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The "Amateur" Division I Athlete Is Becoming a Thing of the Past, so Now What?: Addressing the Action Needed to Preserve Amateurism in College Sports

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NOTES

The "Amateur" Division I Athlete Is Becoming a Thing of the Past, so Now What?: Addressing the Action Needed to Preserve Amateurism in College Sports

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College sports are in a state of logistical chaos. How did we get here? Where do we go next? What does the future of college sports look like? The driving force behind much of this uncertainty is the demise of amateurism at the Division I level of competition. The National Collegiate Athletic Association ("NCAA") has struggled to define what makes a college athlete an "amateur" since its inception. Over time—and under the NCAA's purported control—the line between amateur and professional athletes has become increasingly blurred. The NCAA's failure to maintain the amateur model at the Division I level poses a substantial threat to the NCAA in the context of antitrust litigation. Antitrust challenges to the NCAA's amateurism rules constitute a highly contested topic for all stakeholders of college sports: the players, the coaches, the fans, etc.

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This Note explores the loss of amateurism in Division I sports and the resulting scrutiny the NCAA has faced, especially in recent years. Approaching this issue with an antitrust lens, this Note illustrates how the NCAA's amateurism rules are evaluated by the courts and suggests why a court would no longer find the NCAA's amateurism defense to antitrust claims viable, at least at the Division I level. Throughout this piece, the Note critiques the NCAA's responses to the evolving landscape of collegiate sports, thus calling for a new method of oversight to preserve what is left of amateurism. This Note argues that amateurism is still intact at the Division II and III levels of competition, but steps must be taken in the near future to protect these programs and this sense of amateurism from the imminent changes to the college sports enterprise. Accordingly, this Note offers potential solutions to avoid the loss of amateurism and insulate Division II and III programs from impending cost-cutting measures. To conclude, this Note highlights what a loss of amateurism altogether could mean for future NCAA athletes as well as consumers of the college sports product.

INTRODUCTION

Since its inception, the National Collegiate Athletic Association ("NCAA") has relied on a key principle to distinguish itself from professional sports leagues: amateurism.[1] From the NCAA's perspective, consumer demand for amateur collegiate sports is distinguishable from the demand for professional sports, and certain restraints must be maintained to sufficiently differentiate the college athlete from its professional counterpart.[2] What is curious, however, is that the NCAA has struggled to define what "amateurism" entails.[3] This lack of clarity has become especially evident in recent years with the emergence of Name, Image, and Likeness ("NIL") compensation opportunities, the easing of transferability restrictions, and the increasingly prominent role that media deals play

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[1] *See* Lindsay J. Rosenthal, Comment, *From Regulating Organization to Multi-Billion Dollar Business: The NCAA Is Commercializing the Amateur Competition It Has Taken Almost a Century to Create*, 13 SETON HALL J. SPORT L. 321, 323–24 (2003).

[2] *See* Ted Tatos, *Deconstructing the NCAA's Procompetitive Justifications to Demonstrate Antitrust Injury and Calculate Lost Compensation: The Evidence Against NCAA Amateurism*, 62 ANTITRUST BULL. 184, 185 (2017); Thomas A. Baker III et al., *Debunking the NCAA's Myth That Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661, 662 (2018).

[3] *See* Casey E. Faucon, *Assessing Amateurism in College Sports*, 79 WASH. & LEE L. REV. 3, 10 (2022).

in the structure of athletic conferences.[4] These developments have predominantly affected the NCAA's Division I ("DI") league, where the college athlete has become a quasi-professional.[5]

The NCAA has demonstrated that it cannot preserve amateurism in DI sports through its own regulation.[6] This is troublesome for the NCAA because it has consistently relied on amateurism to defend its "necessary" restrictions to differentiate college and professional athletes within the context of antitrust litigation.[7] If the NCAA can no longer survive antitrust challenges to the restraints it places on student-athletes, what does the future of college sports look like? Will the consumer product become too similar to the one created by professional sports leagues? This could be inevitable for DI sports, but Division II ("DII") and Division III ("DIII") sports programs could maintain their amateur character if steps are taken now to preserve the distinction between college and professional sports.

Part I of this Note summarizes the evolution of the NCAA's amateur model and demonstrates the ambiguity of the "amateur" student-athlete. A comparison of the early amateur model with the "modern framework" as it exists today reveals the inconsistency of the NCAA's amateurism rules and reflects the growing enterprise of college sports. Part II explores three noteworthy antitrust cases against the NCAA to illustrate the courts' method of evaluating the NCAA's amateurism restrictions and the level of scrutiny the NCAA is subject to under antitrust laws.

Section III.A then addresses recent developments that undermine the amateur character of collegiate sports, namely DI sports programs. These developments have occurred within the last decade, and their impact has been monumental. In Section III.B, this Note explains how these developments essentially strip DI sports of their amateur character. Part IV then provides potential solutions for this loss of amateurism in college sports. Overall, this Note argues that amateurism could be preserved in DII and DIII sports through: (1) the appointment of an independent regulatory body separate from DI regulation, and (2) an amendment to the NCAA bylaws that

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[4] *See* discussion *infra* Part III.

[5] *See* discussion *infra* Part III.

[6] *See* discussion *infra* Part III.

[7] *See* Kristen R. Muenzen, Comment, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 268 (2003).

permits member schools to select DI status on a sport-by-sport basis for legislative and competitive purposes. Part IV concludes with a discussion of the uncertainty that exists at the DI level amid a pending landmark settlement and the effect it could have on DII and DIII sports.

I. THE EVOLUTION OF AMATEURISM WITHIN THE NCAA

The NCAA's concept of "amateurism" has been in flux since the organization was created in the beginning of the twentieth century.[8] The NCAA articulated a definition of amateurism as early as 1916, labeling the "'amateur athlete' as 'one who participates in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits directly derived therefrom.'"[9] The guiding principle was the prioritization of academics over athletics, and certain restrictions were deemed necessary to "foster an environment in which amateur athletics could flourish in the absence of commercial influences."[10] Subsequent developments in the twentieth and twenty-first century undermined this original vision of the amateur student-athlete.[11] In recent years, it has become far more difficult, even for the NCAA, to ascertain what amateurism entails.[12] Ongoing developments in NCAA antitrust litigation could replace this "modern framework" with an entirely new governing structure for college athletics, marking a dramatic departure from the amateurism model that the NCAA has desperately tried to maintain for the last century.[13]

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[8] *See* Katherine Kargl, Note, *Is Amateurism Really Necessary or Is It an Illusion Supporting the NCAA's Anticompetitive Behaviors?: The Need for Preserving Amateurism in College Athletics*, 2017 UNIV. ILL. L. REV. 379, 383 (2017).

[9] Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 331–32 (2007) (quoting ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION & LEGACY OF THE NCAA'S AMATEUR MYTH 33 (1998)).

[10] Rosenthal, *supra* note 1, at 323–24.

[11] *See* Kargl, *supra* note 8, at 383–86.

[12] *See* Faucon, *supra* note 3, at 10.

[13] *See* discussion *infra* Section IV.C.

A. *The Early Era*

The NCAA was officially established in 1910 with the goal of creating more effective rules to reduce injury and violence within college football.[14] Regulations related to amateurism and eligibility also held great importance and came to the forefront in the NCAA's early years.[15] The NCAA's founders wanted to ensure the primacy of the student-athlete's commitment to academics, which reflects the founders' desire to create a "clear distinction between NCAA athletics and professional athletics."[16] To achieve these objectives, the NCAA implemented rules that required student-athletes to attend class and prohibited them from accepting any compensation for their athletic performance.[17] Despite these restrictions on athletic-related compensation, NCAA member schools nevertheless engaged in practices that supported student-athletes financially based on their athletic abilities.[18] The NCAA realized that the explosion in popularity that college football enjoyed in the first half of the twentieth century, and the accompanying financial opportunities, would demand stricter enforcement of the amateurism rules to prevent member schools from exploiting these opportunities at the expense of the "amateur model."[19]

In response to this realization, the NCAA adopted the Sanity Code in 1948 to preserve amateurism and command compliance with such rules.[20] The Sanity Code required that financial aid be awarded based on need as opposed to athletic ability and restricted aid to the cost of tuition and fees.[21] The NCAA also formed a Compliance Committee as part of this effort, which could terminate a school's NCAA membership for non-compliance with the rules.[22]

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14 *See* Lazaroff, *supra* note 9, at 331.

15 *See id*.

16 Rosenthal, *supra* note 1, at 323.

17 *Id.*

18 Kargl, *supra* note 8, at 384 (noting that eighty-one out of 121 colleges involved in at study at the time financially supported their student-athletes "in some form, including employment, loans, athletic scholarships, and cash.").

19 *See* Lazaroff, *supra* note 9, at 332.

20 *Id.* at 332–33.

21 *Id.* at 333; Kargl, *supra* note 8, at 384.

22 Lazaroff, *supra* note 9, at 333.

The Sanity Code was ultimately ineffective, and it was discontinued in 1952, leading to a new era of NCAA regulation.[23]

B. *The Modern Era*

The NCAA's financial aid policy observed a dramatic shift in the 1950s.[24] Under the new policy, financial aid no longer needed to be based on need or academic abilities.[25] Rather, member institutions could grant aid based on athletic ability *alone*.[26] In 1956, the NCAA announced that these athletic scholarships, also known as grants-in-aid, were capped at the value of "commonly accepted educational expenses."[27] Aside from this limitation, member institutions were free to structure their financial-aid policies as they saw fit.[28] This newfound freedom motivated member schools to gain the most athletic talent possible through a variety of financial incentives.[29]

This shift, however, was followed by rules and regulations implemented during the 1960s that reinforced the idea of amateurism.[30] These rules prohibited student-athletes from profiting off their reputation or skills, receiving special benefits from member schools, and entering into any negotiations for a professional sports contract.[31] Despite these efforts, the NCAA's amateur model was disrupted again in 1973 when the NCAA announced that member schools could no longer award multi-year scholarships.[32] Instead, member schools could only award scholarships on a *yearly* basis,

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[23] Kargl, *supra* note 8, at 385 ("The Sanity Code turned out to be a disaster and many colleges did not follow it because they already awarded athletic scholarships, even though the NCAA prohibited them.").

[24] *See* Lazaroff, *supra* note 9, at 333–34.

[25] Kargl, *supra* note 8, at 385.

[26] *See id.*

[27] "In 1957, the NCAA released an 'Official Interpretation' which defined educational expenses as tuition and fees, room and board, books, and fifteen dollars per month for laundry." *Id.* The NCAA revised its definition of commonly accepted expenses in 1976 and excluded "course related supplies and incidental expenses, including laundry" in this new definition. *Id.* at 386.

[28] *See id.* at 385.

[29] *See* Lazaroff, *supra* note 9, at 334.

[30] *See* Kargl, *supra* note 8, at 385.

[31] *Id.* at 385–86.

[32] *Id.* at 386.

thereby allowing collegiate coaching staffs to revoke student-athletes' scholarships if they were to, for example, sustain an injury affecting their ability to compete or contribute minimally to the team in any given season.[33] This rule seemed to prioritize athletic performance over academics, directly contradicting the NCAA's amateur model.[34]

These developments in the latter half of the twentieth century largely guided the NCAA's "modern framework" of eligibility and amateurism rules, but these rules have consistently evolved since the adoption and subsequent termination of the Sanity Code.[35] Notably, in 2014, the NCAA announced that the individual athletic conferences could authorize their member schools to offer scholarships up to the *full* cost of attendance.[36] The NCAA also provided ways for student-athletes to receive funds in addition to their full scholarship, including awards "incidental to athletics participation" such as "qualifying for a bowl game" in the DI Football Bowl Subdivision (FBS) or participating in the Olympics.[37] Further, the NCAA established "the 'Student Assistance Fund' and the 'Academic Enhancement Fund' to 'assist student-athletes in meeting financial needs,' 'improve their welfare or academic support,' or 'recognize academic achievement.'"[38] This framework includes other incidental payments and benefits that further demonstrate the seemingly inconsistent yet continuous changes to the NCAA's amateur model.[39]

While this "modern framework" largely controls at present, the world of college sports seems to be heading in a new direction where

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[33] *See id.*

[34] Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 356 (2005).

[35] *See* Lazaroff, *supra* note 9, at 334; NCAA v. Alston, 594 U.S. 69, 77–78 (2021).

[36] *Alston*, 594 U.S. at 78. Further, "[t]he [thirty-two] conferences in Division I function similarly to the NCAA itself, but on a smaller scale. They 'can and do enact their own rules.'" *Id.* at 79 (quoting *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1090 (N.D. Cal. 2019)).

[37] *Id.* at 78–79 (quoting *In re NCAA*, 375 F. Supp. 3d at 1064, 1071, 1074) ("The NCAA divides Division I football into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision [(FCS)], with the FBS generally featuring the best teams.").

[38] *Id.* at 78 (quoting *In re NCAA*, 375 F. Supp. 3d at 1072).

[39] *See id.* at 79.

the amateurism model will become a thing of the past, at least at the DI level.[40] There are many questions left unanswered, including how and to what extent this new era will affect the bona fide amateur athletes at the DII and DIII levels.[41]

II. ANTITRUST CHALLENGES TO THE NCAA'S RESTRAINTS AND THE AMATEURISM DEFENSE

The NCAA has promoted academics as the paramount concern of the student-athlete since its founding as an organization.[42] Under the NCAA's amateur model, the commitment to academics and lack of commercial influence differentiate the collegiate athlete from his or her professional counterpart, and these characteristics in turn create a consumer demand for collegiate sports separate from the demand for professional sports.[43] The NCAA argued for decades that this amateur model would be undermined if collegiate athletes were to receive payment for their participation in college sports.[44]

The NCAA's compensation and commercial restraints in addition to their noncommercial amateurism restraints mark a significant area of antitrust challenge.[45] Within the last year alone, antitrust suits against the NCAA have captured the attention of all stakeholders in college sports.[46] On their face, these restraints violate antitrust laws, but the Supreme Court in *NCAA v. Board of Regents of the University of Oklahoma* set an important precedent for future review of NCAA restraints.[47] The legal framework outlined in *Board of Regents* was later applied in two pivotal cases within NCAA antitrust litigation that addressed amateurism restraints: *O'Bannon v. NCAA* and *NCAA v. Alston*.[48]

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40 *See* discussion *infra* Section IV.C.
41 *See* discussion *infra* Section IV.C.
42 *See* Tatos, *supra* note 2, at 185.
43 *See id.*; Baker III et al., *supra* note 2, at 662.
44 *See* Tatos, *supra* note 2, at 185.
45 *See id.*; Muenzen, *supra* note 7, at 273.
46 *See* discussion *infra* Section IV.C.
47 *See* Muenzen, *supra* note 7, at 266–68.
48 *See* Faucon, *supra* note 3, at 58–60, 68.

A. Board of Regents*: The Breakthrough to the Rule of Reason Analysis*

Certain agreements, such as horizontal price fixing, are deemed illegal *per se* under Section 1 of the Sherman Antitrust Act due to their inherent anticompetitive nature.[49] However, antitrust jurisprudence developed a "rule of reason" framework that courts can apply to these facially unlawful restraints to determine whether the agreement actually enhances competition overall.[50] Under the rule of reason framework, the plaintiff must first demonstrate that there is an anticompetitive effect on competition caused by the defendant's action in a market in which the defendant has market power.[51] Once that is shown, the burden then shifts to the defendant to provide some procompetitive justification for its action that outweighs the alleged anticompetitive effect.[52] If the defendant succeeds in doing so, the burden shifts back to the plaintiff to show that the same efficiency or outcome can be achieved through less restrictive means.[53] In other words, whether the defendant could have reached the same result without the chosen anticompetitive action.[54] The rule of reason analysis, in essence, attempts to balance the procompetitive and anticompetitive effects of the restraint to determine which effect outweighs the other.[55]

The restraints intended to promote the NCAA's amateur model, such as the restrictions on student-athlete compensation, are facially illegal due to their anticompetitive effect.[56] In *Board of Regents*,

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[49] Tatos, *supra* note 2, at 185.

[50] *See id.* at 185–86.

[51] *See id.* at 186. An anticompetitive effect can be demonstrated though an increase in price, a decrease in output, or deterioration in the quality of goods or services. *Id.* at 185–86. It can also be demonstrated through the restriction of consumer choice. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984).

[52] *See* Tatos, *supra* note 2, at 186.

[53] *Id.*; *see also* O'Bannon v. NCAA, 802 F.3d 1049, 1074 (9th Cir. 2015) (quoting Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1159 (9th Cir. 2001)) ("[T]o be viable under the Rule of Reason—an alternative must be 'virtually as effective' in serving the procompetitive purposes . . . and 'without significantly increased cost.'").

[54] Tatos, *supra* note 2, at 186.

[55] *See id.*

[56] *See id.* at 185.

however, the Court held that some of the restraints imposed by the NCAA are "necessary for the product of intercollegiate athletics to exist."[57] The Court determined that the restraint at issue, a horizontal output limitation on televised collegiate football,[58] should be analyzed under the rule of reason framework because it "involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."[59] The Court explained that the availability of college football as a product distinct from the product of professional football improves consumer choice and can therefore be considered procompetitive.[60]

The fact that horizontal agreements are needed to create the product of intercollegiate athletics, however, does not imply that these agreements are necessarily lawful.[61] The procompetitive effects of the restraint must still outweigh the anticompetitive effects, which was not the case in *Board of Regents*.[62] Although the plaintiffs prevailed, the Court in dicta acknowledged that "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports."[63] Lower courts later interpreted this language to mean that NCAA amateurism restraints have a "procompetitive presumption,"[64] which became relevant in both *O'Bannon* and *Alston*.

B. O'Bannon*: Reaffirming Antitrust Scrutiny of the NCAA's Amateurism Rules*

Even though *Board of Regents* did not involve an amateurism restraint, it signaled to the courts that restraints designed to enforce the NCAA's amateur model should be reviewed under the rule of reason framework because intercollegiate athletics could not exist but for certain horizontal agreements.[65] The district court in *O'Bannon* therefore applied the rule of reason analysis and weighed the

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57 Muenzen, *supra* note 7, at 266.
58 *See id.* at 266–67.
59 NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101 (1984).
60 *Id.* at 102.
61 *See id.* at 113.
62 *See id.* at 119–20.
63 *Id.* at 120.
64 Baker III et al., *supra* note 2, at 670.
65 *Bd. of Regents*, 468 U.S. at 99–10.

procompetitive and anticompetitive effects of the amateurism rule being challenged: student-athletes' inability to receive compensation for their NIL.[66]

In June 2014, the district court found that the NCAA's NIL rules violated Section 1 of the Sherman Act despite its determination that the rules served a procompetitive purpose because the same outcome could have been achieved through less restrictive alternatives.[67] The less restrictive alternatives outlined by the district court were: (1) permitting NCAA member schools to award stipends up to the full cost of attendance, and (2) allowing member schools to pay DI student-athletes up to $5,000 per year in deferred compensation upon graduation from their respective school.[68]

On appeal, the NCAA argued that its amateurism rules were "valid as a matter of law" according to the Court's dicta in *Board of Regents*.[69] The Ninth Circuit Court of Appeals rejected this argument, concluding that it was "not bound by *Board of Regents* to conclude that every NCAA rule that somehow relates to amateurism is automatically valid."[70] The Ninth Circuit further stated that "we accept *Board of Regents*' guidance as informative with respect to the procompetitive purposes served by the NCAA's amateurism rules, but we will go no further than that."[71] The appellate court therefore proceeded to the rule of reason analysis.[72]

After affirming the anticompetitive effect of the compensation rules, the Ninth Circuit analyzed only one of the NCAA's proffered procompetitive justifications: the "promotion of amateurism."[73] The Ninth Circuit ultimately concluded that the compensation rules served the procompetitive purposes of: (1) integrating academics with collegiate athletics, and (2) "preserving the popularity of the NCAA's product by promoting its *current* understanding of amateurism."[74] Before reaching the Ninth Circuit, the district court

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66 *See* Faucon, *supra* note 3, at 59.

67 O'Bannon v. NCAA, 802 F.3d 1049, 1056–57 (9th Cir. 2015).

68 *Id.* at 1060–61.

69 *Id.* at 1061.

70 *Id.* at 1063.

71 *Id.* at 1064.

72 *Id.* at 1070.

73 *O'Bannon*, 802 F.3d at 1072.

74 *Id.* at 1073 (emphasis added) (quoting O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1005 (N.D. Cal. 2014)).

noted that this current definition of amateurism is inconsistent and that the definition has changed continuously over the years in "significant and contradictory ways."[75]

As to the less restrictive alternatives identified by the district court, the Ninth Circuit upheld the increased cap on financial aid up to the cost of attendance because it did not undermine the procompetitive purpose of the NCAA's amateurism rules.[76] The funds covered "legitimate educational expenses" and therefore kept the student-athletes' amateur status intact.[77] However, the appellate court did not affirm the alternative restriction permitting student-athletes to receive deferred NIL payments "untethered to their education expenses."[78] The Ninth Circuit emphasized "that not paying student-athletes is *precisely what makes them amateurs*," so these deferred payments did not sufficiently preserve amateurism so as to constitute a reasonable alternative.[79] Although this may have seemed like a loss for student-athletes in terms of their right to be compensated for their NIL, the Ninth Circuit highlighted that certain NCAA amateurism rules are "more restrictive than necessary to maintain its tradition of amateurism."[80]

C. Alston*: Redefining the NCAA's Power*

Before *O'Bannon* was decided in 2015, several DI football and basketball (male and female) student-athletes filed antitrust suits against the NCAA.[81] All these suits, with one exception, were consolidated into one action that was ultimately reviewed by the Court in the 2021 *Alston* decision.[82] The scope of the amateurism rules challenged in *Alston* was not limited to NIL compensation, but rather, "[t]he student-athletes challenged the 'current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services.'"[83] The district court approved

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[75] *Id.* at 1058–59 (quoting *O'Bannon*, 7 F. Supp. 3d at 1000).

[76] *See id.* at 1074–75.

[77] *Id.* at 1075.

[78] *Id.* at 1076.

[79] *O'Bannon*, 802 F.3d at 1076.

[80] *Id.* at 1079.

[81] *See* Faucon, *supra* note 3, at 64.

[82] *See id.* at 64, 66.

[83] NCAA v. Alston, 594 U.S. 69, 80 (2021) (quoting *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1062 (N.D. Cal. 2019)).

some of the NCAA's compensation rules and rejected others, and on appeal, the NCAA challenged the district court's ruling in an attempt to "seek[] immunity from the normal operation of the antitrust laws."[84]

1. JUSTICE GORSUCH'S MAJORITY

Despite the Ninth Circuit's ruling in *O'Bannon*, the NCAA argued—once again—that the Court is bound by its language in *Board of Regents*.[85] The NCAA contended that the *Board of Regents* decision "expressly approved its limits on student-athlete compensation—and this approval forecloses any meaningful review of those limits today."[86] In its opinion, the Court highlighted that student-athlete compensation rules were not at issue in *Board of Regents*, and it further emphasized that the "market realities" of collegiate sports have changed dramatically since that case was decided in 1984.[87]

In addition to rejecting the NCAA's argument that it should be granted deferential treatment under antitrust law, the Court upheld the district court's findings in its rule of reason analysis.[88] After the student-athletes met their burden of proof, the district court assessed the NCAA's only viable procompetitive justification: that "its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports."[89] In evaluating this procompetitive rationale, the district court failed to ascertain what the current conception of amateurism entails given the consistent changes to the NCAA's amateurism rules.[90] The district court emphasized "that the NCAA 'nowhere define[s] the nature of the amateurism they claim consumers insist upon.'"[91] Moreover, the district court found little evidentiary support for the NCAA's assertion that its compensation restrictions

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[84] *Id.* at 74.
[85] *See id.* at 91.
[86] *Id.*
[87] *Id.* at 92–93.
[88] *See id.* at 107.
[89] *Alston*, 594 U.S. at 82.
[90] *See id.* at 83.
[91] *Id.* (quoting *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019)).

impacted consumer demand.[92] The NCAA ultimately "failed to establish that its rules *collectively* sustain consumer demand"[93] for collegiate sports, but the district court determined that select rules might be procompetitive "'to the extent' they prohibit compensation 'unrelated to education, akin to salaries seen in professional sports leagues.'"[94]

To that point, the district court rejected the plaintiffs' challenge to NCAA amateurism rules that limit scholarships "to the full cost of attendance and that restrict compensation and benefits *unrelated to education*."[95] However, the district court sided with the plaintiffs as to the NCAA's restrictions on education-related compensation.[96] The court determined that the removal of "caps on education-related benefits—such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships"—constitutes a reasonable less restrictive alternative because these education-related payments reaffirm the student-athletes' amateur status and help distinguish the collegiate athlete from a professional one.[97] Therefore, the district court only enjoined the NCAA from restricting education-related compensation and benefits to DI football and basketball student-athletes.[98] Moreover, this holding was limited to NCAA and multiconference rules, so the individual athletic conferences could still impose compensation restrictions at their discretion.[99]

2. JUSTICE KAVANAUGH'S CONCURRENCE

In addition to upholding the NCAA's education-related restraints as unlawful, Justice Kavanaugh took this opportunity to question the validity of the NCAA's remaining compensation rules in a concurring opinion.[100] Justice Kavanaugh emphasized that the remaining compensation rules are subject to rule of reason scrutiny

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92 *Id.*
93 *Id.* at 99 (emphasis added).
94 *Id.* at 99–100 (quoting *In re NCAA*, 375 F. Supp. 3d at 1082–83).
95 *Alston*, 594 U.S. at 84 (emphasis added).
96 *See id.*
97 *Id.*
98 *Id.* at 85.
99 *Id.* at 103.
100 *See id.* at 108 (Kavanaugh, J., concurring).

and, from his perspective, the NCAA's procompetitive defense is prone to attack.[101] He argued that the NCAA's justification for not paying student-athletes their fair share of compensation employs a circular theory of reasoning: "that the defining characteristic of college sports is that the colleges do not pay student athletes."[102] Justice Kavanaugh further discussed the complex questions that would arise if the remaining compensation rules were deemed unlawful under antitrust principles, and in doing so, he described a potential new era of college sports.[103] In the last sentence of his concurrence, Justice Kavanaugh reminded the NCAA that they are "not above the law."[104]

The Court thus made the NCAA more vulnerable to antitrust challenges to its amateurism rules by affirming the findings of the district court and asserting that the NCAA does not deserve deferential treatment. Consequently, the Court undermined the power the NCAA once claimed.[105] The new era of college sports that Justice Kavanaugh envisioned is seemingly becoming a reality as opposed to pure speculation.[106] The questions he raised in 2021 are now at the center of the college sports world, and the answers to these questions are no clearer now than they were three years ago.[107]

III. THE DEMISE OF AMATEURISM UNDER NCAA REGULATION

The "amateur model" observed today is nowhere near what the founders envisioned it to be.[108] The NCAA's lack of effective enforcement and unwillingness to respond to the changing collegiate landscape caused the DI student-athlete to become a quasi-professional one.[109] The current state of DI athletics exemplifies how

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101 *Alston*, 594 U.S. at 108–09.
102 *Id.* at 110–11.
103 *See id.* at 111.
104 *Id.* at 112.
105 *See id.*
106 *See id.* at 111; discussion *infra* Section IV.C.
107 *See* discussion *infra* Section IV.C.
108 *See* Rosenthal, *supra* note 1, at 323.
109 *See* Michael D. Fasciale, Comment, *The Patchwork Problem: A Need for National Uniformity to Ensure an Equitable Playing Field for Student-Athletes' Name, Image, and Likeness Compensation*, 52 SETON HALL L. REV. 899, 905–06 (2022); Henry Skarecky, *How the NCAA Is Attempting to Rein in the Chaos of the*

blurred the line between college and professional sports has become.[110] The fact that this became a reality under the NCAA's control, or lack thereof, demonstrates that the NCAA cannot self-regulate its amateur model.[111]

A. *Notable Developments Within the Last Decade*

Although the amateur model has observed changes since the NCAA's inception, the most striking changes have occurred within the last decade.[112] The recent liberalization of NIL compensation opportunities, easing of transferability restrictions among athletic programs, and realignment of athletic conferences constitute substantial developments that undermine the amateur character of both the student-athlete and athletic conferences.[113] These changes have disproportionately impacted DI sports, where DI student-athletes and conferences now mimic their professional counterparts.[114]

1. NIL DEVELOPMENTS

Under the traditional amateur model, student-athletes could not be compensated for any use or commercialization of their NILs.[115] Rather, the NCAA and its member institutions reaped the benefits.[116] Although member schools could not profit off the commer-

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Transfer Portal, GEO. VOICE (Apr. 29, 2023), https://georgetown-voice.com/2023/04/29/how-the-ncaa-is-attempting-to-rein-in-the-chaos-of-the-transfer-portal/.

110 *See* discussion *infra* Section III.B.

111 *See* Andrew Bondarowicz, *The NCAA's Historical Challenges with Antitrust Issues and Its Current Battle for Continued Relevance*, 45 SETON HALL LEGIS. J. 575, 601 (2021).

112 *See generally* Kargl, *supra* note 8 (summarizing the consistent changes to the amateur model from the NCAA's founding through the twenty-first century).

113 *See* discussion *infra* Section III.B.

114 *See* Nicole Auerbach, *NCAA Changes Transfer Rules, Formalizing Era of Immediate Eligibility: How We Got Here*, N.Y. TIMES (Apr. 16, 2024), https://www.nytimes.com/athletic/5419130/2024/04/16/college-football-transfer-portal-rule-changes/; Michael McCann, *ACC Adds Stanford, Cal, SMU and Antitrust Risk*, SPORTICO (Sept. 1, 2023, 3:03 PM) [hereinafter *ACC Adds Antitrust Risk*], https://www.sportico.com/law/analysis/2023/acc-expansion-antitrust-employment-law-1234735969/.

115 *See* Faucon, *supra* note 3, at 49.

116 *Id.*

cialization of an individual student-athlete's NIL, they could commercialize multiple student-athletes' NIL.[117] If student-athletes violated these restrictions and accepted compensation for the use or commercialization of their NIL, they would lose their amateur status and be ineligible to compete.[118]

The beginning of the end to this approach to NIL rights took place in September 2019, when California Governor Gavin Newsom signed "The Fair Pay to Play Act" into law.[119] The Fair Pay to Play Act allowed "student-athletes enrolled in California colleges and universities to be compensated for the use of their name, images, and likenesses just like non-athletes" and not lose their eligibility as a result.[120] Before the bill became law, the NCAA Board of Governors (the "Board") sent a letter to Governor Newsom arguing that the proposed bill would "erase the critical distinction between college and professional athletics and, because it gives those schools an unfair recruiting advantage, would result in them eventually being unable to compete in NCAA competitions."[121] The Board also voiced their desire "to develop a fair name, image and likeness approach for all [fifty] states."[122] These efforts proved to be ineffective, and other states began to follow California's lead.[123]

The NCAA responded to the pressure of this new state legislation by publishing notices "encouraging each conference to consider ways to allow student-athletes to share in the revenues and participate in the commercialization of student-athlete NILs."[124] The Board also created a working group to discuss the potential restructuring of its NIL rules and offer recommendations.[125] In July 2020,

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117 *See id.*

118 *Id.* at 50.

119 *See* Steven A. Bank, *The Olympic-Sized Loophole in California's Fair Pay to Play Act*, 120 COLUM. L. REV. F. 109, 109 (2020).

120 *Id.*

121 *NCAA Responds to California Senate Bill 206*, NCAA (Sept. 11, 2019, 10:08 AM), https://www.ncaa.org/news/2019/9/11/ncaa-responds-to-california-senate-bill-206.aspx.

122 *Id.*

123 *See* Faucon, *supra* note 3, at 51; Ashley J. Beth, *NCAA & Agent Representation: The Policy Implications of Agent's Roles Pertaining to Proposed Name, Image, and Likeness Legislation*, LOY. UNIV. CHI. SCH. OF L.: INSIDE COMPLIANCE (Aug. 26, 2020), https://blogs.luc.edu/compliance/?p=3111.

124 *See* Faucon, *supra* note 3, at 51.

125 *See* Beth, *supra* note 123.

the working group presented its recommendations to Congress and requested federal NIL legislation in hopes of preventing the states from adopting their own NIL rules.[126] Several state statutes, however, were set to become effective in July 2021, and a federal solution had not yet been finalized.[127] Governance bodies in all three NCAA divisions ultimately decided to adopt an interim NIL policy on June 30, 2021, in an attempt to provide some uniformity.[128]

This interim policy essentially replaced the former NIL rules, announcing that "[i]ndividuals can engage in NIL activities that are consistent with the law of the state where the school is located," and those student-athletes "who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image and likeness."[129] The policy further permitted student-athletes to work with professional service providers, such as agents and attorneys, to protect their NIL rights.[130] This policy applied to all incoming and current student-athletes in all collegiate sports.[131]

Despite this new opportunity for student-athletes to profit off their NIL, the division presidents stressed that the policy did not alter NCAA rules regarding payment in exchange for athletic services ("pay for play").[132] Student-athletes were also confined by the "no conflict" provision, which prevented student-athletes from entering into contracts for the use of their NIL that conflicted with their team contract.[133]

Currently, there is still no finalized federal response to the new NIL framework.[134] As bills continue to be introduced in Congress,

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126 *Id.*

127 *See* Faucon, *supra* note 3, at 51.

128 *See id.* at 51–52; Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx.

129 Hosick, *supra* note 128.

130 *See id*.; Faucon, *supra* note 3, at 52.

131 Hosick, *supra* note 128.

132 *See* Faucon, *supra* note 3, at 52.

133 *See* Bank, *supra* note 119, at 112.

134 *See* Ben Pope et al., *Highlights of the Federal Proposals to Regulate NIL Deals*, LITTLER: INSIGHT (Feb. 6, 2024), https://www.littler.com/publication-press/publication/highlights-federal-proposals-regulate-nil-deals.

the states continue to rely on their own NIL laws.[135] Despite the NCAA's assertion that the interim policy was "a temporary solution pending further collaboration between the NCAA and Congress," it appears that the states have usurped the NCAA's power in this realm for the time being.[136] Until a federal solution is implemented, the current "patchwork of different laws from different states" will control.[137]

That said, the NCAA DI Council approved a proposal on January 10, 2024, to "address student-athlete protections related to name, image and likeness effective Aug[ust] 1."[138] To better protect student-athletes' interests, the NCAA plans to "establish a voluntary registration process for NIL service providers," such as agents, to form a centralized database, require student-athletes to disclose NIL agreements exceeding $600 in value to their respective schools,[139] and educate student-athletes on contractual obligations and best practices for NIL deals.[140] In April 2024, the DI Council approved another "proposal that allows schools to provide assistance in supporting name, image and likeness activities for student-athletes who disclose NIL arrangements, effective Aug[ust] 1."[141] Under this more recent proposal, member schools can be more involved in

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135 *See id.*

136 Faucon, *supra* note 3, at 52.

137 Bank, *supra* note 119, at 111.

138 Meghan Durham Wright, *Division I Council Approves NIL Disclosure and Transparency Rules*, NCAA (Jan. 10, 2024, 7:56 PM) [hereinafter *DI Council Approves NIL Disclosure and Transparency Rules*], https://www.ncaa.org/news/2024/1/10/media-center-division-i-council-approves-nil-disclosure-and-transparency-rules.aspx.

139 In April 2024, the DI Council amended this rule to require students to disclose "any NIL activity *equal to or greater than* $600 in value, no later than [thirty] days after entering or signing the NIL agreement" to receive school support for their NIL arrangements. Meghan Durham Wright, *DI Council Approves NIL Reforms, Permits School Assistance with NIL Activity*, NCAA (Apr. 17, 2024, 6:32 PM) [hereinafter *DI Council Approves NIL Reforms*] (emphasis added), https://www.ncaa.org/news/2024/4/17/media-center-di-council-approves-nil-reforms-permits-school-assistance-with-nil-activity.aspx.

140 *DI Council Approves NIL Disclosure and Transparency Rules*, *supra* note 138.

141 *DI Council Approves NIL Reforms*, *supra* note 139.

"identifying NIL opportunities and facilitating deals between student-athletes and third parties."[142]

Although these proposals indicate that the NCAA is finally starting to take a more proactive versus reactive stance on NIL opportunities, the NCAA was placed back on the defensive earlier this year. In February 2024, U.S. District Judge Clifton Corker of the Eastern District of Tennessee granted a preliminary injunction preventing the NCAA from enforcing its NIL rules that "prohibit student-athletes from signing NIL contracts that are designed as inducements to get them to attend a particular school" during the recruitment process or while they are in the transfer portal.[143] In his decision, Judge Corker concluded that "[w]hile the NCAA permits student-athletes to profit from their NIL, it fails to show how the timing of when a student-athlete enters such an agreement would destroy the goal of preserving amateurism."[144] In granting this injunction, Judge Corker ultimately sanctioned the practice of third parties, such as collectives,[145] paying recruits to attend a certain school.[146]

In response to the injunction, NCAA President Charlie Baker announced that "[a]n endless patchwork of state laws and court

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[142] *Id.*

[143] In bringing this lawsuit, "[t]he attorneys general of Tennessee and Virginia argued that the NCAA is illegally restricting opportunities for student-athletes by preventing them from negotiating the terms of NIL deals prior to deciding where they want to go to school." Dan Murphy, *NCAA Can't Enforce NIL Rules After Judge Grants Injunction*, ESPN (Feb. 24, 2024, 9:16 AM), https://www.espn.com/college-sports/story/_/id/39585390/ncaa-enforce-nil-rules-judge-grants-injunction.

[144] Tennessee v. NCAA, No. 3:24-CV-00033-DCLC-DCP, 2024 WL 755528, at *3 (E.D. Tenn. Feb. 23, 2024).

[145] Collectives are "groups of individuals (typically alumni and influential supporters of universities) [that] have formed new business entities, with the purpose of funding NIL endorsements." *NCAA Takes Aim at Booster-backed "Collectives" and Their NIL Deals*, DAVIS GILBERT (June 22, 2022), https://www.dglaw.com/ncaa-takes-aim-at-booster-backed-collectives-and-their-nil-deals/. Collectives are created with the intent of "lur[ing] top-tier athletes to specific universities by promising them lucrative NIL payments." *Id.*

[146] Teresa M. Walker & Ralph D. Russo, *Judge Hands NCAA Another Loss, Says Compensation Rules Likely Violate Antitrust Law, Harm Athletes*, ASSOCIATED PRESS (Feb. 23, 2024, 11:31 PM), https://apnews.com/article/tennessee-ncaa-lawsuit-nil-7ecfad9c88f8c8baa7e0f4bb00f22ec9.

opinions make clear partnering with Congress is necessary to provide stability for the future of all college athletes."[147] The NCAA's failure to adapt to the evolving collegiate landscape as it relates to NIL has forced it to Congress' doorstep and augmented the uncertainty currently surrounding college sports.[148]

2. TRANSFER RULE DEVELOPMENTS

Up until recently, the NCAA enforced strict transfer rules to restrain the student-athlete from transferring from one NCAA member school to another.[149] Under the traditional transfer rule framework, student-athletes had to obtain permission from their current school to transfer to another member school.[150] If they obtained such permission, they were not eligible to play at the new school until they spent one full academic year there.[151] These rules created a disincentive to transfer because the student-athlete would have to forfeit an entire year of eligibility.[152] Waivers of this one-year requirement were available in limited circumstances, but the transferee school rather than the student-athlete had to request such waiver.[153]

This framework observed a significant change in 2018 with the introduction of the NCAA Transfer Portal (the "portal").[154] Student-athletes could enter the portal in hopes of transferring to another school without requesting their current school's permission.[155] Another major change occurred in April 2021 when the NCAA DI Board of Directors approved a rule that allowed student-athletes across all sports to transfer one time in their collegiate career and be immediately eligible to compete at their new school.[156] This one-

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147 *Id.*

148 *See id.*

149 Roger D. Blair & Wenche Wang, *The NCAA's Transfer Rules: An Antitrust Analysis*, 11 HARV. J. SPORTS & ENT. L. 1, 1 (2020).

150 *See id.* at 2–3.

151 *See id.* at 5.

152 *See id.* at 5–6.

153 *See id.* at 3.

154 Skarecky, *supra* note 109.

155 *See id.*

156 Associated Press, *NCAA 1-Time Transfer Rule Clears Last Step, Starts With 2021-22 Academic Year*, ESPN (Apr. 28, 2021, 6:59 PM), https://www.espn.com/college-sports/story/_/id/31353578/ncaa-1-transfer-rule-clears-last-step-sta-rts-2021-22-academic-year.

time exception was granted to select student-athletes in prior years, but it was not made available to the high-revenue sports, such as DI men's and women's basketball or DI football, until this development.[157] Even if a student-athlete had transferred once already, he or she could still request a waiver to become immediately eligible at the next school.[158] This new rule took effect in the 2021–22 academic year, and a significant increase in the number of DI transfers followed.[159] For example, in the 2022–23 off-season, over twenty percent of student-athletes on scholarship in men's and women's DI basketball and DI football entered the portal.[160]

The NCAA began taking action to minimize the increasingly influential role of the portal in college sports.[161] In August 2022, the DI Council approved new transfer window dates that outlined when a player can enter the portal.[162] Previously, a student-athlete could enter the portal at any time throughout the year, so this new rule was intended to streamline off-season recruiting and reduce the uncertainty accompanying mid-season transfers.[163] These windows also provide more certainty as to the amount of scholarship that might be available for new recruits.[164] Even if student-athletes are on scholarship at their current school, they are not guaranteed to remain on scholarship if they transfer, so these new windows help clarify whether the transferee school can offer sufficient funds.[165]

The NCAA also approved a new set of guidelines in March 2023 that limited the reasons for granting an eligibility waiver for student-athletes who already used their one-time transfer exception.[166] Un-

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157 *See id.*

158 Skarecky, *supra* note 109.

159 *See* Associated Press, *supra* note 156; Tom VanHaaren, *College Football's New Transfer Portal Windows, Explained*, ESPN (Nov. 9, 2022, 6:35 AM), https://www.espn.com/college-football/story/_/id/34967085/college-football-new-transfer-portal-windows-explained.

160 Skarecky, *supra* note 109.

161 *See id.*

162 VanHaaren, *supra* note 159.

163 *See id.*; Skarecky, *supra* note 109.

164 *See* VanHaaren, *supra* note 159.

165 *See id.*

166 *See* Skarecky, *supra* note 109.

der these guidelines, a waiver would only be granted for reasons related to a student-athlete's physical or mental health, exigent circumstances, or education-related disabilities.[167]

Despite these recent attempts by the NCAA to mitigate the unprecedented impact of the portal, the NCAA acquiesced in an antitrust battle that targeted these transfer eligibility rules.[168] The lawsuit was joined by several plaintiff states and the Department of Justice,[169] and it argued that the NCAA's restrictions on transfer eligibility illegally restrain college athletes in the relevant labor market: DI athletics.[170] In response to the litigation, the DI Council ultimately approved a new set of rules that allows undergraduate and graduate students to transfer and be immediately eligible, regardless of the amount of times they previously transferred, so long as they satisfy outlined academic eligibility requirements.[171] The transfer window dates remain in effect, however, even with the adoption of these new rules.[172]

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[167] Mike McDaniel, *NCAA Updates Rules for Undergraduate Transfer Waivers*, SPORTS ILLUSTRATED (Mar. 23, 2023), https://www.si.com/college/2023/03/23/ncaa-updates-rules-undergraduate-transfer-waivers.

[168] *See* Ralph D. Russo, *NCAA Allows Transfers to Be Immediately Eligible, No Matter How Many Times They've Switched Schools*, ASSOCIATED PRESS (Apr. 17, 2024, 7:44 PM) [hereinafter *NCAA Allows Transfers to Be Immediately Eligible*], https://apnews.com/article/ncaa-transfer-rules-9c1c8b499e21a26e7978f22ed35a380a.

[169] Noah Henderson, *U.S. DOJ Joins Action Against NCAA Transfer Rules*, SPORTS ILLUSTRATED (Jan. 20, 2024, 12:00 PM), https://www.si.com/fannation/name-image-likeness/news/u-s-doj-joins-action-against-ncaa-transfer-rules-noah9.

[170] Amended Complaint for Injunctive Relief at 10, Ohio et al., v. NCAA, 706 F. Supp. 3d 583 (N.D.W.V. 2023) (No. 1:23-cv-100).

[171] Meghan Durham Wright, *Division I Council Approves Changes to Transfer Rules*, NCAA (Apr. 17, 2024, 6:35 PM) [hereinafter *DI Council Approves Changes to Transfer Rules*], https://www.ncaa.org/news/2024/4/17/media-center-division-i-council-approves-changes-to-transfer-rules.aspx.

[172] *See id.* On October 8, 2024, the DI Council voted to shorten the transfer window dates for football and men's and women's basketball. *See* Max Olson, *NCAA's Division I Council Votes to Shorten Transfer Windows*, ESPN (Oct. 8, 2024, 6:34 PM), https://www.espn.com/college-sports/story/_/id/41686947/ncaa-division-council-votes-shorten-transfer-windows. Student-athletes in the FBS and FCS now have a twenty-day winter transfer window and ten-day spring window. *Id.* Those competing in men's and women's basketball will also have thirty days to transfer instead of the forty-five days they once had. *See id.* "Once they've entered the portal, players will still be able to transfer to a new school at any time."

Once again, the NCAA only made changes when forced to react.[173] Now that transferability is the least restrictive it has ever been in NCAA history, it seems likely that transferring schools during one's college career will become the norm rather than the exception in this new era of college sports.[174]

3. CONFERENCE REALIGNMENTS

As showcased in *Board of Regents*, broadcast and media rights are a key concern for NCAA member institutions and athletic conferences.[175] In fact, media rights constitute the main source of revenue for college athletic programs.[176] This dependency on a strong media presence has come to the forefront with the most recent wave of conference realignments, largely guided by DI football programs.[177] In July 2021, after a relatively long period of conference stability, the University of Texas ("UT") and Oklahoma University ("OU") revealed their intent to join the Southeastern Conference ("SEC"), and just under one year later, the University of Southern California ("USC") and University of California Los Angeles ("UCLA") announced their plan to leave the Pacific-Twelve Conference ("Pac-12") and join the Big Ten Conference ("Big Ten").[178] Around the time of these announcements, the SEC was purportedly discussing a lucrative new media deal with ESPN while the Pac-12

Id. This recent measure represents another step the NCAA has taken to lessen the impact of the portal.

173 *See NCAA Allows Transfers to Be Immediately Eligible*, *supra* note 168.

174 *See* Auerbach, *supra* note 114.

175 *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 105–06 (1984).

176 Associated Press, *Pac-12's Downfall Came After It Could Not Adjust to Changing Media Landscape*, NBC SPORTS (Aug. 7, 2023, 10:35 PM), https://www.nbcsports.com/college-football/news/pac-12s-downfall-came-after-it-could-not-adjust-to-changing-media-landscape.

177 *See* Jabari Young, *To Understand Why Texas and Oklahoma Want to Move to the SEC, Follow the Money*, CNBC (July 29, 2021, 7:42 AM), https://www.cnbc.com/2021/07/29/why-texas-and-oklahoma-want-to-move-to-the-sec-follow-the-money.html.

178 *See* Stewart Mandel, *College Football Conference Realignment Timeline: 124 Years of Drama, Money and Bitterness*, N.Y. TIMES (July 14, 2023), https://theathletic.com/4662822/2023/07/14/college-football-conference-realignment-history/.

was being outperformed by the Big Ten and SEC in media rights revenue.[179]

These announcements created a domino-effect of schools leaving their former conferences and joining new ones, and the Pac-12 ultimately collapsed after failing to reach a suitable media deal.[180] With the demise of the Pac-12, the "Power Five Conference" era of college football was replaced with a "Power Four" landscape.[181] While conferences were generally central to one geographic area under the Power Five model, member schools within the same conference now span from coast to coast.[182] These changes will present logistical issues for student-athletes in terms of their travel and academic schedules, but leadership at USC and UCLA, for example, contend that the move to the Big Ten will offer "increased visibility, exposure, and resources" as well as "exciting new competitive opportunities."[183]

B. *Loss of Amateurism in DI Sports*

The traditional amateur model built on the primacy of academics and loyalty to school programs has been replaced by a semi-professional model in DI sports where academics play a far less integral role. When deciding where to attend college, student-athletes will likely look to those states and member schools with the best NIL opportunities rather than the schools that are the best educational fit

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[179] *See* Young, *supra* note 177; J. Brady McCollough, *Inside the Pac-12 Collapse: Four Surprising Moments That Crushed the Conference*, L.A. TIMES (Aug. 16, 2023, 4:42 PM), https://www.latimes.com/sports/story/2023-08-16/pac-12-collapse-decisions-realignment-ucla-oregon.

[180] *See* McCollough, *supra* note 179; Ralph D. Russo, *AP Sports Story of the Year: Realignment, Stunning Demise of Pac-12 Usher in Super Conference Era*, ASSOCIATED PRESS (Dec. 18, 2023, 9:39 PM) [hereinafter *AP Sports Story of the Year*], https://apnews.com/article/conference-realignment-e0356caa1c9cf5ba2630e7b23a1a06ed.

[181] *AP Sports Story of the Year*, *supra* note 180 (noting that the Pac-12 is likely to survive but not remain in the same tier as the Big Ten, Big 12, SEC, and Atlantic Coast Conference ("ACC") who now make up the "Power Four").

[182] *See id.*; David Cobb, *USC, UCLA to Leave Pac-12 for Big Ten in 2024: College Sports Begins its Latest Seismic Shakeup*, CBS SPORTS (June 30, 2022, 8:27 PM) [hereinafter *Latest Seismic Shakeup*], https://www.cbssports.com/college-football/news/usc-ucla-to-leave-pac-12-for-big-ten-in-2024-college-sports-begins-its-latest-seismic-shakeup/.

[183] *Latest Seismic Shakeup*, *supra* note 182.

for them.[184] Given the current patchwork of state NIL laws and the heightened role that member schools and third party collectives can now play in the recruitment process, some states and schools will be more appealing merely because of their NIL arrangements rather than their academic opportunities.[185] This places the focus on compensation rather than academics, which is a reality that directly contradicts the foundational principles of the NCAA's traditional amateur model.[186]

Even when a student-athlete commits to a school, there is no guarantee that he or she will remain there.[187] Now that student-athletes can transfer an unlimited amount of times and remain immediately eligible to play, member schools' athletic programs have to dedicate far more resources to recruiting.[188] According to leadership at a Power Five school, collegiate programs have "to start thinking like NFL teams" in that they have to recruit new talent and restructure their roster every offseason.[189] These constant changes to the roster result in an everchanging team dynamic—a trend that the traditional amateur model did not contemplate.[190]

The decision to transfer is the easiest it has ever been, and the current, free agency-like movement of star players will remain the norm for DI sports.[191] This consistent movement in pursuit of better playing and compensation opportunities also prioritizes academics far less than what the amateur model envisioned.[192] Research reveals that athletes who transfer are less likely to earn a degree, which is the antithesis of what the amateur model stands for.[193]

The traditional amateur model has been further undermined by recent conference consolidation.[194] The new Power Four model has uprooted historic college rivalries and created conferences that span

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184 *See* Fasciale, *supra* note 109, at 909.
185 *See id.*; *DI Council Approves NIL Reforms*, *supra* note 139.
186 *See* Rosenthal, *supra* note 1, at 323–24.
187 *See* Skarecky, *supra* note 109.
188 *See* VanHaaren, *supra* note 159; Auerbach, *supra* note 114.
189 VanHaaren, *supra* note 159.
190 *Id.*
191 *See* Auerbach, *supra* note 114.
192 *See* Rosenthal, *supra* note 1, at 323–24.
193 *See* Skarecky, *supra* note 109.
194 *See AP Sports Story of the Year*, *supra* note 180.

the country.[195] Despite statements made by leadership at member schools suggesting that these changes are in the best interest of the student-athlete, the true underlying motive is the revenue derived from media deals.[196] It is questionable whether academics remain a top priority under this new model where student-athletes will travel across the country for multiple days during their academic semesters.[197] The remaining power conferences now resemble professional leagues, "where coaches earn millions of dollars, TV contracts pay billions of dollars, and athletes travel across the country . . . to play intraconference games."[198]

Although these trends affect intercollegiate athletics in their own unique ways, the accumulative effect has blurred the line between college and professional sports.[199] Student-athletes can now enter into lucrative NIL deals and transfer programs as if they are a professional free agent, and member schools now operate on a model akin to professional sports teams.[200] This reality showcases the loss of amateurism at the DI level.

IV. WHAT CAN BE DONE TO PRESERVE AMATEURISM IN COLLEGE SPORTS, IF ANYTHING?

Now that DI sports have arguably morphed into semi-professional sports, will a distinguishable consumer demand for collegiate sports cease to exist? Studies show that certain consumer demographics still prefer college sports that are distinct from professional sports.[201] To fulfill this consumer demand, the solution might be to take steps aimed at preserving amateurism in DII and DIII sports—where the student-athlete reflects the traditional amateur model far more than their DI counterpart.[202] As part of this effort,

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195 *See Latest Seismic Shakeup*, *supra* note 182.

196 *See id.*; *AP Sports Story of the Year*, *supra* note 180.

197 *See ACC Adds Antitrust Risk*, *supra* note 114.

198 *Id.*

199 *See* Auerbach, *supra* note 114.

200 *See id.*; VanHaaren, *supra* note 159.

201 Faucon, *supra* note 3, at 79–80.

202 *See* Skarecky, *supra* note 109 (highlighting high transfer rates among high-revenue DI sports); Michael McCann et al., *Name, Image and Likeness: A Guide to College Athlete NIL Deals, Compensation*, SPORTICO (Mar. 7, 2023, 12:00

there would be a greater emphasis on academics and less free-agency like movement in pursuit of economic opportunities.[203] Preserving this sense of amateurism could "encourage student-athletes to stay in school longer, graduate, and emerge with practical and professional life skills."[204] However, steps must be taken *now* to protect the amateur character of DII and DIII sports. This Note proposes two solutions that will likely need to occur in conjunction to achieve this objective: (1) separate and independent regulatory oversight of DII and DIII sports, and (2) the ability to opt-in or out of DI status on a sport-by-sport basis for legislative and competitive purposes.

A. *NCAA's Failure to Respond: The Need for Separate and Independent Regulation of DII and DIII Sports*

To effectively prevent DII and DIII sports from losing their amateur character, these programs should be overseen by an independent regulatory body separate from DI regulation.[205] The NCAA has consistently failed to respond to the changing collegiate landscape, adopting a "paternalistic" approach to emerging issues such as NIL opportunities.[206] To exemplify, the NCAA maintained its desire to "police" the compensation framework instead of offering some sort of less restrictive alternative to the issues of compensation raised in *O'Bannon* and *Alston*.[207] The NCAA expressly opposed California's Fair Pay to Play Act and refused to recognize the changing realities of student-athlete compensation.[208] The NCAA's working group provided NIL policy recommendations that were more restrictive than the various state laws, thereby demonstrating the NCAA's failure to make reasonable concessions on this issue.[209] The NCAA's inability to respond effectively to state NIL legislation has

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PM), https://www.sportico.com/feature/college-athletes-paid-name-image-likeness-deals-nils-1234616329/ (noting that "most NIL dollars have gone toward Division I athletes, though deals at the Division II and even Division III level have happened.").

203 *See* Faucon, *supra* note 3, at 99.

204 *Id.*

205 *See* Bondarowicz, *supra* note 111, at 601–03.

206 *Id.* at 600.

207 *Id.*

208 *See NCAA Responds to California Senate Bill 206*, *supra* note 121.

209 *See* Fasciale, *supra* note 109, at 906.

ultimately forced the NCAA to rely on Congress for a federal response, demonstrating another instance of the organization's failure to self-regulate.[210]

This failure to oversee the amateur model for DI sports evidences why external oversight is needed across all NCAA divisions.[211] The NCAA has already requested that Congress intervene and establish a uniform NIL policy, so the possibility of appointing an independent regulatory body to monitor other aspects of DI sports may not be as inconceivable today as it once was.[212] In addition to his request for a federal NIL policy that would preempt the various state laws, Baker is hopeful that Congress will grant the NCAA an exemption from antitrust law.[213] Given the recent affirmation in *Alston* that the NCAA is not entitled to deferential treatment under antitrust law and Justice Kavanaugh's added point that the NCAA is "not above the law," it seems unlikely that the Court would approve this exemption if it is granted.[214]

Regardless of whether an alternative to self-regulation is adopted for DI sports, there should be a separate and independent regulatory body established for DII and DIII sports only. Student-athletes and member institutions that compete at the DII and DIII levels reflect the traditional amateur model far more than their DI counterparts, but if this amateurism is to be preserved, the NCAA should not be given another chance to enforce its model.[215] Rather, an outside regulatory agency such as the Federal Trade Commission or Department of Justice should oversee the aspects of amateurism

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[210] "Meanwhile, Congress must enact legislation to bring common sense to college athletics." Bondarowicz, *supra* note 111, at 600.

[211] *See id.* at 601–03.

[212] *See* Fasciale, *supra* note 109, at 907.

[213] *See* Michael McCann, *Year in Sports Law: The NCAA Amateurism Meltdown*, SPORTICO (Dec. 27, 2023, 5:55 AM) [hereinafter *Year in Sports Law*], https://www.sportico.com/law/analysis/2023/biggest-sports-law-controversies-2023-ncaa-amateurism-1234760591/.

[214] NCAA v. Alston, 594 U.S. 69, 112 (2021) (Kavanaugh, J., concurring); *see also* McCann et al., *supra* note 202 (discussing why Congress is unlikely to grant an antitrust exemption).

[215] *See* Bondarowicz, *supra* note 111, at 600–01.

that are still intact at the DII and DIII levels and enforce guidelines that preserve the unique characteristics of these athletic programs.[216]

Although the current NCAA NIL policies and various state NIL laws apply to DII and DIII student-athletes, compensation opportunities do not have as strong of an effect at these levels of competition.[217] Therefore, these oversight bodies could take steps now to ensure that the NIL deals that do exist at these levels are kept within reasonable bounds so as to prevent compensation from becoming the primary driver of school selection.[218] Further, reasonable restrictions could be placed on collectives to undermine the influence these boosters have in the recruitment process and encourage student-athletes to select a school fit for their educational and personal goals.[219] In doing so, there would be a greater focus on the academic and professional opportunities presented at a given school.[220] DI sports are too far gone to revert back to some sort of structured model for NIL compensation, but DII and DIII sports could still benefit from such regulation.[221]

Similarly, transfer exceptions that permit immediate eligibility are available to DII and DIII student-athletes, but efforts could be made to restrict the elements of free agency that are being observed at the DI level.[222] Despite the DI Council's statement that the new transfer rules "continue to prioritize long-term academic success for college athletes who transfer" and are intended to "encourage student-athletes to make well-informed decisions about transferring and the impacts such a move could have on time in their degree of choice,"[223] it is questionable whether DI

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[216] *See Antitrust: DOJ and FTC Jurisdictions Overlap, but Conflicts Are Infrequent*, U.S. GOV'T ACCOUNTABILITY OFF. (Jan. 3, 2023), https://www.gao.gov/products/gao-23-105790 (explaining that the Department of Justice and Federal Trade Commission are both tasked with the enforcement of federal antitrust laws).

[217] *See* McCann et al., *supra* note 202.

[218] *See* Fasciale, *supra* note 109, at 909.

[219] *See id*; Walker & Russo, *supra* note 146.

[220] *See* Fasciale, *supra* note 109, at 909.

[221] *See* McCann et al., *supra* note 202.

[222] *See* NCAA ELIGIBILITY CENTER, NCAA GUIDE FOR FOUR-YEAR TRANSFERS 2023–24 12 (2023), http://fs.ncaa.org/Docs/eligibility_center/Transfer/FourYearGuide.pdf.

[223] *DI Council Approves Changes to Transfer Rules*, *supra* note 171.

student-athletes are making transfer decisions based on what is best for their academic success now that pecuniary influences, such as collectives, are so involved in the recruitment and transfer process.[224]

If greater attention is afforded to the academic and professional opportunities offered at a member school as opposed to that school's NIL and collective opportunities, student-athletes may be more encouraged to remain with that school's athletic program and pursue a more stable path to a degree.[225] The appointed regulatory body could potentially enforce stricter academic eligibility guidelines to ensure that student-athletes are in fact prioritizing their academics, absent extraordinary circumstances that could be reviewed by such body. As of now, DII athletes, for example, must "have earned at least nine-semester/eight-quarter hours of degree credit from [their] last full-time term of attendance."[226] Incorporating a stricter grade point average requirement or requiring that student-athletes be "full-time" students based on their credit hours could further emphasize academic success and challenge the norm of unrestricted movement at the DI level.

The genuine love for competition, the sport, and the team drives the amateur student-athlete as opposed to compensation and economic opportunities.[227] The bona fide amateur athlete is also far

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[224] *See* David A. Fahrenthold & Billy Witz, *How Rich Donors and Loose Rules Are Transforming College Sports*, N.Y. TIMES (Oct. 22, 2023), https://www.nytimes.com/2023/10/21/us/college-athletes-donor-collectives.html ("The New York Times identified more than 120 collectives, including at least one for every school in each of the five major college football conferences. The average starter at a big-time football program now takes in about $103,000 a year, according to Opendorse, a company that processes payments to the players for the collectives. This year, Opendorse said it expects to process over $100 million in payments for athletes, with about 80 percent coming through collectives.").

[225] *See* Fasciale, *supra* note 109, at 909; Skarecky, *supra* note 109 (noting that "[r]esearch conducted by the NCAA reveals that athletes who transfer schools are less likely to earn a degree.").

[226] NCAA ELIGIBILITY CENTER, *supra* note 222, at 12.

[227] *See* Jack Kelly, *Newly Passed California Fair Pay to Play Act Will Allow Student Athletes to Receive Compensation*, FORBES (Oct. 1, 2019, 12:36 PM), https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-recei

more loyal to their member school and fellow teammates relative to today's star players who move from team to team.[228] This "revered tradition of amateurism in college sports" [229] can be maintained at the DII and DIII levels, but the NCAA has proven that it cannot regulate the amateur model on its own.[230] The appointment of an external body tasked with the regulation of DII and DIII sports offers more promise of preserving amateurism in college sports, but efforts must be taken now to achieve this objective.

B. *Amending the NCAA Bylaws: Allowing Schools to Opt-In or Out of DI on a Sport-by-Sport Basis for Legislative and Competitive Purposes*

As discussed previously, the loss of amateurism is felt most heavily in DI sports.[231] The 2024–25 NCAA DI Manual, which contains the most recent NCAA bylaws,[232] explains that each "member institution . . . is designated as a member of Division I, II or III for certain legislative and competitive purposes."[233] Bylaw 20.1.2.7 allows member institutions to "be members of different NCAA divisions,"[234] meaning that "[a] member of Division II or Division III may have a sport classified in Division I, provided the sport was so

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ve-compensation/ (discussing former college athlete Tim Tebow's belief that the focus of college sports should be an athlete's dedication to his or her school and team rather than potential compensation opportunities).

[228] *See id.*; Christian Goeckel, *Trevor Etienne Discusses Decision to Transfer to Georgia*, SPORTS ILLUSTRATED (Mar. 4, 2024, 12:47 PM), https://www.si.com/college/georgia/football/trevor-etienne-discusses-decision-to-transfer-to-georgia-football (detailing star running back Trevor Etienne's decision to transfer from the University of Florida to one of their SEC rivals—the University of Georgia).

[229] NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984).

[230] *See* Bondarowicz, *supra* note 111, at 600–01.

[231] *See* Auerbach, *supra* note 114; *ACC Adds Antitrust Risk*, *supra* note 114.

[232] *See* Bondarowicz, *supra* note 111, at 577.

[233] NCAA, DIVISION I 2024–25 MANUAL 357 (2024) [hereinafter DI 2024–25 MANUAL], https://www.ncaapublications.com/productdownloads/D125.pdf.

[234] *Id.* at 360.

classified during the 2010–11 academic year."[235] If a member institution elects to exercise this "multidivision classification,"[236] it nevertheless must select one division that controls for legislative and competitive purposes.[237]

If these bylaws are amended to permit the classification of DI versus DII or DIII status on a sport-by-sport basis for legislative and competitive purposes as opposed to the current blanket application, the sports that have not yet lost their amateur character could be more insulated from the quasi-professional trends occurring in DI sports.[238] The high-revenue sports, namely DI FBS football and DI men's and women's basketball, are the ones observing the pursuit of NIL deals and movement indicative of free agency most glaringly, given these sports' popularity, concentration of talent, and highly profitable media opportunities.[239]

Under the proposed amendment, a member institution could choose to promote these high-revenue sports at the DI level yet concurrently abide by DII or DIII regulations for its lower revenue sports. In doing so, the member school could apply more stringent amateurism rules to the sports classified as DII or DIII for legislative and competitive purposes and allow the sports classified as DI to operate under different guidelines that are more conducive to the reality of these quasi-professional programs.[240] In addition to preserving amateurism in the sports that have not yet lost touch with the traditional amateur model, member schools could also dedicate their resources more efficiently in response to differing consumer demands.[241]

This subclassification of sports programs is not an entirely novel concept for the NCAA.[242] In 2023, Baker proposed a new model for DI athletics that consists of a "subdivision where participating colleges can pay athletes at least $30,000 per year via an 'enhanced

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235 *Id.* at 371.
236 *Id.*
237 *Id.* at 360.
238 *See* Auerbach, *supra* note 114; *ACC Adds Antitrust Risk*, *supra* note 114.
239 *See* NCAA v. Alston, 594 U.S. 69, 79 (2021).
240 *See* DI 2024–25 MANUAL, *supra* note 233, at 360.
241 *See* Bondarowicz, *supra* note 111, at 576–77.
242 *See Year in Sports Law*, *supra* note 213.

educational trust fund.'"[243] The underlying objective was to "distinguish[] pro sports-like college programs from the rest" and "keep amateurism alive at DI colleges where the athletes are[] [not] pro prospects and where athletics' revenues are relatively modest."[244] Similarly, this proposed solution would attempt to differentiate sports programs that are still representative of the traditional amateur model from those that are quasi-professional and apply separate guidelines accordingly.

To make this classification process more streamlined, the NCAA could appoint the Strategic Vision and Planning Committee (the "Committee") or some other oversight body. The Committee currently monitors the reclassification process of member institutions that request to participate in a different division, so this group's experience could be beneficial for subclassification purposes.[245]

The separation between semi-professional DI programs and bona fide amateur programs that could be achieved through this amendment, in addition to the appointment of a separate and independent regulatory body, could make an instrumental difference in preserving what is left of amateurism in DII and DIII sports. Even if the high-revenue DI programs continue towards a model more akin to professional sports, this degree of separation could keep traces of the traditional amateur model alive.

C. *If Steps Are Not Taken Now, What Is Next for DII and DIII Sports?*

Given the influential role of collectives and NIL opportunities and the reality of free agency at the DI level, it is highly questionable whether a court would uphold the NCAA's amateurism defense as a reasonable procompetitive justification when it comes to DI sports.[246] These developments undermine the primacy of academics and grant student-athletes the same privileges of professional free agents—seeking out the best compensation deals and engaging in generally unrestricted movement.[247] Further, the recent conference consolidation will cause student-athletes to travel longer distances

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243 *Id.*
244 *Id.*
245 *See* DI 2024–25 MANUAL, *supra* note 233, at 371.
246 *See* Auerbach, *supra* note 114; Fahrenthold & Witz, *supra* note 224.
247 *See* Fahrenthold & Witz, *supra* note 224.

and interrupt their studies more so than prior years, so it would be difficult for the NCAA to demonstrate how these conference changes reflect the ideals of amateurism.[248]

The NCAA has arguably come to the realization that this is a losing argument in court.[249] In May 2024, the Board and all Power Five conferences approved a landmark settlement to avoid trial in three other major antitrust cases against the NCAA: *House v. NCAA*, *Carter v. NCAA*, and *Hubbard v. NCAA*.[250] All three cases challenged the NCAA's restrictions on compensation and education-related benefits as antitrust violations in some capacity.[251] Notably, the terms of the settlement include: (1) back-pay awards of more than $2.75 billion for DI athletes dating back to 2016 to compensate for lost NIL opportunities, and (2) a future revenue sharing model for DI sports that is expected to take effect as early as Fall 2025.[252] This revenue sharing model allows DI member schools to pay student-athletes directly for their participation in the schools' sports

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[248] *See ACC Adds Antitrust Risk*, *supra* note 114.

[249] *See, e.g.*, Brandon Marcello, *College Athletes Set to Get $2.8 Billion, Revenue-Sharing Model in Landmark* House v. NCAA *Settlement*, CBS SPORTS: NCAA FB (May 23, 2024, 8:52 pm), https://www.cbssports.com/college-football/news/college-athletes-set-to-get-2-8-billion-revenue-sharing-model-in-landmark-house-v-ncaa-settlement/ ("College sports is [sic] on the precipice of changing forever after the NCAA Board of Governors and every Power Five conference agreed to destroy the amateurism model and share revenue with players by coming to terms on settling a multi-billion dollar lawsuit that threatened to bankrupt the collegiate athletics enterprise.").

[250] Chris Vannini et al., *NCAA, Power Conferences Approve Settlement That Makes Way for Players to Be Directly Paid*, N.Y. TIMES (May 23, 2024), https://www.nytimes.com/athletic/5510354/2024/05/23/house-v-ncaa-settlementvotes/.

[251] *See* Nicole Auerbach & Justin Williams, *How the* House v. NCAA *Settlement Could Reshape College Sports: What You Need to Know*, N.Y. TIMES (May 20, 2024), https://www.nytimes.com/athletic/5506457/2024/05/20/ncaa-settlement-house-lawsuit-college-sports/ ("*House v. NCAA* seeks back pay for Division I college athletes who were barred from earning name, image and likeness (NIL) compensation prior to the NCAA changing its policy in summer 2021, while also pursuing a cut of future broadcast revenues for athletes at power-conference schools . . . . *Hubbard* is similar to *House* in the sense that it is seeking retroactive damages for education-related *Alston* payments; Carter argues that rules prohibiting college athletes from receiving 'pay for play' violate antitrust law. A *House* settlement would resolve each of them.").

[252] *See* Marcello, *supra* note 249; Vannini et al., *supra* note 250 ("The settlement will also eliminate NCAA scholarship caps . . . .").

programs and necessarily eliminates the amateur model at the DI level.[253]

The settlement approval embodies another reactive move taken by the NCAA, but the NCAA did have an incentive to react early versus wait until a verdict at trial.[254] A loss at trial would have subjected the NCAA to triple the amount of damages handed down by the judge, as is the case with all antitrust cases.[255] A verdict against the NCAA would have also repealed any existing restrictions on NIL deals and the revenue sharing model.[256] In turn, this settlement provides the NCAA with more autonomy in determining how the damages will be paid and what revenue sharing will look like.[257] Moreover, this settlement could undermine the strength of future antitrust suits against the NCAA—a source of litigation that has plagued the organization for decades.[258]

The settlement, if approved, will mark the historic end to the NCAA's amateur model, at least at the DI level.[259] The settlement will not be finalized until U.S. District Judge Claudia Wilken of the Northern District of California, the judge presiding over the case,[260] decides whether to formally approve it.[261] In the meantime, the details of the settlement need to be sorted out, and there are several questions that remain unanswered.[262]

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253 *See* Billy Witz, *The N.C.A.A.'s Landmark Athlete-Pay Settlement, Explained*, N.Y. TIMES (May 24, 2024), https://www.nytimes.com/2024/05/24/us/ncaa-settlement-college-athletes-payments.html.

254 *See* Marcello, *supra* note 249.

255 *See id.*

256 *See* Vannini et al., *supra* note 250.

257 *See id.*

258 *See id.*

259 *See id.*

260 Judge Wilken also presided over the *O'Bannon* and *Alston* cases. *See* Witz, *supra* note 253.

261 *See* Vannini et al., *supra* note 250 ("If Judge Wilken grants preliminary approval, there would be a set period of several months in which those in the retroactive damages and future revenue-sharing class have an opportunity to either opt out or object to the terms of the agreement, depending on the judge's ruling. That's followed by a final approving hearing, at which point, if the judge approves it, the settlement officially goes into effect.").

262 *See* David Cobb, House v. NCAA *Settlement Winners and Losers: Athletes Take Monumental Step, Non-Revenue Sports at Risk*, CBS SPORTS (May 24, 2024, 8:56 AM) [hereinafter House v. NCAA *Settlement Winners and Losers*],

For one, how will the settlement be paid out? The NCAA is responsible for approximately forty percent of the settlement, and the Power Five schools are expected to pay an additional twenty-four percent.[263] The less profitable DI schools outside the Power Five will have to contribute the remaining thirty-six percent.[264] The money is set to be paid out over the next ten years.[265] Also, how will member schools confront the logistics of the future revenue sharing framework? The settlement requires DI member schools to share roughly twenty-two percent of the sports-generated revenue with their student-athletes, but each member school can decide for itself how to distribute the money.[266] That said, a DI member school could decide to divide the money among the traditional high-revenue programs only—DI FBS football and DI men's and women's basketball.[267] These questions merely scratch the surface of the uncertainty created by the settlement and the logistical chaos that has emerged.[268]

Amidst these lingering questions, one thing is clear: the major losers of this settlement will likely be the low-revenue sports.[269] The NCAA needs to reduce spending to contribute its share of the settlement, and the athletic conferences will supply their portion with

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https://www.cbssports.com/college-football/news/house-v-ncaa-settlement-winners-and-losers-athletes-take-monumental-step-non-revenue-sports-at-risk/.

263 *Id.*

264 The thirty-six percent contribution is broken down as follows: The five conferences in the FBS other than the Power Five will contribute ten percent, the FCS will pay thirteen percent, and the remaining DI conferences that do not play football will pay twelve percent. Witz, *supra* note 253. Critics argue that the Power Five schools are acting irrationally by forcing these smaller schools to pay such a significant portion of the settlement given their relative size and popularity and the fact that these schools were not named defendants in the antitrust lawsuits. *See* Sally Jenkins, *The Problem with College Sports Isn't the Athletes. It's the Schools.*, WASH. POST (June 2, 2024, 6:05 AM), https://www.washingtonpost.com/sports/2024/06/02/ncaa-future-nil-rules/.

265 Witz, *supra* note 253.

266 *Id.*

267 *See id.*

268 *See* House v. NCAA *Settlement Winners and Losers*, *supra* note 262.

269 *See* Liam Griffin, *Low-Revenue Sports Could Be on the Chopping Block After $2.8 Billion NCAA Settlement*, WASH. TIMES (June 3, 2024), https://www.washingtontimes.com/news/2024/jun/3/low-revenue-sports-could-be-chopping-block-after-2/.

"money withheld from future NCAA distributions."[270] With less money coming in from NCAA distributions and more money going out through the revenue sharing model, member schools could likely be forced to eliminate certain sports programs.[271] The lower revenue sports are expected to be the first to go.[272] Historically, when schools eliminate sports programs, they often start with the smaller programs that generate minimal revenue.[273] Sports such as tennis, swimming, gymnastics, and track are often cut first, seeing that they "boast high price tags without the same revenue as high-earning sports like football and basketball."[274] Once a school decides to eliminate a sport, that program rarely returns.[275]

The *House* settlement does not directly involve DII and DIII sports, yet it will likely have an adverse effect on these bona fide amateur programs.[276] DII and DIII sports programs similarly do not generate significant revenue for member schools compared to the more popular DI sports, so schools may look to these programs when deciding what can be sacrificed to minimize spending.[277] The president of Student-Athlete NIL recently told CBS Sports that "[i]t's very likely we're going to see non-revenue sports get massacred."[278]

If this grim fate becomes a reality for the DII and DIII levels of competition, the existence of amateurism in college sports altogether could be a thing of the past. Not only would the loss of amateurism harm those consumers who still favor a college product distinct from professional sports, but it would also harm society as a whole.[279] Sixty-seven percent of NCAA member schools are DII or DIII, and sixty-four percent of all NCAA student-athletes represent

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270 Witz, *supra* note 253.

271 House v. NCAA *Settlement Winners and Losers*, *supra* note 262; Griffin, *supra* note 269 ("The *House* deal would add another expense to be balanced, forcing athletic departments to tighten their belts after decades of mostly unchecked spending.").

272 *See* Griffin, *supra* note 269.

273 *Id.*

274 *Id.*

275 *Id.*

276 *See* Witz, *supra* note 253.

277 *See* Griffin, *supra* note 269.

278 *Id.*

279 *See* Faucon, *supra* note 3, at 79–80.

these two divisions.[280] That said, *most* student-athletes play at these levels of competition.[281] What options will these student-athletes have in the coming years if the sports they grew up competing in are cut from several schools across the nation? Not all athletes can or want to play at the DI level, whether that be for physical, mental, or otherwise personal reasons. Some student-athletes are driven to compete solely because of their love for the sport and the team dynamic, and they also want a more traditional college experience alongside such an endeavor. Among DIII schools, one in every six students are student-athletes, and at the DII level, the statistic is one in every nine.[282] The contributions that student-athletes make to the culture of these schools, both in and out of the classroom, are pivotal to the schools' integrity and uniqueness. Special bonds are formed both on the field and in the classroom; bonds that are formed wholly apart from the noise of commercial influence and transfer portal prospects.

Between the pending *House* settlement and the ongoing lawsuit in Tennessee, the future of college sports remains largely unclear.[283] As chaos continues to unfold at the DI level, with recent talks of DI splitting into two intra-division conferences,[284] one looming question will likely remain: who is looking out for DII and DIII sports? The cost cutting measures are impending,[285] so advocates for DII and DIII sports are needed now more than ever. Most of the major forthcoming changes will likely center on DI sports,[286] so those

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280 NCAA ELIGIBILITY CENTER, *supra* note 222, at 8.

281 *See id.*

282 *Id.* (compared to one in every twenty-two students at the DI level).

283 *See* Auerbach & Williams, *supra* note 251.

284 *See* Dennis Dodd, *How the NCAA's Proposal to Let the Power Four Form Its Own Governing Body Would Change All of College Sports*, CBS SPORTS (July 17, 2024, 11:25 AM), https://www.cbssports.com/college-basketball/news/how-the-ncaas-proposal-to-let-the-power-four-form-its-own-governing-body-would-change-all-of-college-sports/.

285 *See* Griffin, *supra* note 269.

286 *See* Auerbach & Williams, *supra* note 251 (emphasizing that the *House* "settlement will further widen the gap between high-major revenue sports—particularly power-conference football—and the rest of college athletics."); House v. NCAA *Settlement Winners and Losers*, *supra* note 262 (describing the *House* settlement as "another setback for the competitive aspirations of those outside the power conference structure").

championing DII and DIII programs, alongside the preservation of amateurism, must be proactive.

The NCAA is still knocking on Congress' door, hoping that it will offer some sort of federal solution to the mess the NCAA has created for itself.[287] Even if Congress supplies some sort of uniformity,[288] steps must be taken that specifically focus on DII and DIII sports programs. Their amateur character is still intact, and it can only be preserved if these programs are provided separate treatment and regulation. These measures must be taken in the near future to both maintain amateurism in college sports and insulate these bona fide amateur programs from anticipated budget cuts.[289]

CONCLUSION

The NCAA's conception of the amateur student-athlete has evolved since the organization's founding. For decades, the NCAA was unable to articulate what it meant to be a true "amateur." Today, the world of college sports is in its most uncertain stage yet, as the NCAA's lack of effective regulation has replaced the original amateur model with a semi-professional model at the DI level. Although the pending settlement ultimately strips DI sports of their amateur character altogether, there is an opportunity to preserve amateurism in DII and DIII programs and maintain differentiation between college and professional sports. However, steps must be taken now to properly distinguish DII and DIII sports and afford them separate treatment before more chaos ensues at the DI level. If this separation

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287 *See* Jenkins, *supra* note 264.

288 *See id.*

289 This Note was written while the *House* settlement was still pending before Judge Wilken. On October 7, 2024, Judge Wilken granted preliminary approval to the terms of the *House* settlement. *See* Jesse Dougherty, *Judge Gives Preliminary Approval to Settlement in Major NCAA Antitrust Case*, WASH. POST (Oct. 7, 2024, 5:12 PM), https://www.washingtonpost.com/sports/2024/10/07/ncaa-house-settlement-preliminary-approval/. A final hearing to approve the settlement is tentatively scheduled for April 7, 2025. *See id.* Developments are occurring rapidly in this area of the law, and there will likely be monumental changes in the coming months and years. The protection and preservation of DII and DIII sports that this Note calls for will likely remain pertinent as decisions regarding this new era of college sports are made, with most efforts being directed towards lucrative DI programs.

is not achieved, amateurism may eventually be lost in college sports altogether. If this becomes a reality, college sports will no longer offer a product distinct from professional sports, and those consumers who care about this distinction will ultimately be harmed. An even greater degree of harm could be felt by the majority of future NCAA student-athletes whose sports are in jeopardy of being eliminated. This consumer and societal harm can be avoided, but a sense of urgency is needed.