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The NCAA and the AAU: Reunited At Last in Amateur Sports Exile

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THE NCAA AND THE AAU: REUNITED AT LAST IN AMATEUR SPORTS EXILE

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I. INTRODUCTION

College athletics have been embedded in American culture for well over a century, primarily gaining popularity through the football programs at Harvard, Yale, and Princeton.¹ President Woodrow Wilson, a Princeton alumnus, once proclaimed that “Princeton is noted in this wide world for three things: football, baseball, and collegiate instruction.”² Amidst the glory and nostalgia of college athletics, a darker side of amateur

1. NCAA v. Alston, 141 S. Ct. 2141, 2148 (2021).

2. *Id.* (quoting ANDREW S. ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 7 (1999)).

sports has reared its ugly head in the decades since the National Collegiate Athletic Association (“NCAA”)’s inception. The Supreme Court’s decision in *NCAA v. Alston* sheds light on the potentially illegal antitrust compensation activities of the NCAA.³ Name, image, and likeness (“NIL”) reform adopted by the NCAA after the *Alston* decision is merely the catalyst to greater compensation reform as the Association undoubtedly faces future antitrust litigation.⁴ The *Alston* decision is another landmark in the long and winding road of the NCAA’s history. Now, it is likely that the NCAA will face a legal extinction like the American Athletic Union (“AAU”).⁵

Part II of this Comment examines the history of the NCAA and its struggle with the AAU for power over amateur athletics. In 1905, President Theodore Roosevelt convened a roundtable of Ivy League leaders to address violence in college football.⁶ In that year alone, eighteen college football players died, and 149 more were seriously injured.⁷ President Roosevelt strategically established rule changes to preserve college football.⁸ The meeting further sought to establish an organized, standard-setting body.⁹ This led to the creation of the Intercollegiate Athletic Association, which later became the NCAA.¹⁰ The creation of the NCAA led to a fierce power struggle with the extant AAU over the governing of amateur athletics in the United States.¹¹ In the end, the NCAA would become the exclusive, most powerful, and most influential institution in inter-collegiate athletics.¹²

Part III of this Comment discusses the Ted Stevens Amateur Sports Act of 1978.¹³ That Act, by taking Olympic governing power away from the AAU and granting it to the United States Olympic Committee (“USOC”), led to the irreversible decline of the AAU.¹⁴ As the AAU’s control over amateur sports waned following the Amateur Sports Act, the NCAA’s control over amateur sports increased in the absence of competition from a viable rival.¹⁵ The Act played a significant role in shielding the NCAA from competition, allowing it to dominate amateur sports in the United States and gain financially from college athletes.¹⁶ Ironically, the absence of competition caused by the Act helped create the current environment in which the NCAA is subject to antitrust status as a cartel and monopoly.¹⁷

3. 141 S. Ct. at 2141.

4. Gregory Marino, *NCAA v. Alston: The Beginning of the End or the End of the Beginning?*, JDSUPRA (Aug. 5, 2021), <https://www.jdsupra.com/legalnews/ncaa-v-alston-the-beginning-of-the-end-9351737/>.

5. Howard P. Chudacoff, *AAU v. NCAA: The Bitter Feud that Altered the Structure of American Amateur Sports*, 48 J. SPORT HIST. 50, 62 (Spring 2021).

6. *Alston*, 141 S. Ct. at 2148–51.

7. *Timeline – 1900s*, NCAA, <https://www.ncaa.org/sports/2021/6/14/timeline-1900s.aspx> (last visited Sept. 30, 2021).

8. John S. Watterson III, *Political Football: Theodore Roosevelt, Woodrow Wilson and the Gridiron Reform Movement*, 25 PRESIDENTIAL STUD. Q. 555, 559–60 (1995).

9. *Timeline – 1900s*, *supra* note 7.

10. *Id.*

11. Chudacoff, *supra* note 5, at 52–53.

12. *Id.* at 62.

13. 36 U.S.C. § 220501.

14. 36 U.S.C. § 220526(a); *see also* Chudacoff, *supra* note 5.

15. Chudacoff, *supra* note 5, at 62–63.

16. *Id.*

17. *See NCAA v. Alston*, 141 S. Ct. 2141, 2149, 2152 (2021).

Part IV of this Comment explains how the *Alston* decision created potential antitrust liability for the NCAA, which had been previously protected by the Supreme Court’s paradoxical argument in *NCAA v. Board of Regents of the University of Oklahoma*.¹⁸ At a minimum, *Alston* will subject the NCAA to future antitrust liability, more compensation-related benefits changes for athletes, and possible extinction.¹⁹ The *Alston* decision highlighted the fact that the NCAA acts as a monopsony, meaning that “[w]hereas monopoly refers to the case of a single seller confronted in a market by many buyers, monopsony refers to the case of a single buyer confronted in a market by many sellers.”²⁰ The NCAA proves to be the single buyer in the college sports market—a market composed of many member universities competing for access and revenue.²¹ The *Alston* Court held that the means used by the NCAA to control education-related benefits for athletes were too restrictive.²² The Court also highlighted the NCAA’s antitrust liability going forward.²³ In the wake of the Supreme Court’s holding, the NCAA adopted a new NIL rule that permits college athletes to pursue benefits from their name, image, and likeness unrelated to education, including endorsement deals.²⁴ However, this rule likely comes as a precursor to compensation-related antitrust litigation.²⁵ Justice Kavanaugh suggested as much in his concurring opinion, concluding that “[t]he NCAA is not above the law.”²⁶ Now, the NCAA faces pressure to fend off antitrust liability by addressing compensation-related benefits for college athletes.²⁷ In the process, the Association will have to avoid the same outcome of fading into oblivion as its one-time rival, the AAU. In the absence of serious organizational, regulatory, and policy changes, the NCAA as we know it will likely cease to exist, devolving into an amateur governing body artifact like the AAU. For the NCAA, according to Southeastern Conference Commissioner Greg Sankey, it is time to “change or die.”²⁸

II. HISTORY OF AMERICAN AMATEUR SPORTS

College athletics has struggled to define its identity for over a century. Since the beginning, it has existed somewhere in the gray area between amateur and professional.²⁹

18. 468 U.S. 85, 101 (1984).

19. *Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring); *Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston*, 135 HARV. L. REV. 471, 480 (2021).

20. 141 S. Ct. at 2148; Orley C. Ashenfelter et al., *Labor Market Monopsony*, 28 J. OF LABOR ECON. 203, 203 (2010).

21. 141 S. Ct. at 2150–51.

22. *Id.* at 2160.

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

24. *Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston*, *supra* note 19, at 471, 480.

25. Marino, *supra* note 4.

26. *Alston*, 141 S. Ct. at 2169 (Kavanaugh, J., concurring).

27. Marino, *supra* note 4.

28. Keith Farner, *Greg Sankey offers candid remarks on new NCAA constitution: ‘We’re either going to change or die,’* SATURDAY DOWN SOUTH (Jan. 27, 2022, 3:30 PM), <https://www.saturdaydownsouth.com/sec-football/greg-sankey-offers-candid-remarks-on-new-ncaa-constitution-were-either-going-to-change-or-die/> (Greg Sankey, the commissioner of the Southeastern Conference, said in an interview with Mike Krzyzewski on Sirius XM that the NCAA’s new constitution was adopted because “we don’t have a lot of choice. . . [w]e’re either going to change or die.”).

29. *NCAA v. Alston*, 141 S. Ct. 2141, 2148 (2021).

As amateur sports developed in the United States in the late-nineteenth and early-twentieth centuries, the NCAA and AAU fiercely battled over control of amateur sports in America.³⁰ In 1905, President Theodore Roosevelt addressed the violent play in college football by gathering prominent Ivy League leaders at the White House.³¹ The meeting addressed the mounting deaths and injuries among college football players resulting from violent play.³² Because President Roosevelt enjoyed college football, he strategically helped establish rule changes to preserve the game's existence.³³ Further, the meeting designated an organized standard-setting body.³⁴ This ultimately produced the Intercollegiate Athletic Association, which later became the NCAA.³⁵ Almost immediately, a fierce power struggle ensued between the NCAA and the AAU to control amateur athletics in the United States.³⁶ In the end, the NCAA won this competition to achieve the powerful, lucrative, and perilous position it is in today.³⁷

A. President Theodore Roosevelt Led the Charge for College Sports Reform Amid Dangerous Playing Styles

Amidst public outcry to abolish college football, President Theodore Roosevelt convened a reform meeting at the White House that not only salvaged college football but also laid the foundation for an intercollegiate sports regulatory body.³⁸ With the rising popularity of college football in the United States also came an alarming number of serious injuries and deaths from playing the game.³⁹ Along with a brutal style of play came brutally ugly recruitment tactics that tarnished the image of amateur athletics.⁴⁰ The need to establish an entity that could both propose and enforce rule changes, as well as implement the principles of amateur sport, would ultimately lead to the formation of the NCAA.⁴¹

From the beginning, college athletics has bent the rules of amateurism.⁴² The first college athletic event is credited to Harvard and Yale's boat race in 1852 at Lake Winnepesaukee, New Hampshire.⁴³ True to form, the first intercollegiate athletic competition featured a prominent railroad executive compensating the athletes and sponsoring the event as a means to promote tourism to the area.⁴⁴ From the 1880s to early 1900s, football boomed in popularity in the United States, especially on the East Coast in

30. Chudacoff, *supra* note 5, at 51.

31. *Alston*, 141 S. Ct. at 2148.

32. *Timeline – 1900s*, *supra* note 7.

33. Watterson, *supra* note 8.

34. *Timeline – 1900s*, *supra* note 7.

35. *Id.*

36. Chudacoff, *supra* note 5, at 51.

37. *Id.* at 62–63.

38. *Timeline – 1900s*, *supra* note 7.

39. *Id.*

40. *NCAA v. Alston*, 141 S. Ct. 2141, 2148 (2021).

41. *Timeline – 1900s*, *supra* note 7.

42. See *Alston*, 141 S. Ct. at 2148.

43. *Id.*

44. *Id.*

schools like Harvard, Yale, and Princeton.⁴⁵ The game began as a form of British rugby, but it soon took on an American flavor, with unenforceable rules and few officials to oversee gameplay.⁴⁶ Many school administrators were appalled by the brutality of a sport that was rapidly rising in popularity.⁴⁷ In 1885, Harvard administrators banned football from campus, only to reinstate it the following year after calls from students and alumni to bring it back.⁴⁸ While football's brutality gained notoriety, so too did the elaborate recruitment schemes used by schools to lure top players to their teams.⁴⁹ For example, Yale recruited James Hogan, a tackle, by providing him with "free meals and tuition, a trip to Cuba, the exclusive right to sell scorecards from his games—and a job as a cigarette agent for the American Tobacco Company."⁵⁰ Because there were no residency requirements, the so-called "tramp athlete" became ubiquitous.⁵¹ The tramp athlete would play for one team one weekend only to change uniforms and play for another team the following weekend.⁵²

Corruption and violence plagued football in the early 1900s, but it continued to rise in popularity as prominent leaders like President Theodore Roosevelt and Woodrow Wilson championed its existence on college campuses.⁵³ When Walter Camp, a leading football coach and rules influencer, published a defense of college football, Roosevelt commented that "[o]f all games, I personally like foot ball [sic] the best, and I would rather see my boys play it than see them play any other. I have no patience with the people who declaim against it because it necessitates rough play and occasional injuries."⁵⁴ Coming from the rugged leader who organized "The Rough Riders," young men playing football appeared a mild risk to Roosevelt.⁵⁵ Similarly, in response to a Cornell professor who called for college football to be abolished, Woodrow Wilson stated, "I believe it develops more moral qualities than any other game of athletics."⁵⁶ Further, Wilson claimed that colleges in favor of abolishing college football had merely been unsuccessful in making it a game of amateurs.⁵⁷ Although colleges were supposed to field teams of amateur athletes, college football more closely resembled a professional sport of compensated and incentivized athletes.⁵⁸ Amateurism and injuries within college football would soon come to a cross roads—one which neither Roosevelt nor Wilson could avoid without taking corrective action.⁵⁹

The game of football reached the breaking point of reform or abolition in the tragic

45. Watterson, *supra* note 8, at 556.

46. *Id.*

47. *Id.*

48. *Id.*

49. See *NCAA v. Alston*, 141 S. Ct. 2141, 2148 (2021).

50. *Id.*

51. *Id.*

52. *Id.*

53. Watterson, *supra* note 8, at 556.

54. *Id.* at 557.

55. *Id.* at 558.

56. *Id.* at 557.

57. *Id.*

58. Watterson, *supra* note 8, at 559.

59. *Id.* at 560.

1905 season.⁶⁰ In the months following Roosevelt's 1905 reform meeting at the White House, sweeping changes came to the rules of college football.⁶¹ To reduce the brutality of mass play at the line of scrimmage, the rules committee increased the first down marker from five to ten yards, and, even more radically, adopted the forward pass.⁶² These changes successfully allowed for gameplay to spread across the field and reduced the injuries that had been common to the sport, creating a more "attractive" game in the eyes of Woodrow Wilson.⁶³ Nevertheless, the need arose for a regulatory body to continue to propose and enforce rule changes, as well as establish a commitment to amateur competition amongst collegiate institutions.⁶⁴

B. The NCAA and the AAU Arose as the Two Amateur Sports Governing Entities

Answering the need for a governing body to control amateur sports in the United States, the NCAA was formed to regulate amateur college athletics.⁶⁵ The Roosevelt rules committee succeeded in effectively changing the way football would be played, but the lack of any central enforcement organization posed a threat to the continued existence of amateur college athletics.⁶⁶ By the end of 1905, sixty-two football-playing institutions agreed to form the Intercollegiate Athletic Association of the United States, which in 1910 would become the National Collegiate Athletic Association.⁶⁷ The NCAA and AAU would soon clash over jurisdiction of amateur athletics.⁶⁸

The newly-formed NCAA aimed to organize amateur intercollegiate athletics by acting as a standard-setting body and prohibiting the compensation of its member athletes.⁶⁹ Although the formation of the NCAA was a significant achievement in the effort to promote amateur sports, it came nearly two decades after the AAU had been established to promote amateurism and aid in selecting American athletes to compete in the newly-founded Olympic games.⁷⁰ The AAU also oversaw male athletes from organizations like the YMCA, the armed services, and individuals who were not in college or who had already graduated.⁷¹

The feud between the NCAA and the AAU originated in a seeming overlap of jurisdiction.⁷² By 1921, the NCAA sponsored national collegiate championships in track and field.⁷³ As elite college track athletes sought to compete in international meets, the

60. *Timeline – 1900s*, *supra* note 7; Aaron Gordon, *Did Football Cause 20 Deaths in 1905? Re-Investigating a Serial Killer*, DEADSPIN (Jan. 22, 2014, 3:45 PM), <https://deadspin.com/did-football-cause-20-deaths-in-1905-re-investigating-1506758181>.

61. *Id.*

62. Watterson, *supra* note 8, at 561.

63. *Id.* at 562.

64. Chudacoff, *supra* note 5, at 51.

65. *Timeline – 1900s*, *supra* note 7.

66. Watterson, *supra* note 8, at 562.

67. *Timeline – 1900s*, *supra* note 7.

68. Chudacoff, *supra* note 5, at 52.

69. *NCAA v. Alston*, 141 S. Ct. 2141, 2148 (2021).

70. Chudacoff, *supra* note 5, at 51.

71. *Id.*

72. *Id.* at 52.

73. *Id.*

athletes went to the NCAA for approval to compete while maintaining their amateur status.⁷⁴ Because the AAU had been connected to Olympics selection for several decades, the AAU believed it had authority over who could and could not compete in international competitions.⁷⁵ Charley Paddock, a sprinter from the University of Southern California, brought the conflict to a head in 1922 when he competed at an international meet in France with the permission of the NCAA, but not the AAU.⁷⁶ The AAU punished Paddock for competing without their express permission by ruling him ineligible to compete in future amateur meets, including the 1924 Olympic trials.⁷⁷ Even worse, the AAU held a grudge against Paddock for his disapproval of the organization.⁷⁸ The AAU president, William C. Prout, stated “as long as I am President of the Amateur Athletic Union and as long as Paddock maintains his present attitude, just so long will I refuse to affix my signature to any certificate of amateurism for him.”⁷⁹ Turf-conscious leadership in the AAU and NCAA began to dominate amateur athletics.⁸⁰

Over the coming decades, the leaders of the NCAA and AAU continued to posture in the attempt to assert their dominance and gain power over the regulation of amateur sports.⁸¹ In the 1950s, when the Soviet Union began sending athletes to compete in the Olympic games, the United States Olympic Team became more of a point of interest for Americans to look to for symbolic prestige over their rival.⁸² Just as the country faced a Cold War with the Soviet Union, so too the NCAA and AAU continued in an arms race to control the Olympic team selections and the greater amateur athletics space.⁸³ The conflict between the two reached such a breaking point that the entities canceled formal alliances, and prominent government officials attempted to intervene to reconcile their differences.⁸⁴ Because the NCAA and AAU failed to agree on what entity should properly select the track and field team for the 1964 Olympics in Tokyo, President John F. Kennedy arranged for the parties to meet with General Douglas MacArthur to arbitrate.⁸⁵ General MacArthur successfully negotiated a temporary agreement, but after the Olympics the entities returned to their petty squabbling—prohibiting athletes from competing in the other’s events and confusing amateur athletes throughout the process.⁸⁶

The dispute between the NCAA and the AAU regarding the governing of amateur sports in the United States proved to be a point of national interest.⁸⁷ Accordingly, Senator Warren G. Magnuson, a Washington Democrat leading the Senate Commerce Committee,

74. *Id.*

75. Chudacoff, *supra* note 5, at 52.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Chudacoff, *supra* note 5, at 52.

81. *Id.* at 51.

82. *Id.*

83. *Id.*

84. *Timeline – 1960s*, NCAA, <https://www.ncaa.org/sports/2021/6/14/timeline-1960s.aspx> (last visited Mar. 8, 2022).

85. Chudacoff, *supra* note 5, at 54.

86. *Id.*

87. *Id.* at 54–58.

held a hearing in 1965 on the dispute which included testimony from athletes, journalists, and athletic administrators.⁸⁸ The testimony revealed that the NCAA had threatened college athletes with the loss of their eligibility and scholarship if they participated in AAU competitions, and, in response, the AAU claimed that athletic scholarships made college athletes professionals and ineligible to compete at AAU events.⁸⁹ The AAU's executive director, Donald Hull, asserted that the NCAA sought to use its earnings from college football to gain power and control over other amateur sports, including track and field, which the AAU had a stranglehold on.⁹⁰ When asked whether the NCAA could legally prevent athletes from competing in AAU competitions, Hull went so far as to remark that "[t]he NCAA can do anything it likes . . . [t]he NCAA has made itself lord and master over the athletic destinies of its member schools and their athletes."⁹¹ Ironically, the NCAA responded by stating that, because the AAU claimed to be the sole governing body of track and field and graduated amateur athletes, the AAU had violated antitrust law.⁹² Further, athletes whom the AAU banned from competition had limited options for recourse, as there were no statutory provisions to guarantee an amateur athlete the right to compete.⁹³ Thus, the AAU, as a private entity, had been mostly "immune from legal action[s]" against it.⁹⁴ Notably, both the NCAA and AAU stood united in opposition to any direct federal regulation of amateur sports.⁹⁵ Nevertheless, the entities' inability to compromise would soon force the federal government to take more drastic efforts to seek lasting resolution in amateur sports.⁹⁶ This eventually led to the weakening of the AAU and the strengthening of the NCAA.⁹⁷

III. THE AAU'S DOWNFALL AND THE NCAA'S EMPOWERMENT

The Ted Stevens Amateur Sports Act⁹⁸ led to the demise of the AAU as a powerful governing body of amateur sports by expressly granting Olympic governing power to a fortified USOC.⁹⁹ This ultimately strengthened the NCAA.¹⁰⁰ The AAU's control over amateur sports declined following the enactment of the Amateur Sports Act.¹⁰¹ Consequently, without a rival in amateur college sports, the NCAA's control of the industry increased.¹⁰² The Act unintentionally empowered the NCAA to dominate

88. *Id.* at 55.

89. *Id.*

90. Chudacoff, *supra* note 5, at 55.

91. *Id.*

92. *Id.* at 56.

93. Kenny Moore, *The Campaign for Athletes' Rights*, 445 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 59, 62 (1979).

94. *Id.* (quoting PRESIDENT'S COMM'N ON OLYMPIC SPORTS, 1 FINAL REPORT 62 (1977), <https://bit.ly/3KoYfrZ>).

95. Chudacoff, *supra* note 5, at 57.

96. *Id.* at 50–51.

97. *See generally* Chudacoff, *supra* note 5.

98. 36 U.S.C. § 220501.

99. 36 U.S.C. § 220505(c).

100. Chudacoff, *supra* note 5, at 62–63.

101. *Id.* at 50–51.

102. 36 U.S.C. § 220526(a); *see also* Chudacoff, *supra* note 5, at 50–51.

amateur sports in the United States and financially gain from its college athletes.¹⁰³ Without competition, the NCAA achieved its current role as a monopsony constrained only by the threat of antitrust law.¹⁰⁴

A. The Ted Stevens Amateur Sports Act Removed Governing Power from the AAU and Strengthened the Role of the NCAA

The Amateur Sports Act effectively diminished the power of the AAU by expressly naming the USOC as the coordinating amateur sports body for all sports, except for a few enumerated classifications including high school and college athletics.¹⁰⁵ In 1976, President Gerald Ford appointed a twenty-two member Commission, composed mostly of politicians and athletes, to further investigate the feud between the NCAA and AAU and prepare recommendations for the president to consider.¹⁰⁶ The commission examined the state of amateur sports in the United States as compared to the rest of the world and noted that, unlike the United States, most other countries supported their athletes through funds from the government treasury.¹⁰⁷ Although Congress and the President did not wish to directly control American amateur sports through the federal government, they recognized the need for lasting reform and the role they could play in bringing it about.¹⁰⁸

In 1978, to settle the amateur sports governing dispute, President Jimmy Carter signed into law a bill championed by Senator Ted Stevens from Alaska.¹⁰⁹ This bill became known as the Ted Stevens Amateur Sports Act of 1978.¹¹⁰ The Act incorporated many of the recommendations that the 1976 President's Commission had included in its review.¹¹¹ In President Carter's press release, he stated that the Amateur Sports Act "establishe[d] procedures and guidelines to resolve disputes without placing the Federal Government in control of amateur sports," and "[t]he act designate[d] the United States Olympic Committee as the coordinating body for amateur sports, restructure[d] the Olympic Committee and many of its constituent organizations, and [gave] the Olympic Committee a mandate to resolve disputes through arbitration."¹¹²

Under the Amateur Sports Act, the USOC replaced the AAU as the main regulatory body for amateur sports, with national governing bodies ("NGBs") created for specific sports.¹¹³ For example, NGBs were established for USA Track and Field, USA Hockey,

103. Chudacoff, *supra* note 5, at 62–63.

104. NCAA v. Alston, 141 S. Ct. 2141, 2152, 2166 (2021).

105. 36 U.S.C.A. §§ 220526(a), 220505(c).

106. Joseph Durso, *Report to Ford Calls for Amateur Reform*, N.Y. TIMES (Feb. 8, 1976), <https://www.nytimes.com/1976/02/08/archives/report-to-ford-calls-for-amateur-reform-reforms-for-amateur-sports.html>.

107. *Id.*

108. *Id.*

109. 36 U.S.C. § 220501.

110. *Id.*

111. Chudacoff, *supra* note 5, at 61.

112. *Amateur Sports Act of 1978 Statement on Signing S. 2727 Into Law*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/amateur-sports-act-1978-statement-signing-s-2727-into-law> (last visited July 30, 2022).

113. 36 U.S.C. § 220505; see also Rafael X. Zahralddin, *Ted Stevens Act and Restricted Amateur Athletic Competitions*, GOFF RUGBY REPORT (May 28, 2020), <https://www.goffrugbyreport.com/news/op-ed-ted-stevens-act-gives-amateur-competitions-freedom>.

USA Gymnastics, and several other sports.¹¹⁴ The Act carved out jurisdiction for the NGBs in the realms of each sport's international competition.¹¹⁵ Further, each NGB would be autonomous and would be a member of only one international federation that supervised a particular Olympic sport.¹¹⁶ Importantly, the Act restricted the NGBs from having jurisdiction over certain enumerated organizations, including "high school students, college students, members of the Armed Forces, or similar groups or categories."¹¹⁷ The Act redefined the landscape of amateur sports in America, permanently hindered the power of the AAU, and unfettered the NCAA.¹¹⁸

The Amateur Sports Act effectively ended the AAU's stranglehold on controlling amateur Americans' development for the Olympic Games, and it diminished the AAU's power to near oblivion.¹¹⁹ Because the Act created NGBs for each sport, all governed by the USOC, the AAU could no longer find a foothold in any amateur sport affiliated with the Olympics.¹²⁰ As a result, the AAU had to divest itself of its operations associated with Olympic sports.¹²¹ Today, the AAU flounders in the amateur sports world by operating youth track meets and boys' and girls' competitive basketball leagues—a far cry from its one-time domination of amateur sports.¹²² After the Amateur Sports Act, the NCAA no longer had a rival within amateur sports.¹²³ In a competition-free environment, the NCAA experienced unchecked growth in financial, procedural, and regulatory influence over college athletics.¹²⁴

Not only did the Amateur Sports Act diminish the power of the AAU, it also increased the power of the NCAA by expressly carving out jurisdiction reserved for the NCAA to control college athletics.¹²⁵ Now that it had statutorily-recognized power, the NCAA existed outside of the control of the USOC governing rules, acting as its own autonomous organization.¹²⁶ As a consequence of the Act, the NCAA enjoyed a newfound autonomy and the destruction of its rival, the AAU.¹²⁷ Without the AAU, the NCAA no longer faced challenges to its complete and independent control of college athletes.¹²⁸ Moreover, the NCAA enjoyed the ever-expanding influence of college football, the annual March Madness college basketball tournaments, and lucrative television contracts.¹²⁹ These deals led to the NCAA becoming the wealthiest amateur sports organization in the

114. 36 U.S.C. § 220521; *see also* Zahralddin, *supra* note 113.

115. 36 U.S.C. § 220521.

116. *Id.*; *see also* Chudacoff, *supra* note 5, at 61.

117. 36 U.S.C. § 220526(a).

118. Chudacoff, *supra* note 5, at 62.

119. *Id.*

120. 36 U.S.C. § 220521; *see also* Chudacoff, *supra* note 5, at 62.

121. Nancy Scannell, *Once-Mighty AAU Feeling Its Way*, WASH. POST (Dec. 24, 1978), <https://www.washingtonpost.com/archive/sports/1978/12/24/once-mighty-aau-feeling-its-way/2844f54a-6e12-408f-bfa7-b1b3f6771737/>.

122. Chudacoff, *supra* note 5, at 62.

123. *Id.* at 62–63.

124. *Id.*

125. 36 U.S.C. § 220526(a).

126. *Id.*; *see also* Chudacoff, *supra* note 5, at 62.

127. *See generally* Chudacoff, *supra* note 5.

128. *Id.* at 62.

129. *Id.*

United States.¹³⁰ These extensive resources provided increased revenues for both the administration and member institutions, as well as increased spending on government lobbying.¹³¹ Finally, the NCAA enjoyed seemingly unbridled power to levy punishments for violations by athletes and organizations, illustrated most infamously when it issued a “death penalty” to the non-compliant Southern Methodist University football team and banned it from competing in intercollegiate athletics.¹³² With this power came new hurdles for the NCAA. As college football became more lucrative in the 1970s and 1980s, member institutions began to demand better television contracts that would allow their teams to be featured on national television more frequently.¹³³

B. Board of Regents Checked the NCAA’s Power, but also Provided an Antitrust Loophole

The NCAA’s unchecked power finally yielded in 1984 with the *NCAA v. Board of Regents of the University of Oklahoma* decision.¹³⁴ As television contracts provided substantial income to successful college football programs, institutions sought more influence in television contract discussions than the NCAA allowed.¹³⁵ The Supreme Court ultimately found that the NCAA’s television contract restrictions restrained price and output and had a significant potential for anticompetitive effects.¹³⁶ Nevertheless, *Board of Regents* proved to not be a total loss for the NCAA.¹³⁷ Indeed, the opinion provided the NCAA with a paradoxical argument that it could limit particular aspects of its member institutions’ behavior while avoiding antitrust liability—all in the name of preserving the unique product of college sports.¹³⁸ The NCAA would rely on this argument to justify its actions in subsequent decades,¹³⁹ including in the *Alston* case.¹⁴⁰

Television contracts were nothing new for the NCAA, but the way it negotiated the contracts had to change to remain modern.¹⁴¹ In 1952, at the beginning stages of televised college football games, the NCAA implemented a policy restricting the number of times a team could be featured on a televised game to twice per season.¹⁴² Only one school, the University of Pennsylvania, challenged the NCAA’s new television policy and declared that it would televise all of its football team’s home games.¹⁴³ However, because the NCAA threatened to consider the University of Pennsylvania a member in bad standing, and other schools feared retaliation if they played against University of Pennsylvania

130. *Id.*

131. *Id.*

132. Chudacoff, *supra* note 5, at 62.

133. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 88, 90 (1984).

134. *Id.*

135. *Id.* at 94–95.

136. *Id.* at 104.

137. *Id.* at 102.

138. *Bd. of Regents*, 468 U.S. at 102.

139. *Id.*

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

141. *Bd. of Regents*, 468 U.S. at 90.

142. *Id.*

143. *Id.*

teams, the University eventually gave in and abided by the NCAA's television rules.¹⁴⁴

Although the NCAA's maximum allowable televised games did increase in the late 1970s and early 1980s, the debate over broadcast limitations continued.¹⁴⁵ Member institutions finally clashed with the NCAA over these limitations when a group of successful football schools attempted to bypass the NCAA and enter into television contracts on their own.¹⁴⁶ A group of high-profile college football conferences and a group of independent institutions created the College Football Association ("CFA") in hopes of better promoting the interests of major football-playing schools in the NCAA.¹⁴⁷ In 1981, the CFA signed a contract with NBC to allow a greater number of television appearances for major football schools.¹⁴⁸ The NCAA responded publicly that it would enforce disciplinary action across all sports against any school that complied with the CFA-NBC contract.¹⁴⁹

The University of Oklahoma and the University of Georgia took exception to the NCAA's threats and filed an action against it, alleging that the television appearance limitations unreasonably restrained trade.¹⁵⁰ In *NCAA v. Board of Regents*, the Supreme Court held that "by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA ha[d] restricted rather than enhanced the place of intercollegiate athletics in the Nation's life."¹⁵¹ The Supreme Court noted the district court's comments about the NCAA as a cartel which "impose[d] production limits on its members, and maintain[ed] mechanisms for punishing cartel members who [sought] to stray from these production quotas."¹⁵² The Court reasoned that by applying the Sherman Act, the validity of a restraint on trade would be judged according to its impact on competition.¹⁵³ It found that the NCAA's television plan restrained both price and output, and had significant potential for anticompetitive effects.¹⁵⁴

Nevertheless, the Court made a critical observation about the type of product the NCAA markets.¹⁵⁵ It described a paradoxical scenario that seemingly shields the NCAA from antitrust liability.¹⁵⁶ Specifically, the Court stated that the unique case of the NCAA "involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."¹⁵⁷ The Court reasoned in *Board of Regents* that the product marketed by the NCAA and its member institutions is the competition itself.¹⁵⁸

144. *Id.*

145. *Id.* at 91, 94.

146. *Bd. of Regents*, 468 U.S. at 94–95.

147. *Id.* at 89.

148. *Id.* at 94–95.

149. *Id.* at 95.

150. *Id.* at 88.

151. *Bd. of Regents*, 468 U.S. at 120.

152. *Id.* at 96.

153. *Id.* at 104.

154. *Id.*

155. *Id.* at 101.

156. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984).

157. *Id.*

158. *Id.*

Further, the NCAA is not only marketing football but distinctly *college* football.¹⁵⁹ The Court reasoned that, in order for a college football product to exist, the amateur athletes playing in the games must be students who attend college classes.¹⁶⁰ The Court found the integrity of college football relied on mutual agreement from member institutions, which could only be achieved at the directive of the NCAA and not by particular institutions acting unilaterally.¹⁶¹ The Court concluded that “the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.”¹⁶² Although the Court ultimately held that the NCAA’s attempt to limit member institutions’ television appearances violated the Sherman Act, the NCAA came away from the litigation with the Supreme Court’s paradoxical ruling that it could limit particular aspects of its member institutions’ behavior in the name of preserving the unique product of college sports.¹⁶³ This circular argument is one the NCAA would return to in future litigation to justify its actions and veil itself from antitrust liability.¹⁶⁴

Notably, Justice Byron White’s dissenting opinion in *Board of Regents* warned that not allowing the NCAA to tightly regulate activities by its member institutions posed a danger to the college sports system.¹⁶⁵ Justice White wrote that “the television plan, like the ban on compensating student-athletes, may well encourage students to choose their schools, at least in part, on the basis of educational quality by reducing the perceived economic element of the choice.”¹⁶⁶ Justice White—a former All-American college football star¹⁶⁷—accurately foretold the booming marketability of college football, March Madness basketball, and the influence economics would play in the athlete recruitment process.¹⁶⁸ The NCAA, though losing the television contracts battle, still gained leverage following *Board of Regents* by appearing to be exempt from antitrust liability in other aspects of its operations.¹⁶⁹

IV. *ALSTON* USHERS IN THE LEGAL DOWNFALL OF THE NCAA

In the wake of the *Alston* decision, the NCAA faces public scrutiny, rule reform, antitrust liability, and possible extinction. The Supreme Court decided in *Alston* that the means chosen by the NCAA to control education-related benefits were too restrictive.¹⁷⁰ Further, Justice Kavanaugh, in his concurrence, highlighted the NCAA’s potential antitrust

159. *Id.* at 101–02.

160. *Id.* at 102.

161. *Bd. of Regents*, 468 U.S. at 102.

162. *Id.*

163. *Id.*

164. See generally *NCAA v. Alston*, 141 S. Ct. 2141, 2166–69 (2021) (Kavanaugh, J., concurring).

165. *Bd. of Regents*, 468 U.S. at 135–36 (White, J., dissenting); see also Adam R. Schaefer, Comment, *Slam Dunk: The Case for an NCAA Antitrust Exemption*, 83 N.C. L. REV. 555, 559–60 (2005).

166. *Bd. of Regents*, 468 U.S. at 136 (White, J., dissenting).

167. Nicholas deB. Katzenbach, *Byron White*, 55 STAN. L. REV. 13, 13 (2002).

168. Joel Mitnick et al., *A slam dunk from the Supreme Court for college athletes: No antitrust immunity for the NCAA*, 29 No. 05 WJANTITRUST 11 (Aug. 10, 2021).

169. *Bd. of Regents*, 468 U.S. at 101.

170. *Alston*, 141 S. Ct. at 2166.

liability going forward.¹⁷¹ In response to the *Alston* decision, the NCAA quickly adopted internal rule changes regarding an athlete's ability to profit from her own name, image, and likeness.¹⁷² As Justice Kavanaugh stated in his concurring opinion, this case will likely be a precursor to antitrust litigation to follow because "[t]he NCAA is not above the law."¹⁷³ Not only must the NCAA juggle increased legal scrutiny regarding its antitrust liability exposure, it also must handle the public scrutiny that has come with NIL rules.¹⁷⁴ Some feel this has led college athletes to prioritize seeking NIL deals to maximize financial gain rather than competing and winning in their college sport, further blurring the lines between amateur and professional.¹⁷⁵ The NCAA must balance all of this while maintaining the unique product of amateur college athletics amid the cultural changes associated with NIL reform.¹⁷⁶ Soon, powerful college athletic conferences could prove to be viable alternatives to the NCAA and ultimately lead to its downfall.¹⁷⁷ The NCAA no longer has a choice, it must undertake drastic compensation-related changes or cease to exist.¹⁷⁸ Ultimately, the NCAA seeks to avoid the same fate of fading into oblivion as its one-time rival, the AAU.¹⁷⁹

A. Alston Reveals the NCAA's Antitrust Liability for Restricting Education-Related Benefits

The Supreme Court in *Alston* affirmed the trial court's decision that the NCAA's limitations on education-related benefits to student athletes constituted unlawful restraints under Section I of the Sherman Act.¹⁸⁰ Since its founding, the NCAA has stood in "opposition to 'promised pay in any form.'"¹⁸¹ However, over the past century, the NCAA has become a powerful enterprise overseeing around 1,100 member institutions across three separate divisions.¹⁸² In contrast to the student athletes, the executive leaders within this powerful enterprise earn large salaries.¹⁸³ Notably, the president of the NCAA earns \$4 million annually, and the commissioners of the NCAA's most powerful conferences earn between \$2 million and \$5 million annually.¹⁸⁴ The optics of an organization standing in opposition to "promised pay in any form" for its lucrative athletes while compensating its executives with large annual salaries certainly do not help the NCAA avoid the image

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

172. *Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston*, *supra* note 19, at 471.

173. *Alston*, 141 S. Ct. at 2169 (Kavanaugh, J., concurring).

174. Terence Moore, *NCAA Had No Choice, But NIL Rule Will Damage College Football and Basketball*, FORBES (July 6, 2021), <https://www.forbes.com/sites/terencemoore/2021/07/06/the-ncaa-hadnt-a-choice-but-nil-rule-will-damage-college-football-and-basketball/?sh=14a992082c0d>.

175. *Id.*

176. *Bd. of Regents*, 468 U.S. at 115.

177. Farner, *supra* note 28.

178. *Id.*

179. *Id.*

180. *NCAA v. Alston*, 141 S. Ct. 2141, 2166 (2021); see also *Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston*, *supra* note 19, at 472.

181. *Alston*, 141 S. Ct. at 2149.

182. *Id.* at 2150.

183. *Id.* at 2151.

184. *Id.*

of a corrupt entity.¹⁸⁵

In *Alston*, the Court was tasked with evaluating the lower court's holding that the NCAA may not limit the education-related benefits that schools offer to student-athletes.¹⁸⁶ There, the student-athlete plaintiffs challenged the NCAA's rules that limited the compensation they could receive for their athletic services.¹⁸⁷ Further, the plaintiffs alleged that the rules of the NCAA "violate[d] § 1 of the Sherman Act, which prohibits 'contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce.'"¹⁸⁸ Congress enacted the Sherman Act under the theory that "'competition is the best method of allocating resources' in the Nation's economy."¹⁸⁹

The NCAA's restrictions allowed it to enjoy monopsony control in its market, as the NCAA itself admitted.¹⁹⁰ The NCAA enjoyed such monopsony control in college athletics that it could depress wages and restrict the quantity of student-athletes.¹⁹¹ Further, in *Alston*, the NCAA did not dispute that its own restrictions decreased the compensation that a student-athlete could receive.¹⁹²

In *Alston*, the NCAA contended that the lower courts erred by applying a "rule of reason analysis" to the NCAA's compensation rules and restrictions because it acted as a joint venture with the member institutions.¹⁹³ Typically, "[a] restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects," and "[t]he plaintiff bears the initial burden of showing that the restraint produces 'significant anticompetitive effects' within a 'relevant market.'"¹⁹⁴ The NCAA argued that it should not be subject to a rule of reason analysis; instead, it argued for classification as a joint venture with collaboration and cooperation among its member institutions for the market of intercollegiate athletic competition to exist at all.¹⁹⁵ The Court reasoned that most joint ventures are similarly subject to a rule of reason analysis.¹⁹⁶ Further, the Court concluded that the NCAA's status as a joint venture or other construct did not exempt it from ordinary rule of reason review, as the NCAA's members use monopsony power in the intercollegiate athletic market, and its restraints can harm competition and leave the student-athletes no economic alternatives to sell their labor.¹⁹⁷

The parties disputed the extent to which NCAA restrictions in "[its] labor market yield benefits in its consumer market that can be attained using substantially less restrictive means."¹⁹⁸ The Court declined to overrule *Board of Regents*, because its analysis was

185. *Id.* at 2149.

186. *Alston*, 141 S. Ct. at 2147.

187. *Id.* at 2151.

188. *Id.*; see also 15 U.S.C. § 1.

189. *Alston*, 141 S. Ct. at 2160 (quoting *Nat'l Soc. of Prof. Engineers v. U.S.*, 435 U.S. 679, 695 (1978)).

190. *Id.* at 2154.

191. *Id.*

192. *Id.*

193. *Id.* at 2155.

194. *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (quoting *Hairston v. Pac. 10 Conf.*, 101 F.3d 1315, 1319 (9th Cir. 1996)).

195. *Alston*, 141 S. Ct. at 2155.

196. *Id.* at 2156.

197. *Id.*

198. *Id.* at 2157.

consistent with *Alston*.¹⁹⁹ The NCAA argued that the Court should not apply a rule of reason analysis because in *Board of Regents* the Court afforded the NCAA “ample latitude” to accomplish its goal of promoting amateurism in college sports.²⁰⁰ However, the Court reasoned that *Board of Regents* did not hold that courts must reject any challenge to the NCAA’s compensation restrictions, as student-athlete compensation restrictions were not at issue in that case.²⁰¹ The NCAA further asserted that the rule of reason analysis was invalid because the NCAA and its member institutions were not commercial enterprises, but instead managed intercollegiate athletics as part of the undergraduate experience.²⁰² As the Court noted, the NCAA’s categorization as a nonprofit is questionable, as the NCAA and its member schools seek to maximize revenues like a commercial enterprise.²⁰³ Even the NCAA did not dispute that its significant economic activities affect interstate commerce and make it subject to the Sherman Act.²⁰⁴

Pursuant to rule of reason analysis, the Court applied “a three-step, burden-shifting framework” in which it ultimately found that the harm to competition outweighed its procompetitive effects.²⁰⁵ The Court applied the three-step framework to determine whether the harm to competition attributable to the NCAA’s limits to education-related benefits that schools may offer to student-athletes outweighed its procompetitive effects.²⁰⁶ First, the initial burden lies with the plaintiff to show that the restraint being challenged supports an anticompetitive effect.²⁰⁷ Next, the burden shifts to the defendant to prove that the restraint actually supports a procompetitive rationale.²⁰⁸ Finally, if the defendant successfully shows the restraint supports a procompetitive rationale, then the burden again shifts to the plaintiff to show that the procompetitive rationale could be achieved through less restrictive anticompetitive restraints.²⁰⁹ Because of the high burden the plaintiff must meet to show a substantial anticompetitive effect, nearly all rule of reason cases have been dismissed in the past half-century.²¹⁰ However, the plaintiffs in *Alston* overcame the high burden by adequately showing that the NCAA enjoyed the power to set wages in the student-athletes’ labor market, and the NCAA’s applications of that power produced significant anticompetitive effects.²¹¹ The lower court considered whether the student-athletes could prove that a substantially less restrictive education-related compensation rule existed to achieve the same procompetitive benefit the NCAA

199. *Id.*

200. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 120 (1984).

201. *Alston*, 141 S. Ct. at 2158.

202. *Id.*

203. *Id.* at 2159.

204. *Id.* at 2158.

205. *Id.* at 2160.

206. *Alston*, 141 S. Ct. at 2160.

207. *Id.* (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)).

208. *Id.*

209. *Id.*

210. Brief for 65 Professors of Law, Business, Economics, and Sports Management as Amici Curiae Supporting Respondents, *NCAA v. Alston*, 141 S. Ct. 2141 (2021) (Nos. 20-512, 20-520), 2021 WL 943556, *21, n.9 (courts have disposed of 90% (809 of 897) of Rule of Reason cases since 1977, and 97% (391 of 402) since 1999, on the grounds that the plaintiffs failed to show a substantial anticompetitive effect).

211. *Alston*, 141 S. Ct. at 2161.

had established at the second phase.²¹² The lower courts found that the student-athletes successfully demonstrated that the NCAA could achieve the same procompetitive benefits with less restrictive restraints, at least regarding education-related benefits.²¹³

Based on these findings, the Court held that less restrictive restraints on graduate school scholarships, tutoring payment scholarships, and the like “would not blur the distinction between college and professional sports and thus impair demand.”²¹⁴ Notably, the Court acknowledged that the critical debate about amateurism in college sports would continue, as the Court did not seek to resolve the issue but instead reviewed the district court’s application of antitrust law.²¹⁵ Importantly, the majority opinion loosened restraints on the NCAA’s education-related restrictions, allowing for sweeping changes in the economics and structure of intercollegiate athletics.²¹⁶ Further, the decision created increased competition between schools, greater benefits to college athletes, and illuminated possible antitrust liability exposure for the NCAA.²¹⁷

B. Justice Kavanaugh’s Concurring Opinion Unveils the Paradoxical Argument of Board of Regents and Suggests that the NCAA will Face Even Harsher Antitrust Liability in Future Compensation-Related Litigations

Justice Brett Kavanaugh’s concurring opinion articulated the treacherous path forward for the NCAA.²¹⁸ It also ominously foreshadowed the uphill climb the NCAA must face to overcome antitrust liability.²¹⁹ Kavanaugh impliedly invited future plaintiffs to pursue litigation against the NCAA.²²⁰ He reiterated the Court’s holding that the NCAA’s education-related benefits policy at issue violated antitrust laws, and he further suggested that the NCAA’s current structure and other restrictions on compensation to student-athletes could be subject to future antitrust challenges.²²¹ Although the Court only reviewed certain education-related benefit restrictions by the NCAA, the Court’s decision established how the NCAA’s other compensation restrictions will be analyzed in future litigation.²²² Going forward, the NCAA must answer to the ordinary rule of reason analysis, as it did in *Alston*.²²³ As Kavanaugh noted, it is highly questionable whether the NCAA’s compensation restrictions could succeed against the rule of reason scrutiny in future litigation.²²⁴ For this reason, the NCAA, as it currently operates, will likely cease to exist.

Justice Kavanaugh reasoned that the NCAA may lack a legally valid procompetitive

212. *Id.* at 2162.

213. *Id.*

214. *Id.* at 2164.

215. *Id.* at 2166.

216. Mitnick, *supra* note 168.

217. *Id.*

218. *NCAA v. Alston*, 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring).

219. *Id.*

220. Mitnick, *supra* note 168.

221. *Id.*

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

223. *Id.*

224. *Id.*

justification for its continuing compensation restrictions.²²⁵ In essence, the NCAA's justification for its compensation restrictions proves to be especially unjustifiable.²²⁶ Justice Kavanaugh noted the NCAA's circular argument that "its compensation rules are procompetitive because those rules help define the product of college sports . . . [and] the NCAA [said] that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student-athletes are not paid."²²⁷

Justice Kavanaugh reiterated that the NCAA's troubling reasoning appeared circular and "would be flatly illegal in almost any other industry in America."²²⁸ In resounding simplicity, "[p]rice-fixing labor is price-fixing labor."²²⁹ The NCAA cannot include price-fixed labor in the definition of the product it markets and expect to receive a pass from antitrust liability.²³⁰ However, the rich tradition of college athletics and the passion Americans have for their schools' sports teams add complexity to the NCAA's situation.²³¹ Nevertheless, Kavanaugh noted that traditions alone are not enough to justify the NCAA's lucrative enterprise, supported by student-athletes who are not fairly compensated.²³²

In dramatic foreshadowing, Kavanaugh painted a bleak future for the NCAA as "under ordinary principles of antitrust law, it is not evident why college sports should be any different [from other businesses]" because "[t]he NCAA is not above the law."²³³ Further, his concurring opinion expressed the sentiment that the NCAA should be grateful that it only received the limited outcome it did, rather than a sweeping defeat.²³⁴ Future litigation is almost guaranteed unless legislation providing otherwise is enacted or fair compensation agreements between the NCAA and student-athletes are negotiated.²³⁵ Even before *Alston*, states like California passed the Pay to Play Act, and legislators began planning federal changes to NIL rights.²³⁶ If the NCAA wants to control its fate, then it needs to alter its standards to stay ahead of future legislation and litigation.²³⁷ The *Alston* decision will likely encourage more antitrust litigation addressing the remaining compensation restrictions in place by the NCAA.²³⁸

225. *Id.*

226. *Id.*

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

228. *Id.*

229. *Id.*

230. *Id.* at 2168 (Kavanaugh, J., concurring).

231. *Id.*

232. *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring).

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

234. Marino, *supra* note 4.

235. *Alston*, 141 S. Ct. at 2168.

236. Luke Tepen, Note, *Pay to Play: Looking Beyond Direct Compensation and Towards Paying College Athletes for Themselves*, 65 WASH. U. J. L. & POL'Y 213, 214, 216 (2021).

237. *Id.* at 214.

238. Marino, *supra* note 4.

C. NIL is Just the Beginning, and it Will Lead to Other Compensation Activity Reform Measures Taken by the NCAA

In light of the student athletes' success in *Alston*,²³⁹ the NCAA will continue to modify student-athlete compensation restrictions, which it started by passing a measure allowing college athletes to receive compensation for their name, image, and likeness.²⁴⁰ As Kavanaugh highlighted, the *Alston* decision likely leads to more questions than answers.²⁴¹ These questions include: "How would paying greater compensation to student-athletes affect non-revenue-raising sports? Could student-athletes in some sports but not others receive compensation? How would any compensation regime comply with Title IX?"²⁴² The implications of the rule changes must also be considered, as NIL reform has already impacted college football by further blurring the line between professional and amateur sports.²⁴³ Reform to NIL rules are likely just the beginning of compensation-related changes the NCAA will undertake, as it may also consider how amateur college athletics could look if the NCAA engaged in collective bargaining with student-athletes.²⁴⁴

As the NCAA considers potential rule changes regarding compensation-related benefits to student-athletes, it will likely seek to add benefits that will not further blur the distinction between college and professional sports so as to maintain the status of amateurism.²⁴⁵ However, with the temporary NIL rules that the NCAA passed in the days after the *Alston* decision, the distinction between college and professional sports may actually be blurrier than ever before.²⁴⁶ These rules, in principle, allow for student-athletes to be compensated for their name, image, and likeness—including endorsement deals.²⁴⁷ But, in practice, the NCAA regulations regarding NIL may go mostly uninhibited.²⁴⁸ Although an athlete may simply pursue an NIL deal by agreeing to post an advertisement for a business on their social media platform in exchange for compensation, NIL groups of school boosters, called "collectives," have also formed with the goal of compensating college athletes so that they will choose to play for their favorite school.²⁴⁹

A collective operates as a for-profit or a non-profit entity and seeks to unite supporters of a university and provide more substantial NIL opportunities to players.²⁵⁰

239. *Alston*, 141 S. Ct. at 2169 (Kavanaugh, J., concurring).

240. *Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston*, *supra* note 19, at 471, 480.

241. *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring).

242. *Id.*

243. See generally Dennis Dodd, *Inside the world of 'collectives' using name, image and likeness to pay college athletes, influence programs*, CBS SPORTS (Jan. 26, 2022, 1:03 PM), <https://www.cbssports.com/college-football/news/inside-the-world-of-collectives-using-name-image-and-likeness-to-pay-college-athletes-influence-programs/>.

244. *Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston*, *supra* note 19, at 478–79; *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring).

245. *Alston*, 141 S. Ct. at 2164.

246. *Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston*, *supra* note 19, at 471; Dodd, *supra* note 243.

247. *Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston*, *supra* note 19, at 471, 480.

248. Dodd, *supra* note 243.

249. *Id.*

250. *Id.* (Notably, a former NCAA vice president for regulatory affairs, Oliver Luck, said "[g]ood luck to the NCAA or anybody to make that determination or hold anybody accountable on that," when referring to the

The new NIL rules allow boosters to get around the NCAA's prohibition against "buying" recruits by paying the athlete who competes at their school in exchange for a task from the athlete, like attending a birthday party.²⁵¹ One collective, called "Horns with Heart," plans to pay all offensive linemen for the University of Texas \$50,000 each year in exchange for promotional charity work.²⁵² Even with the new NIL rules, the NCAA continues to restrict compensation that a school can provide directly to its athletes unrelated to education.²⁵³ These compensation restrictions will continue to subject it to potential antitrust liability.²⁵⁴

One alternative that could reduce the NCAA's potential antitrust liability is to engage in collective bargaining with college athletes.²⁵⁵ Because the NCAA does not do this, the athletes, who are the victims of anticompetitive rules, are not able to negotiate to receive the purported benefit of the restraint.²⁵⁶ Collective bargaining would allow players to negotiate for a greater share of benefits resulting from the restraints, like enhanced ticket sales or television contracts.²⁵⁷ Then, the NCAA may receive a less harsh analysis under a rule of reason approach applied by the courts because the NCAA would be able to point to collective bargaining to show that student athletes, similar to professional athletes, had the opportunity to negotiate for their share of benefits arising from labor market restraints.²⁵⁸ The NCAA must make a structural change, like engaging in collective bargaining with student athletes, to avoid antitrust liability exposure.²⁵⁹

D. The NCAA Will Ultimately Face Extinction Like the AAU

The NCAA no longer has a choice. It must explore drastic compensation-related changes or it will cease to exist.²⁶⁰ If the NCAA fails to correct its compensation-related shortfalls then it will continue to be subjected to future antitrust liability and rule of reason scrutiny. It may also experience diminishing power through legislation or internal structural changes. For example, California and other states passed various "pay to play" legislation allowing athletes compensation for their name, image, and likeness before the NCAA passed its own NIL rules in 2021 allowing athletes to similarly be compensated.²⁶¹ It is likely that other compensation-related benefits for athletes, including directly compensating and reclassifying athletes as university employees, could gain momentum as possible solutions among state legislators.²⁶² As discussed earlier, Congress intervened

legality of the collectives model for NIL deals).

251. *Id.*

252. *Id.*

253. *Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston*, *supra* note 19, at 471.

254. *Id.*

255. *Id.* at 478–79; *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring).

256. *Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston*, *supra* note 19, at 478.

257. *Id.* at 478–79.

258. *Id.*

259. *Id.*

260. Farmer, *supra* note 28.

261. See generally CAL. EDUC. CODE § 67456 (West 2021) (signed into law in 2019); see also Tepen, *supra* note 236, at 216.

262. Dennis Dodd, *Iowa state bill aims to reclassify college athletes as employees due compensation by universities*, CBS SPORTS (Jan. 27, 2022, 11:51 AM), <https://www.cbssports.com/college-football/news/iowa-state-bill-aims-to-reclassify-college-athletes-as-employees-due-compensation-by-universities/>.

in a past amateur sports dispute by passing the Amateur Sports Act, which effectively took governing power away from the AAU.²⁶³ The federal government could choose to intervene again and directly oversee college athletics and take governing power away from the NCAA.²⁶⁴ It may soon become apparent that the NCAA no longer suffices as a governing organization for college athletics and that alternatives, including direct intervention by the federal government,²⁶⁵ or restructuring to give governing power to the conferences or member institutions, could prevail.²⁶⁶

“Pay to play” legislation in California, which predated the NCAA’s own attempt to reform NIL regulations, is likely a precursor to more state legislation addressing the compensation-related shortfalls for student athletes. California adopted the Fair Pay to Play Act in 2019—two years before the NCAA adopted similar rule changes.²⁶⁷ Several more states, including Florida, Colorado, and Nebraska, adopted similar NIL laws.²⁶⁸ These laws serve to prohibit state universities from penalizing college athletes who are compensated for their name, image, and likeness.²⁶⁹ Similarly, Iowa state representative Bruce Hunter introduced a bill in January 2022 that would classify college athletes in Iowa as university employees.²⁷⁰ The bill would allow the Iowa Board of Regents, which oversees the state’s public universities, to set athlete compensation just as it does for other state employees.²⁷¹ Although critics predict that the bill is unlikely to pass, it could create momentum for other states to take similar action and, eventually, force the NCAA to adopt direct compensation for athletes.²⁷²

Congress may seek to correct the NCAA’s compensation-related activities by directly overseeing college athletics and removing the NCAA’s power.²⁷³ To a limited extent, the NCAA may be waiting for Congress to intervene and provide uniformity with current NIL rules that have expanded beyond the scope or control of the NCAA.²⁷⁴ However, if Congress intervenes, it is likely that it would not stop with NIL rules, and would also address the larger problem of direct compensation and other education-related compensation.²⁷⁵ To stay afloat, the NCAA could attempt to lobby Congress for an antitrust exemption to provide it immunity from future rule of reason scrutiny.²⁷⁶ More likely, the NCAA’s protected carve-out in the Amateur Sports Act may be altered or

263. See generally 36 U.S.C. § 220501.

264. Dodd, *supra* note 243.

265. *Id.*

266. Dennis Dodd, *With the NCAA’s authority quickly eroding, significant change is ahead for major college sports*, CBS SPORTS (July 18, 2021, 1:11 PM), <https://www.cbssports.com/college-football/news/with-the-ncaas-authority-quickly-eroding-significant-change-is-ahead-for-major-college-sports/>.

267. See generally CAL. EDUC. CODE § 67456 (West 2021); see also Tepen, *supra* note 236, at 216.

268. Tepen, *supra* note 236, at 216.

269. *Id.*

270. Dodd, *supra* note 262.

271. *Id.*

272. *Id.*

273. Dodd, *supra* note 243.

274. *Id.*

275. *Id.*

276. Marc Edelman, *What Happens Now that the Supreme Court has Decided Alston v. NCAA?*, FORBES (June 22, 2021, 10:34 AM), <https://www.forbes.com/sites/marcedelman/2021/06/22/what-happens-now-that-the-supreme-court-has-decided-alston-v-naaa/?sh=58accbd47393>.

granted to a government entity, just as Congress granted the AAU's power to the USOC.²⁷⁷

The NCAA's adoption of a new constitution in January 2022 also signifies that the NCAA recognizes structural changes are necessary to survive.²⁷⁸ Among the changes adopted in the new constitution, student-athletes will have voting representation on the presidential body and the NCAA Board of Governors.²⁷⁹ It appears that the changes will also allow for more autonomy in each of the NCAA's three classification divisions.²⁸⁰ Notably, the NCAA's new constitution continues its previous revenue allocations.²⁸¹ The changes, though limited in scope, suggest that the NCAA recognizes that its back is against the wall, and it no longer has a choice other than to seek reform.²⁸²

Going forward, possible solutions to the structural problem of the NCAA, absent legislation by Congress, include decentralizing its control and allowing the various conferences to control or establishing an Olympic model in which each sport has a separate governing body.²⁸³ Incorporating a decentralized model in favor of conferences could allow each conference and its student athletes fair compensation for the value they create.²⁸⁴ For example, the powerful Southeastern Conference generates around \$660 million in annual revenue, whereas the smaller Missouri Valley Conference generates around \$11 million in annual revenue.²⁸⁵ By allowing conferences to govern their athletes and negotiate compensation-related benefits, student athletes will be equitably compensated for the value they generate.²⁸⁶ The momentum for conference control of college football is accelerating with recent moves by the University of Oklahoma and University of Texas to the SEC, and USC and UCLA to the Big Ten Conference.²⁸⁷ Going forward, it appears that the SEC and Big Ten are the conferences with enough power to potentially influence the future governance of college football.²⁸⁸ The Pac-12, Big 12, and Atlantic Coast Conference—the other three conferences that, along with the SEC and Big Ten, comprise the “Power Five”—must now seek to add financially viable programs like the currently-independent University of Notre Dame and secure significant television contracts to keep up with the dominant SEC and Big Ten.²⁸⁹

Decentralization of power from the NCAA to allow the conferences to establish their own amateur sports governing rules could lessen legal liability and promote fair

277. 36 U.S.C. § 220526(a).

278. Corbin McGuire, *NCAA members approve new constitution*, NCAA (Jan. 20, 2022, 6:12 PM), <https://www.ncaa.org/news/2022/1/20/media-center-ncaa-members-approve-new-constitution.aspx>.

279. *Id.*

280. Farner, *supra* note 28.

281. McGuire, *supra* note 278.

282. Farner, *supra* note 28.

283. Dodd, *supra* note 266.

284. Tepen, *supra* note 236, at 239.

285. *Id.*

286. *Id.* at 239–40.

287. See generally USC, *UCLA to the Big Ten: What's next for the Pac-12, how it impacts the CFP and more*, ESPN (June 30, 2022), https://www.espn.com/college-football/story/_/id/34173790/usc-ucla-big-ten-next-pac-12-how-impacts-cfp-more.

288. *Id.*

289. *Id.*

competition in the college sports market.²⁹⁰ This change would not be without flaws. It could lead to corruption or relaxed rules in a particular conference, all designed to gain competitive advantages over rivals.²⁹¹ Alternatively, the individual sports could adopt separate governing bodies.²⁹² This model would look very similar to the structure created by the Amateur Sports Act, in which the USOC oversees the various NGBs including USA Hockey, USA Track & Field, and so forth.²⁹³ If an Olympic model were adopted, then the NCAA could be replaced by another entity overseeing the various sports governing bodies.²⁹⁴ This would mirror the AAU's experience when Congress, through the Amateur Sports Act, named the USOC the overseer of Olympic sports NGBs.²⁹⁵ Whether through legislation or through volunteered alterations, the NCAA will likely cease to maintain the influence it has enjoyed in previous decades. As Southeastern Conference Commissioner, Greg Sankey, stated, it is now time for the NCAA to "change or die."²⁹⁶

V. CONCLUSION

College athletics are endearing to many Americans, evoking nostalgia to cheer for their alma mater or the sports team they have known since birth. However, the glory and nostalgia of college athletics is not enough to conceal the hypocrisy of amateurism in failing to properly compensate student athletes.

The Supreme Court's decision in *Alston* revealed the NCAA's potentially illegal compensation activities, and unveiled the paradoxical argument of *Board of Regents* that the NCAA had relied on to support its monopsony activities.²⁹⁷ The NIL reform adopted by the NCAA after the *Alston* decision will likely be the first in a continued effort to avoid future antitrust liability.²⁹⁸ Similarly, the NCAA faces pressure in the form of state legislative proposals to directly compensate student athletes,²⁹⁹ calls for structural changes to decentralize the NCAA's regulatory power,³⁰⁰ and Congressional intervention to do away with the broken system entirely.³⁰¹ The NCAA faces a legal fate similar to the AAU, its one-time amateur athletics rival. It is now likely that the NCAA will join the AAU in amateur sports exile.

-Michael Duke*

290. Dodd, *supra* note 266.

291. *Id.*

292. *Id.*

293. 36 U.S.C. § 220521.

294. Dodd, *supra* note 266.

295. 36 U.S.C. § 220521; *see also* Chudacoff, *supra* note 5, at 62.

296. Farner, *supra* note 28.

297. NCAA v. Alston, 141 S. Ct. 2141, 2141 (2021).

298. Marino, *supra* note 4.

299. Dodd, *supra* note 262.

300. Dodd, *supra* note 266.

301. Dodd, *supra* note 243.

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