch, *Unconscionable Amateurism: How the NCAA Violates Antitrust by Forcing Athletes to Sign Away Their Image Rights*, 44 J. MARSHALL L. REV. 533, 548 (2011) (providing evidence that in the past, although the NCAA has failed to provide credible evidence for their viewership argument in *Alston*, the U.S. District Court for the Eastern District of Pennsylvania in *Pocono Invitational Sports Camp v. NCAA,* 317 F. Supp. 2d 569 (E.D. Pa. 2004) strongly emphasized the NCAA's recruiting rules were immune from antitrust scrutiny, maintaining that the NCAA's regulations "have been upheld as protection of amateurism in student-athlete challenges and non-student-athlete challenges alike . . . .").

III. THE RULE OF REASON AND WHY *AMERICAN NEEDLE V. NATIONAL FOOTBALL LEAGUE* EXPOSES THE NCAA'S PRICE FIXING AND HORIZONTAL RESTRAINTS ON COMPETITION

Just over a decade prior to its release of the *Alston* decision, the Court held in *American Needle, Inc. v. National Football League* that individual teams' licensing activities for their intellectual property, conducted through a corporation (American Needle) separate from the organizations and with its own unique management, constituted concerted action that was not categorically beyond the coverage of § 1 of the Sherman Act.[186] In this case, while the majority of NFL apparel rights were sold through NFL Properties (NFLP), a few companies such as American Needle contracted with individual teams to sell only that team's apparel through the NFLP's nonexclusive licensing scheme.[187] In 2000, the thirty-two NFL teams authorized NFLP to issue exclusive licenses to sell each team's apparel and merchandise.[188] As a result, NFLP declined to renew its contract with American Needle and instead signed an exclusive contract with Reebok International Ltd. (Reebok, Inc.), which resulted in American Needle losing the licensing from which it profited for twenty years.[189] American Needle then filed suit in the Northern District of Illinois against the thirty-two NFL teams, the NFL, the NFLP, and Reebok, Inc. as collective defendants claiming that the agreement at issue constituted a violation of both § 1 and § 2 of the Sherman Act.[190]

Applying the Rule of Reason analysis in a similar manner to the Court in *Alston* and its progeny, Justice Stevens led the charge for the Court in *American Needle* in scrutinizing the thirty-two professional teams in the NFL and ultimately determined that the teams "competed with each other not just on the field but to attract fans, for gate receipts, for contracts with managerial and playing personnel, and in the market for intellectual

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[186] American Needle, Inc. v. National Football League, 560 U.S. 183, 183 (2010) [hereinafter *American Needle*].

[187] *See id.*; *see also* Alan J. Meese, *Will the Supreme Court Recover its Own Fumble? How Alston Can Repair the Damage Resulting from NCAA's Sports League Exemption*, 11 WAKE FOREST L. REV. ONLINE 70 (2021) (explaining that the Court embraced the logic of the Seventh Circuit in its dicta by holding that a NCAA Bylaw is "presumed 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'").

[188] *See American Needle*, 560 U.S. at 183.

[189] *See* Daniel A. Schwartz, *Shutting the Black Door: Using American Needle to Cure the Problem of Improper Product Definition*, 110 MICH. L. REV. 295, 313 (2011).

[190] *See* Katherine Kaso-Howard, American Needle, Inc. v. National Football League: *Justice Stevens' Last Twinkling of an Eye*, 44 LOY. L.A. L. REV. 1163, 1166 (2011).

property."[191] In determining if there was a violation of § 1 of the Sherman Act, the Court focused on whether the conduct of the thirty-two NFL teams, joining together as separate decision makers—similar to that of the NCAA member institutions—deprived the cognizable labor market of "independent centers of decisionmaking."[192] While the NFL teams attempted to provide a "single entity theory," the Court sharply rejected their argument, stating that the teams did not possess a "unitary decisionmaking quality" and clarified that merely because "the financial performance of a team is related to other teams does not mean it necessarily rises and falls with that of the others."[193]

Notably, the Court determined that because each team was a "substantial, independently owned and independently managed business and that each team's general corporate actions were guided by a 'separate corporate consciousness,'" each team was thus responsible for its own intellectual property.[194] The Court added that when a specific NFL team—for example, the New Orleans Saints—licenses its intellectual property to a clothing company for merchandise production, it is not acting for the betterment of the entire NFL but rather solely for the prosperity of its own organization.[195] In *American Needle*, the NLFP's licensing decisions are made by the thirty-two potential competitors, and each of the teams

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[191] *See* Roxane A. Polidora, C. Douglas Floyd & Marley Degner, *In* American Needle v. NFL, *Supreme Court Holds That NFL Joint Venture is Subject to Antitrust Scrutiny Under Section 1 of the Sherman Act*, PILLSBURY LAW (Jun. 9, 2010), https://www.pillsburylaw.com/en/news-and-insights/in-american-needle-v-nfl-supreme-court-holds-that-nfl-joint.html (highlighting that the Court in *American Needle* ultimately held that the thirty-two NFL teams were unable to escape antitrust scrutiny for the decisions they made regarding their respective and separately owned intellectual property rights by acting through a separately managed entity—NFL Properties).

[192] *See American Needle*, 560 U.S. at 193–94 (quoting Copperweld Corp. v. Independent Tube Corp., 467 U.S. 752, 771 (1984)).

[193] *See* Mike Kurtz & Tom Gower, *Breaking Down the* American Needle *Case*, FOOTBALL OUTSIDERS (May 26, 2010), http://people.stern.nyu.edu/wgreene/entertainmentandmedia/AmericanNeedle.pdf (noting that the Court looked at the totality of circumstances to determine how much of a restraint on trade resulted from the agreement between NFL Properties and the thirty-two NFL teams to assess its reasonability). While the most famous and well-documented *per se* violation is an agreement between competitors to fix prices, Kurtz and Gower emphasize that the Court's in-depth look into a situation such as the one present in *American Needle* involved "the intent of the conspirators, probable consequences, market conditions, and any number of other factors which led to the agreement.") *Id.* Further, Kurtz and Gower explicitly note that in the last sentence of the Court's *American Needle* opinion, the Court directed the district court to apply the Rule of Reason analysis "because the product the teams have conspired to sell (the merchandising) could not exist without such an agreement." *Id.*

[194] *See American Needle*, 560 U.S. at 195 (quoting Copperweld Corp., 467 U.S. at 771).

[195] *See id.* (citing Copperweld Corp., 467 U.S. at 770).

actually owns its share of the jointly managed assets.[196] Thus, despite the NLFP being a separate corporation with its own management" and the fact that most of the revenues generated by the NFLP are shared by the teams on an equal basis, the NLFP's decisions constitute concerted action, and its conduct is subject to § 1 of the Sherman Act similar to the conduct of the NFL's thirty-two teams.[197]

Linking this back to *Alston*, while some sports organizations and governing bodies act as a unified, single entity seemingly immune from antitrust scrutiny, the NCAA exists as a joint venture by definition—a commercial enterprise undertaken jointly by two or more parties which otherwise retain their distinct identities—involving the NCAA body and the conferences comprised of its member institutions.[198] At its core, the NCAA consists of its member colleges and universities "that have joined together to create the rules and regulations associated with collegiate sports," and the NCAA's "operation of what may otherwise be viewed as a beneficial joint venture are subject to antitrust scrutiny."[199] The NCAA's rules and regulations lack a clear tie to a cognizable labor market, and its horizontal restraint is not sufficient in bringing the product—the student athletes and their athletic performance in NCAA competitions—to market.[200] The NCAA is thus restricting the quantity of its product to raise

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[196] *See id*. at 197. Because each team owns its individualized share of the jointly managed assets, it would be implausible that the teams are acting in the best interest of the NFL as a single entity as opposed to furthering their unique financial goals as a separate franchise within the league. *Id.*

[197] *See U.S. Supreme Court Decision Revisits Meaning of "Contract, Combination or Conspiracy" Under §1 of the Sherman Act*, GIBSON DUNN (Jun. 1, 2010), https://www.gibsondunn.com/u-s-supreme-court-decision-revisits-meaning-of-contract-combination-or-conspiracy-under-%C2%A71-of-the-sherman-act/.

[198] *See American Needle*, 560 U.S. at 185 (noting that in determining whether antitrust scrutiny is appropriate for the governing body of a sports organization, one that acts as a unified, single entity in its decision-making would be immune from such scrutiny while one with self-interested parties within the organization—as in the NFL and NCAA—are properly subject to antitrust scrutiny).

[199] W. Todd Miller, *More to Supreme Court's NCAA Decision Than Just Sports*, BAKER & MILLER 1, 2 (July 1, 2021), https://bakerandmiller.com/more-to-supreme-courts-ncaa-decision-than-just-sports/_(describing that the *Alston* case interestingly reinforces an important 36-year-old lesson that when a company or joint venture decides to make an important alteration to its method for conducting business that may have an impact on other individuals or entities, "it must pause and ensure that those changes are justifiable from an antitrust standpoint" as well as "think more broadly and question whether those changes undermine the rationales given for other behaviors" that similarly have the ability to impact other individuals or entities).

[200] *See id.* (highlighting the crux of the NCAA's price fixing violation of § 1 of the Sherman Act in unreasonably restraining the student athletes—the genus of the NCAA's cognizable labor market—by not compensating them for their NIL through the implementation of horizontal restraints to stifle its cognizable labor market).

the price and show market power over its product—the student athletes who compete in Division I, Division II, and Division III athletics—which led Justice Kavanaugh in his *Alston* concurrence to label this as *clear price fixing*.[201] Within the cognizable student-athlete labor market, the multitude of conferences within the various NCAA divisions provides student athletes the option to transfer to a school in a different conference should they so choose.[202]

IV. THE IMPACT AND SIGNIFICANCE OF A NEW CONFERENCE-DRIVEN COMPETITIVE MODEL REPLACING THE NCAA'S HUB-AND-SPOKE CARTEL

To look ahead at what compensating student athletes for their NIL may manifest in the future, it is first necessary to harken back to 1989, where, five years after the Supreme Court's decision in *Board of Regents*, the NCAA established the Cost Reduction Committee[203].[204] This Committee quickly adopted the "Restricted Earnings Coach Rule" in the NCAA bylaws in 1991, which subsequently limited the annual compensation of some Division I entry-level coaches to a maximum of $16,000 per year.[205] In response, a collection of approximately 1,900

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[201] NCAA v. Alston, 141 S. Ct. 2141,2167 (Kavanaugh, J., concurring) (emphasis added).

[202] *See id.* At the crux of the NIL issue and in accordance with the Fair Pay to Play legislation in many states across the country, the inherent competition between conferences makes transfer possibilities a larger leverage point for student athletes in being able to transfer to a school that provides them with a greater opportunity to profit off their NIL. *Id.*

[203] *See* Law v. NCAA, 134 F.3d 1010,1019–20 (10th Cir. 1998) (explaining that the NCAA established the Cost Reduction Committee to consider means and strategies for reducing the costs of intercollegiate athletics without disturbing the competitive balance among NCAA member institutions, and the Committee found that reducing the total number of coaching positions would accomplish the goal of reducing the cost of athletic programs).

[204] *See generally NCAA Restricted Earning Coaches Rule*, COLLEGE SPORTS SCHOLARSHIPS, https://www.collegesportsscholarships.com/ncaa-coach-restricted-earning s.htm (describing that as a result of the 1,900 restricted-earnings coaches suing the NCAA under the "Restricted Earnings Coach Rule"—subject NCAA Bylaw 11.02.3 and adopted by a roughly 85 to 15 percent margin—the NCAA "was ordered to pay damages of $11.2 million to basketball coaches, $1.6 million to baseball coaches and $9.5 million to coaches in other sports despite the NCAA's protests that only fifty-nine college coaches were actually injured by the Restricted Earnings Coach Rule, which would have come out to less than $900,000). As a result of the class action lawsuit brought by the restricted-earnings coaches, this decision now has served as a "$67 million millstone around the [NCAA]'s neck" for decades. *Id.*

[205] *See id.*; *see also* AB Staff, *Out of Cost Control*, ATHLETIC BUSINESS (Jun. 30, 1998), https://www.athleticbusiness.com/operations/article/15140643/out-of-cost-control.

college coaches from various sports and schools across the nation filed a class action suit against the NCAA claiming that the NCAA had violated § 1 of the Sherman Act with the "restricted earnings coach" rule that set a cap of NCAA coaches' pay.[206]

In *Law v. NCAA*, the NCAA fell back on its position in *Board of Regents*, asserting it lacked any market power to support its bylaw, but the Tenth Circuit followed the Supreme Court's precedent and rejected this argument, noting that an apparent lack of market power does not excuse an apparent restriction on price or output.[207] The NCAA has relied on dissected fragments from this thirty-seven-year-old opinion in litigation in the subsequent decades, honing in specifically on the following quote:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.[208]

However, the *Alston* Court explicitly rejected this argument and found that this often-cited language by the NCAA from the Court's decision in *Board of Regents* "was inapplicable to questions of athlete compensation" and that this language was mere dicta "that could not insulate the NCAA from antitrust scrutiny."[209] To this point on the dicta

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[206] *See Law*, 143 F.3d at 1019–20. The sheer number of college coaches that band together to fight the NCAA's Restricted Earnings Coaching Rule help garner national attention as well as increased scrutiny on the validity of the NCAA's restrictions and regulations. *Id.*

[207] *See id.* at 1020. The NCAA had relied on this specific position from *Board of Regents* for decades to come and even continued to cite dicta from the Court's decision in *Board of Regents* in its arguments in *Alston* almost forty years later. *Id.*

[208] *See* Gregory, *supra* note 1 (citing NCAA v. Board of Regents, 468 U.S. 85, 88 (1984)).

[209] Gregory A. Marino, NCAA v. Alston: *The Beginning of the End or the End of the Beginning?*, FOLEY & LARDNER, LLP (Aug. 4, 2021), https://www.foley.com/en/insights/publications/2021/08/ncaa-v-alston (explaining that even though the Court generally agreed with a number of the NCAA's arguments—"most notably that antitrust law does not require it to use anything like the least restrictive means of achieving its legitimate business purposes, and that Congressional action on student-athlete benefits would best serve all parties"—the Court specifically hones in on the NCAA's regulations concerning student-athlete educational benefits in its decision). Within the macrocosm of the antitrust war between the NCAA and its student athletes, the *Alston* decision was incredibly significant, but Marino notes that "[e]ven as [the Court] demolished the NCAA's procompetitive argument, the Court explained to the NCAA that, all things considered, it was getting off rather easy," but it is unclear how long the Court will hold back from

from the *Board of Regents* decision, the *Alston* Court further noted that the NCAA failed to produce any meaningful economic analysis concerning how or why the consumer market for NCAA athletics "might be irrevocably destroyed by teenage athletes receiving from their schools unrestrained *educational benefits*."[210] Moreover, in contrast, the *Alston* Court explained that the student-athlete plaintiffs were able to meet their burden of proof and definitively show through empirical evidence that the popularity and viewership for NCAA athletics has undoubtedly increased in the time period following the new allowances for student-athlete educational benefit allocation.[211]

Following *Law v. NCAA*, Division I college coaches now possess their own defined and established labor market, and in the twenty-first century, Division I college coaches across multiple sports have made headlines for their impressive annual salary figures.[212] This has grown to the point where a Division I college football or men's college basketball coach is the highest paid public employee in forty states, led by the University of

possibly adopting a fierier approach against the NCAA as Justice Kavanaugh advocates for in his concurrence. *Id.*

[210] *Id. But see* Daniel Libit, *NCAA's Nobel Prize-Winning Expert Witness Sounds Off on* Alston*, NIL*, YAHOO! SPORTS (Jul. 12, 2021), https://sports.yahoo.com/ncaa-nobel-prize-winning-expert-130056070.html?fr=yhssrp_catchall (expanding on James Heckman's, the renowned University of Chicago economist and staunch defender of the NCAA's model, disapproval of the Court's decision in *Alston* and the expansion of NIL rights for student athletes) (emphasis in original).

[211] *See* NCAA v. Alston, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring) (emphasizing that the student athletes use of empirical evidence and the NCAA's lack thereof was particularly persuasive to the Court in deciding that the student-athlete plaintiffs met their burden).

[212] *See generally* Charlotte Gibson, *Who is the Highest-Paid in Your State?*, ESPN.COM, http://www.espn.com/espn/feature/story?id=28261213&_slug_=dabo-swinney-ed-orgeron-highest-paid-state-employees&redirected=true (illustrating that as a breakdown of the forty college coaches who are the highest paid public employees in their state, twelve are men's college basketball coaches and the remaining twenty-eight are college football coaches). Of the top fourteen highest paid college coaches in the country, there is only one college basketball coach in that group: John Calipari, the legendary Head Coach for the University of Kentucky Wildcats with an annual salary of $9.3 million. *Id.* To further illustrate the massive wealth difference between college football coaches and governors, specifically, the four College Football Playoff coaches in 2019 accrued four times as much as the 50 state governors earned at $6.9 million. *Id.*

Alabama head football coach Nick Saban who brought in $9.75 million in 2021[213] and has an approximate net worth of $60 million.[214]

The development over the past three decades of the NCAA eventually relinquishing its control over coaches' salaries judicially mirrors the NCAA cession of control over student athletes' NIL in the *Alston* decision because college athletes have recently gained significant support in the court of public opinion.[215] In protest, NCAA supporters raise several arguments as to why the *Alston* decision should not be expanded in a manner similar to coaches' salaries.[216] One pro-NCAA concern that is commonly raised proffers that if student athletes are able to accrue millions of dollars through their NIL at larger schools, smaller Division I, Division II, and Division III schools will suffer as a result.[217] This is

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[213] Michael Casagrande, *Nick Saban Again Nation's Highest Paid College Football Coach*, AL.COM (Oct. 14, 2021), https://www.al.com/alabamafootball/2021/10/nick-saban-again-nations-highest-paid-college-football-coach.html; *see also* Matt Johnson, *Alabama Signs Nick Saban to Lucrative Contract Extension Through 2028*, SPORTSNAUT (Jun. 7, 2021), https://sportsnaut.com/alabama-crimson-tide-nick-saban-contract-extension/ (describing how Saban has ascended to the highly respected status of "the greatest coach in college football history" since first signing with the University of Alabama in 2007, and after winning the National Championship game for the seventh time in 2021, Saban signed a multi-year contract extension that reflects his legendary prowess and firmly supplants him as the highest paid college football coach in the nation).

[214] *See* Gibson, *supra* note 212*; see also Alabama State Government Salary*, BALLOTPEDIA, https://ballotpedia.org/Alabama_state_government_salary (listing out the respective salaries of state executives in the State of Alabama led by Steve Marshall, the Attorney General of Alabama with approximately $168,000 per year followed closely by Jim Ridling, the Alabama Commissioner of Insurance, with $164,419 per year). Kat Ivey, the current Governor of Alabama, ranks fifth for highest paid state executive in Alabama with a salary of just under $28,000 per year based on the fifteen current state executives listed. *Id.*

[215] *See generally* Arash Afshar, *Collegiate Athletes: The Conflict Between NCAA Amateurism and a Student Athletes' Right of Publicity*, 51 WILLAMETTE L. REV. 101, 120–21 (2015); *see infra* discussion Part V. (hypothesizing that, in accordance with Justice Kavanaugh's concurrence in *Alston*, the NCAA will continue to relinquish its control over student athletes profiting from their NIL until the conferences overtake the NCAA's hub-and-spoke cartel and are placed in charge of placing their own monetary restrictions on student athletes).

[216] *See Keller*, *infra* note 217 and accompanying text.

[217] *See* Braly Keller, *NIL for Division II and Division III Institutions*, OPENDORSE (Aug. 18, 2021), https://opendorse.com/blog/nil-for-division-ii-and-division-iii-institutions-2/ (explaining that Division II and Division III student athletes "will have the same opportunities to monetize their NIL as the rest of the general student body" by having the ability to "reference their athletic involvement when promoting camps or clinics, cash in on their social media platforms with content related to their athletic experience, market their business ideas related to their sport and much more"). Keller provides the example of Clark Hazlett, former quarterback for Division III Linfield University who had more than 150,000 subscribers on YouTube, as an example of a Division III athlete who would be

complimented by a second popular pro-NCAA argument that asserts the NCAA is integral to bringing professional scouts to practices and games to aid athletes in demonstrating their skills and getting discovered by professional teams.[218]

Both of these concerns are addressed by empirical data.[219] First, while there is no reliable metric to gauge the amount of collegiate athletes who do not desire to ascend to the professional level in their sport, it is a fact that of the more than 500,000 NCAA student athletes, less than 2% will play professionally in their sport.[220] This percentage fluctuates depending on the sport, but men's college basketball at 1.2% and women's college basketball at 0.8% rank among the lowest chances of a student athlete making it to the professional level.[221] For the student athletes who "go pro in something other than sports," in accordance with the language of the NCAA's mission statement,[222] "the experiences of college athletics and the life lessons [student athletes] learn along the way will help them as they pursue careers in business, education, athletics administration, communications, law, medicine and many more fields," and "student-athletes graduate at higher rates than their peers in the student body."[223]

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able to significantly benefit from NIL even if they weren't a household name or a star on the field. *Id.*

218 *See id*. *But see* ABNewswire, *Olumide Stephen Adeyemi of High Level Connects More NCAA Division 1 Players to NBA Scouts*, VIRTUAL-STRATEGY MAGAZINE (Jan. 25, 2022), https://virtual-strategy.com/2022/01/25/olumide-stephen-adeyemi-of-high-level-connects-more-ncaa-division-1-players-to-nba-scouts/ (describing how former collegiate basketball athlete and founder of High Level, Olumide Stephen Adeyemi, has worked directly with NBA Scouts since 2019 to help young male and female basketball players get discovered in the hopes that this exposure will help boost their chances of playing at the professional level).

219 *See generally NCAA Guide for the College-Bound Student Athlete 2021-2022*, *infra* note 220 (explaining that the statistical data and percentages show that smaller Division I, II, and III schools will not only benefit from NIL, but also student athletes will not experience a decreased opportunity to play professionally in their sports).

220 *NCAA Guide for the College-Bound Student Athlete 2021-2022*, NCAA.ORG, http://fs.ncaa.org/Docs/eligibility_center/Student_Resources/CBSA.pdf?j=84410714&sfmc_sub=832316830&l=7842029_HTML&u=737480787&mid=10892399&jb=5 (last visited Oct. 29, 2022).

221 *See id.* (illustrating that while other sports have a higher percentage of players that reach the professional level than men's and women's college basketball, the majority of major NCAA sports have below a 10% chance of its student athletes playing professionally in their respective sport).

222 *See NCAA Mission and Vision Statements Analysis, supra* note 7 (noting that the stated purpose of the NCAA in relation to the services it provides student athletes is to help its student athletes become the next well-rounded and educated leaders of the world in a variety of fields outside the world of sports).

223 *See NCAA Guide for the College-Bound Student Athlete 2021-2022*, *supra* note 220 (emphasizing that what the NCAA advertises to its potential student athletes is a holistic

Thus, while college superstars such as University of Alabama freshman quarterback and 2021 Heisman Trophy winner Bryce Young have already cashed in on their NIL rewards,[224] it remains to be seen if the average college athlete will in fact be impacted monetarily by *Alston* in a meaningful way if they attend a mid-major or smaller Division I, Division II or Division III school.[225]

A possible answer to the questions of where and how far student-athlete compensation may range comes mere months after the *Alston* decision in *Johnson v. NCAA*, a suit filed by a former Villanova University football player, Ralph "Trey" Johnson, which initially commenced as a class action in November 2019 and eventually reached the Eastern District of Pennsylvania in August 2021.[226] Later joined by a collection of former and current collegiate student athletes, the student-athlete plaintiffs claimed "that as college athletes they were employees of their respective institutions and that the NCAA was their joint employer," and in turn, the student athletes argued they were owed "a required minimum wage pursuant to the Fair Labor Standards Act (FLSA)."[227] The student athletes also assert that the NCAA functions as a "joint employer controlling college sports" as additional justification for their employee compensation argument.[228]

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betterment of their academic and athletic prowess in accordance with a unique college education experience).

224 *See* Elizabeth Karpen, *Alabama QB Bryce Young Making "Ungodly" Income from NIL Deals*, NY POST (July 20, 2021), https://nypost.com/2021/07/20/alabama-qb-is-making-ungodly-amounts-from-nil-deals/ (explaining that the nineteen-year-old Alabama quarterback represented by Creative Artist Agency who had never played a down of college football at the time of the *Alston* decision, accrued nearly $1 million in endorsement deals through his NIL prior to the 2021-2022 season).

225 *See generally* Jodi S. Balsam, *What* NCAA v. Alston *Means for Professional Sports Leagues*, HARV. J. SPORTS & ENT. L. (Aug. 26, 2021), https://harvardjsel.com/wp-content/uploads/sites/9/2021/08/Balsam-Alston-essay.pdf (noting that the import of the *Alston* decision may potentially bring "the availability of greater education-related benefits, such as graduate school and study abroad, coupled with the state-by-state legislative revolution empowering student-athletes to exploit their names, images, and likenesses").

226 *See* Michael McCann, *NCAA Athletes-as-Employees Case Heads to Federal Appeals Court*, YAHOO SPORTS.COM (Jan. 4, 2022, 9:01 PM), https://sports.yahoo.com/judge-invites-appellate-review-ncaa-050142141.html?fr=yhssrp_catchall (explaining that the student athletes in *Johnson* urged the district court to recognize them as employees deserving minimum wage since the FLSA, "a federal law that guarantees minimum wage and overtime pay" to employees, allows this to be set as a plausible claim).

227 *See* Chris Lucca & David Singh, *NCAA and Multiple Member Schools Seek Instant Replay Review by Third Circuit*, LAW.COM (Oct. 27, 2021, 11:13 AM), https://www.law.com/thelegalintelligencer/2021/10/27/ncaa-and-multiple-member-schools-seek-instant-replay-review-by-third-circuit/?slreturn=20220010025237.

228 *See* McCann, *supra* note 226. This argument by the student athletes of the NCAA being a joint employer" mirrors the Court in *Alston* finding that despite the NCAA's

Agreeing with the student athletes, Judge Padova in the Eastern District of Pennsylvania denied a motion to dismiss filed by the schools of the student-athlete plaintiffs and the NCAA—rejecting several of their arguments that centered around college athletes being amateurs—and ultimately finding that the plaintiffs plausibly pleaded that they were sufficiently deemed employees under the FLSA.[229] Judge Padova further noted that the Supreme Court had already dispelled this type of amateurism argument in *Alston* and echoed Justice Kavanaugh's concurring opinion in *Alston*, highlighting that "the argument 'that colleges may decline to pay student athletes because the defining features of college sports . . . is that the student athletes are not paid . . . is circular and unpersuasive.'"[230] Judge Padova cut deeper into the NCAA's argument by making it clear that he found it "telling that college athletes 'schedule classes around their required NCAA athletic activities,' and coaches arguably act more like bosses than professors."[231] After their motion to dismiss was denied, the schools and the NCAA appealed to the Third Circuit to reverse Judge Padova's holding and find that student athletes cannot be employees under the FLSA or applicable state laws.[232]

On November 8, 2021, after three months of deliberation, a twenty-eight-person Constitutional Committee chaired by former U.S. Secretary of Defense Robert Gates unveiled a newly worked NCAA Constitution, which pulls power away from the NCAA's central governance and gives it to the three divisions to manage student-athlete compensation for NIL.[233]

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classification as a "joint venture," it is still subject to antitrust scrutiny under the Rule of Reason analysis. *See* Miller, *supra* note 199 and accompanying text.

[229] *See* Lucca & Singh, *supra* note 227. Judge Padova's decision at the district court level sent shockwaves across the nation because for the first time ever and after failing repeatedly throughout the twentieth century, student athletes obtained a victory in federal court to be named employees of the NCAA under the FLSA. *Id.*

[230] Lucca & Singh, *supra* note 227 (citing NCAA v. Alston, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring) (highlighting that the Alston decision is already being cited as precedent in notable cases such as *Johnson* for which of the NCAA's argument may be redeemable, if any, after being struck down by Justice Gorsuch and the Court in *Alston*).

[231] McCann, *supra* note 226. Judge Padova's recognition of the responsibilities and rigors of student-athlete life on and off the field as well as the time management skills necessary to meet all of their academic and athletic requirements added to the analogy that they are employees and the coaches act like their bosses. *Id.*

[232] *Id.* With the Third Circuit appeal by the schools and NCAA still pending, student athletes and those who support them hope for a favorable result in accordance with Judge Padova's ruling at the district court level in granting student athletes employment status under the FLSA. *Id.*

[233] *See* Dennis Dodd, *NCAA Unveils Modernized Constitution Draft with Divisions Granted Increased Governing Power*, CBSSPORTS.COM (Nov. 8, 2021, 12:45 PM), https://www.cbssports.com/college-football/news/ncaa-unveils-modernized-constitution-draft-with-divisions-granted-increased-governing-power/; *see also* Maria Carrasco, *The New NCAA Constitution Hints at Big Changes Ahead*, INSIDE HIGHER ED (Nov. 9,

Born out of the antitrust concerns raised in *Alston* months earlier, this Constitution provides that student athletes "may receive educational benefits and benefit from commercialization through the use of their name, image and likeness in accordance with guidelines established by their NCAA division."[234] While activity largely remained status quo between the *Alston* decision and this new proposal, should this draft of the NCAA Constitution be accepted, the NCAA bylaw prohibiting student athletes from accepting monetary compensation in exchange for the utilization of their NIL may cease to exist.[235]

CONCLUSION: THE NCAA'S LAST STAND AND A NEW AGE OF INTERCOLLEGIATE GOVERNANCE

Standing on the shoulders of decades of challenges to various aspects of the NCAA's restrictions and governance of student athletes since *Board of Regents* and matching the trend of states passing Fair Pay to Play legislation, the Court gifted student athletes an antitrust victory that will change the course of intercollegiate sports forever.[236] The Court for the first time definitively rejected the NCAA's "amateurism" argument that has remained at the core of its hub-and-spoke cartel since its inception in 1906 and has been a justification for the NCAA's regulations for over a century.[237] The NCAA's long-held control over student athletes' NIL has eroded amidst the crashing waves of antitrust litigation over the last half century, and it is possible that the *Alston* decision was the wave that irreparably cracked the NCAA's solidified foundation.[238]

2021), https://www.insidehighered.com/news/2021/11/09/ncaa-draft-constitution-aims-restructure-divisions (explaining that under the new draft, "each division would have the authority to organize itself . . . and create new divisions or subdivisions" as well as "determine [the] governing structure and membership eligibility for new organizations").

234 *See* Ishan K. Bhabha, David Sussman & Allison Douglis, *United States: Update on Proposed Changes to the NCAA Constitution*, MONDAQ (Nov. 24, 2021), https://www.mondaq.com/unitedstates/education/1134442/update-on-proposed-changes-to-the-ncaa-constitution- (citing Robert M. Gates, *Draft of the New NCAA Constitution*, NCAA.ORG (Nov. 8, 2021), https://ncaaorg.s3.amazonaws.com/governance/ncaa/constitution/NCAAGov_DraftConstitution.pdf).

235 *See id.* (noting the importance of the NCAA's new constitutional amendment in determining the scope of the *Alston* decision and its applicability to student athletes in the coming years).

236 *See supra* Part II.B.

237 *See* Litan, *supra* note 145 and accompanying text (highlighting that the NCAA's lack of a clear definition for "amateur" and its constantly evolving nature throughout the twentieth and twenty-first centuries played a significant role in the Supreme Court rejecting the NCAA's procompetitive amateurism justification in *Alston*).

238 *See supra* Part II.A.

As the general public adjusts to the *Alston* decision and most recently the *Johnson* decision on appeal to the Third Circuit, the ability for student athletes to receive education-related benefits is just the beginning of a long, overdue push to allow college athletes to monetize their NIL.[239] Donald H. Yee, a lawyer and partner with Yee & Dubin Sports and representative of professional athletes and coaches, argues the *Alston* decision may "revolutionize the American sports industry, and in turn, . . . positively affect a lot of lives."[240] For others, the *Alston* decision marks the beginning of the fall of the NCAA empire and with it, the death of amateur sports as we know it.[241]

In the coming years, this Note argues that Justice Kavanaugh's concurrence in *Alston* advocating to expand the scope of activities student-athletes can profit off of will become a reality, and the NCAA will eventually cease to exist in its current form, leaving the conferences free to start a new era in collegiate sports.[242] Since the conferences compete with each other, their administration of compensation restraints would comply with § 1 of the Sherman Act in contrast to the NCAA's clear price fixing and horizontal restraints on trade in the student-athlete labor market.[243]

In accordance with the new era of conference-controlled collegiate sports, athletes at smaller schools who participate in low-revenue grossing sports such as lacrosse, water polo, and tennis will begin to garner attention from brick-and-mortar stores looking for an athlete endorsement deal.[244] This relationship between athletes in low-revenue sports and

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[239] *See* Marino, *supra* note 209 (emphasizing that the *Alston* decision, regardless of how far it went in terms of providing NIL benefits to student athletes, has been decades in the making as the antitrust defenses of the NCAA slowly withered away since the *Board of Regents* decision in 1984).

[240] Donald H. Yee, *The Supreme Court's NCAA Ruling Will Turn Sports Upside Down. Here's How.*, WASH. POST (Jun. 22, 2021, 11:47 AM), https://www.washingtonpost.com/outlook/2021/06/22/ncaa-football-alston-ruling/.

[241] *See supra* Part III.B. For those who wish to protect the purity of college amateur athletics and refuse to accept the prospect of student athletes receiving any form of compensation past their grant-in-aid tuition, the writing is on the wall with the *Alston* decision, and there is likely no plausible return the NCAA may make from this resounding defeat at the Supreme Court level. *Id.*

[242] *See supra* Part V (explaining that with the NCAA creating a hole in the NCAA's once-formidable dam, each subsequent antitrust suit by student athletes in the future will use the *Alston* decision as precedent to continue to chip away at the NCAA's dam until the floodgates fully open and the NCAA cedes its control over compensation restraints to the conferences).

[243] *See generally* Ruseki, Reilly & Humphreys, *supra* note 26 and accompanying text.

[244] *See generally* Alan Blinder, *The Smaller, Everyday Deals for College Athletes Under New Rules*, NEW YORK TIMES (Dec. 9, 2021), https://www.nytimes.com/2021/12/09/sports/ncaafootball/college-athletes-nil-deals.html (noting that the superstar student athletes in the highest revenue-grossing sports with national notoriety publicized their NIL

brick-and-mortar stores will be especially prevalent in colleges and universities located in smaller rural communities which lack chain restaurants and larger stores.[245]

The NCAA now sits on the hill in which it will make its last stand, and much like Colonel Custer leading the 7th Cavalry Regiment at the Battle of the Little Bighorn in Montana in one of the worst American military disasters in history,[246] if the NCAA had relinquished its iron-grip on student athletes earlier, the war with student athletes may have ended in peace.[247] Does today's NCAA match Teddy Roosevelt's vision when he gathered the Ivy League schools together in a meeting to save the integrity of college athletics?[248] Regardless of the answer to that question, the *Alston* Court has now joined the societal masses knocking down the once great statue of the NCAA and, from the rubble, building a new governing body for college sports where student athletes may benefit from their NIL without restriction.[249]

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endorsements with major brands such as Gatorade and Nike, but student athletes in lower-revenue grossing sports will have more NIL endorsement opportunities as it becomes integrated into the culture of their schools).

245 *See generally* Austin Green, *How Local Businesses, College Athletes Are Taking Advantage of the NIL Era*, NAT'L CTR. FOR BUS. JOURNALISM (Oct. 20, 2021), https://businessjournalism.org/2021/10/how-local-businesses-college-athletes-are-taking-advantage-of-the-nil-era/ (explaining that there is an untapped market in rural towns with loyal sports fans where a lesser-known student athlete may be able to secure an endorsement deal with a local establishment in their town outside the chain establishments that are supporting the top players in the highest revenue-grossing sports).

246 *See generally* Annette McDermott, *What Really Happened at the Battle of Little Bighorn?*, HISTORY.COM, https://www.history.com/news/little-bighorn-battle-facts-causes (last updated Jun. 7, 2019).

247 *See, e.g.*, Eric Jackson, *Free Labor from Georgia Student-Athletes May Soon Come to an End*, ATLANTA BUSINESS CHRONICLE (Oct. 23, 2019), https://www.bizjournals.com/atlanta/news/2019/10/23/free-labor-from-georgia-student-athletes-may-soon.html?iana=hpmvp_atl_news_headline.

248 *See NCAA v. Alston*, 141 S. Ct. 2141, 2148 (2021). The answer to this question is likely a resounding "No!" as the NCAA has wholly lost sight of Teddy Roosevelt's vision for competitive balance and player safety in the Ivy Leagues and instead exchanged this for stringent restrictions and a fixation on price fixing in the student-athlete cognizable labor market. *Id.*

249 *See supra* Part III.B. With not only sports fans but also academics, labor rights activists, and employment scholars backing the student athlete plaintiffs in *Alston* and more recently in *Johnson*, the court of public opinion is in line with the Supreme Court's decision in removing the NCAA's power over student-athlete compensation restraints one judicial opinion at a time. *Id.*