

## FROM BAGS TO RICHES: GAMING'S NIL SPONSORSHIP INDICATIVE OF NEED FOR FEDERAL OVERSIGHT IN COLLEGE SPORTS

*Cooper Rhodes\**

### I. INTRODUCTION

Sportsbooks and oddsmakers currently pay college athletes for their name, image, and likeness (NIL) activities.<sup>1</sup> This unique environment exists out of legal novelty and oddity created by a patchwork of laws and policy that have forced a shotgun marriage between two industries that previously existed as church and state: college sports and sports betting. While this unique sponsorship opportunity exists on the fringes of a college athletics environment in need of broad reform, its potential legal ramifications should not be ignored. Rather, this blossoming trend signals the power vacuum left by an absentee National Collegiate Athletic Association (NCAA) attempting to rid itself of NIL regulatory responsibility by waiting for federal oversight.<sup>2</sup>

Part II will discuss current NIL trends in the gaming industry. Part III will focus on the NCAA's opposition to and the legal history of gaming and student-athlete compensation. Then, Part IV will discuss the history of college sports and sports betting. Finally, Part V will proffer how these industries might grow together in the wake of legalized sports betting. And, to conclude, Part VI discourages the practice until college sports stabilize.

---

\* J.D./M.B.A. Candidate. Dec. 2023, William S. Boyd School of Law & Lee Business School, University of Nevada, Las Vegas, Notes Editor *UNLV Gaming Law Journal*. A special thanks to my family, whose love and support make this possible, and to the UNLV William S. Boyd School of Law, where my friends and colleagues inspire me. Most of all, I would like to thank my younger brother Clayton Rhodes - I cherish every time I get to tell someone I will be the second Rhodes boy to graduate from UNLV. I am humbled to call myself your brother. There is no one I would rather sit next to at the Thomas & Mack, and no one I would rather bet on college hoops with.

<sup>1</sup> Chris Sheridan, *Maximbet Becomes First Sports Betting Company to Offer NCAA Female Athletes NIL Sponsorships*, MAXIM (Oct. 14, 2021), <https://www.maxim.com/news/maximbet-becomes-first-sports-betting-company-to-offer-ncaa-female-athletes-nil-sponsorships/>.

<sup>2</sup> William Lawrence, *The NCAA's New NIL Guidance: How the NCAA Has Loosened Restrictions on Collectives*, JD SUPRA (Nov. 17, 2022), <https://www.jdsupra.com/legalnews/the-ncaa-s-new-nil-guidance-how-the-3717587/>.

## II. “SHOW ME THE MONEY”: CURRENT NIL TRENDS IN THE GAMING INDUSTRY

To illustrate how these industries are rapidly intertwining, every female college athlete in the state of Colorado is eligible to receive a direct cash payment from the sportsbook MaximBet in exchange for their endorsement.<sup>3</sup> MaximBet’s sponsorship is perfectly legal in Colorado, which has legalized sports betting and adopted forgiving NIL policies for college athletes.<sup>4</sup> However, the direct link between sportsbooks and college athletes is concerning to regulators, MaximBet’s interstate competitors, and university compliance officers alike.<sup>5</sup> Not only does the sponsorship expand a highly regulated industry’s advertising to individuals with direct influence on the outcomes of that industry, but it also signals a lack of communication between the state regulatory bodies responsible for supervising college sports and gambling. Collectively, local legislation remains silent on the issue, the NCAA has been slow to respond to the *Alston* decision, and, for schools like the University of Colorado, the only compliance concern is that partnerships with athletes might compete with their own gaming sponsorships.<sup>6</sup>

On a national level, the NCAA’s sporadic NIL regulatory scheme arises from the fact that American federalism and antitrust law have historically struggled to understand competitive sports.<sup>7</sup> The choice to compete within the arbitrary confines of a “game” forces teams that are normally competitors to collaborate in ways atypical of a market economy. Specifically in intercollegiate athletics, the NCAA has long enjoyed limited antitrust oversight.<sup>8</sup> This exemption formalized the NCAA’s power as an economic cartel and pseudo-

---

<sup>3</sup> Kristi Dosh, *MaximBet Offers Statewide NIL Deal to Every NCAA Female Athlete in Colorado*, FORBES (Sep. 28, 2021), <https://www.forbes.com/sites/kristidosh/2021/09/28/maximbet-offers-statewide-nil-deal-to-every-ncaa-female-student-athlete-in-colorado/?sh=1cee7bd7127d>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* Compare Compensation and Representation of Student Athletes, SB 20-123, 73rd General Assembly (2020), <https://leg.colorado.gov/bills/sb20-123> with Colorado Dept. of Rev., Current Sports Betting Rules (2022), <https://sbg.colorado.gov/sports-betting-rules-and-regulations>.

<sup>6</sup> Dosh, *supra* note 3.

<sup>7</sup> See *Antitrust Labor Law Issues in Sports*, USLEGAL, <https://sportslaw.uslegal.com/antitrust-and-labor-law-issues-in-sports/> (last visited Apr. 23, 2023); see also Nicholas E. O. Gaglio & Zachary D. Stross, *United States: Antitrust in Organised Sports*, GLOB. COMPETITION REV. (Sept. 30, 2022), <https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2023/article/united-states-antitrust-in-organised-sports>.

<sup>8</sup> Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla., 468 US 85, 120 (1984).

legal governing body.<sup>9</sup> However, after numerous previous legal challenges,<sup>10</sup> the Supreme Court overturned the NCAA's antitrust exception in *Alston v. NCAA*.<sup>11</sup> As a result of losing this exemption, the NCAA granted student-athletes the opportunity to benefit from their NIL for the first time in June 2021.<sup>12</sup> This abrupt policy change relinquished regulatory oversight to a patchwork of state statutes that have not yet faced legal challenges.<sup>13</sup> In fact, the NCAA's NIL policy includes clauses that expressly concede NIL oversight to state regulators.<sup>14</sup> These subservient clauses represent calls for state regulators to pass legislation that increases the likelihood of federal oversight.<sup>15</sup> After facially deferring to the states in the NCAA interim policy, President of the NCAA Mark Emmert stated that "with the variety of state laws adopted across the country, we will continue to work with Congress to develop a solution that will provide clarity on a national level."<sup>16</sup>

While its "interim" NIL policy sits stagnant, the NCAA not so secretly desires to place the responsibility of NIL oversight on federal policymakers.<sup>17</sup> However, Congress's hesitancy to adopt any significant NIL policy signals that the NCAA's trust has been misplaced. Since 2019, eight NIL-related bills have been introduced in either the House or Senate, all of which have failed.<sup>18</sup>

Contributing to the necessity for centralized governance concerning this issue is the fact that the inconsistency of a state-based NIL framework places the burden of compliance on the class of individuals with the least resources: college athletes.<sup>19</sup> Athletes in professional sports leagues employ entities like unions, players' associations, and licensed agents to protect players' interests.<sup>20</sup> In

---

<sup>9</sup> Taylor Branch, *The Shame of College Sports*, ATL. MONTHLY, Oct. 2011, at 86.

<sup>10</sup> See *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1024 (1998); see also *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1053 (2015).

<sup>11</sup> *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2160 (2021).

<sup>12</sup> Lawrence, *supra* note 2.

<sup>13</sup> See Derin Dickerson & Trenton Hafley, *State Experiments with NIL Rules Put Athletes on Defense*, BLOOMBERG L. (Apr. 1, 2022, 1:00 AM), <https://news.bloomberglaw.com/ip-law/state-experiments-with-nil-rules-put-athletes-on-defense>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA: MEDIA CTR. (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See Joseph Zucker, *Shabazz Napier Says He Goes to Bed Starving Because He Can't Afford Food*, BLEACHER REP. (Apr. 7, 2014), <https://bleacherreport.com/articles/2020901-shabazz-napier-says-he-goes-to-bed-starving-because-he-cant-afford-food>.

<sup>20</sup> *Collective Bargaining Agreements in Sports Leagues*, JUSTIA, <https://www.justia.com/sports-law/collective-bargaining-agreements-in-sports-leagues/> (last visited May 7, 2023); *Sports Agents – History and Law*, USLEGAL, <https://sportslaw.usleg>

professional leagues, athletes seeking contentious sponsorships have clear restrictive guidelines as to the terms of the sponsorship, if they are not outright banned.<sup>21</sup> Finally, the quid pro quo of an athlete's on field performance translating to their contract more clearly aligns the interests of the athlete with the team and league. NIL attempts to avoid pay-for-play in that an athlete cannot be paid for on-field performance, while their NIL value is inherently correlated to their on-field performance. In doing so, a state-based NIL regime, as a replacement for pay-for-play, ensures that athletes will not have these entities to protect their interests. Given that athletes compete on a national level, without centralized governance, athletes do not have a place to have their voices heard.

Given the NCAA's previous hostility to gambling, sportsbooks sponsoring college athletes would seem surreal, if not unimaginable, even three years ago.<sup>22</sup> However, the inextricable link between college athletics and the gaming industry has always existed.<sup>23</sup> The NCAA fought the legalization of gaming so vigorously that, in many ways, the history of college sports tells the history of the American gaming industry.<sup>24</sup> The recent string of Supreme Court rulings has turned the previously contentious relationship between legal sports gambling and college athletics into a shotgun marriage.<sup>25</sup>

This niche regulatory concern can foster expansive, technocratic, and often pseudo-intellectual speculation that escapes the practical realities of both industries. Not only does the public's passion for sports naturally breed misconceptions, but the fact that elite college athletes can make millions from NIL sponsorships distracts from the reality that a leading NIL company reports

---

al.com/sports-agents-and-contracts/sports-agents-history-and-law/ (last visited May 7, 2023).

<sup>21</sup> Cristina Possamai, *Sponsorships of Bookmakers on Jersey's Remain Banned in the NBA*, IGAMING BRAZ. (June 10, 2021, 11:07 AM), <https://igamingbrazil.com/en/sports-betting-en/2021/10/06/sponsorships-of-bookmakers-on-jerseys-remain-banned-in-the-nba/>.

<sup>22</sup> Ryan Rodenberg, *From 'Irreparable Harm' to Moneymaker: A Brief History of NCAA Sports Betting Policy*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/44380/ncaa-sports-betting-colorado-pointsbet> (Sept. 21, 2020) [hereinafter Rodenburg, *Irreparable Harm*]; Ryan Rodenberg, *NCAA Pivots to Address Sports Betting Integrity*, ESPN (Mar. 11, 2019), [https://www.espn.com/chalk/story/\\_/id/26229344/how-ncaa-pivoting-address-sports-betting-integrity](https://www.espn.com/chalk/story/_/id/26229344/how-ncaa-pivoting-address-sports-betting-integrity) [hereinafter Rodenberg, *NCAA Pivots*]; John Brennan, *NCAA Makes Case to Senators to Ban Betting on College Sports*, SPORTSHANDLE (July 22, 2020), <https://sportshandle.com/ncaa-makes-case-to-senators-to-ban-betting-on-college-sports>.

<sup>23</sup> See Associated Press, *NFL, NCAA Oppose Del. Gambling Bill*, ESPN (Mar. 27, 2009, 3:40 AM), <https://www.espn.com/espn/news/story?id=4019996>; see also Eric Meer, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 283–84 (2011).

<sup>24</sup> See Associated Press, *supra* note 23; see also Meer, *supra* note 23, at 283–84.

<sup>25</sup> See Lawrence, *supra* note 2.

an average transaction amount of \$1,400.<sup>26</sup> The gaming industry's concerns should be grounded in (1) the NCAA's deficiencies and (2) the lack of public confidence in the gaming industry.

First, the evolving trend of sportsbooks operators participating in the NIL activities of college athletes is unique due to the decentralized nature of oversight in college sports.<sup>27</sup> Whereas professional sports have broadly embraced sports betting sponsorships and developed institutional best practices through institutions such as players' associations, the NCAA's most recent interim policy has no categorical restrictions.<sup>28</sup> Further, in college sports, the responsibility of oversight is delegated to the student-athlete. For example, a college football player must comply with federal, state, and local law, as well as the pseudo-legal governing bodies of the NCAA, the player's university, and the conference in which their university competes, all of which vary widely in relation to gaming and sponsorship.<sup>29</sup> The *Alston* decision only overturned the NCAA's previous antitrust exemption and does not comment on NIL.<sup>30</sup> However, in losing that exemption, the NCAA lost its only mechanism to keep athletes from NIL activities and was forced to adjust its policy, giving broad deference to state legislatures.<sup>31</sup>

While the modern NCAA has grossly misused its power, the history of college athletics and the legal questions surrounding this niche advertising issue signal the necessity for a centralized governing body. Before the NCAA era of college athletics, universities consistently cheated and players regularly died.<sup>32</sup> The Roosevelt administration recognized a looming crisis and requested

---

<sup>26</sup> Blueprint Sports, LINKEDIN,

[https://www.linkedin.com/feed/update/urn:li:activity:7013901983103291392?utm\\_source=share&utm\\_medium=member\\_desktop](https://www.linkedin.com/feed/update/urn:li:activity:7013901983103291392?utm_source=share&utm_medium=member_desktop) (last visited Jan. 29, 2023).

<sup>27</sup> See Ralph D. Russo, *NCAA's Emmert: It Is Time to Decentralize College Sports*, ASSOCIATED PRESS (July 15, 2021), <https://apnews.com/article/sports-business-college-sports-63d1739ab7795561b705a8fec31dcae>.

<sup>28</sup> See Meghan Durham, *DI Board Approves Clarifications for Interim NIL Policy*, NCAA: MEDIA CTR. (Oct. 26, 2022), <https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx>.

<sup>29</sup> See Cate Charron, *The State by State NIL Legislation Guide*, STUDENT PRESS L. CTR. (Feb. 22, 2023), <https://splc.org/2023/02/the-state-by-state-nil-legislation-guide/>; see also 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>; Pete Nakos, *How NIL Legislation Varies on a State-by-State Basis*, ON3 OS (July 8, 2022), <https://www.on3.com/nil/news/how-nil-legislation-varies-on-a-state-by-state-basis/>.

<sup>30</sup> Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2167 (2021).

<sup>31</sup> *Id.* at 2167–68. See also *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481, 1484–85 (2018) (holding that Congress may regulate sports betting if it expressly chooses to do so, but if it does not, states are free to regulate their own sports betting markets).

<sup>32</sup> See Branch, *supra* note 9, at 83.

reform.<sup>33</sup> The request gave rise to the governing body that would eventually become the NCAA.<sup>34</sup> After *Alston*, the NCAA is functioning as a negligent partner to gaming, while at the state level, legislators are actively overturning previous NIL legislation to attract the best high school athletes.<sup>35</sup> The necessity for federal oversight is readily apparent.

Second, whether fair to the gaming industry or not, the skepticism surrounding the direct sponsorship of college athletes comes at a time when Americans are generally cynical of sports gambling and believe that legalized betting will hurt the integrity of sports.<sup>36</sup> More importantly, the public's seemingly Puritanesque concerns are not unfounded. NCAA athletes are prohibited from participating in sports wagering, however, 24% of male and 5% of female student-athletes reported wagering on sports in the last year, and one in fifty male student-athletes meet standard diagnostic criteria for problem gambling.<sup>37</sup> In professional sports, where oversight is centralized, examples of scandals abound. From the recent examples of Calvin Ridley<sup>38</sup> and Evander Kane,<sup>39</sup> to the 1919 White Sox ("the Black Sox") accused of fixing World Series games,<sup>40</sup> to Pete Rose,<sup>41</sup> sports betting scandals often bring the public's eye and the sporting world's strictest scrutiny. This large of a policy shift in both industries signals that a crisis in confidence, if not an actual scandal, looms over college sports at a time when gaming is still trying to expand nationally and cannot afford missteps.

---

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See Gregory A. Marino, *The NCAA Declares Independence from NIL Restrictions*, FOLEY: LEGAL NEWS: PUBL'NS (Aug. 21, 2021), <https://www.foley.com/en/insights/publications/2021/08/ncaa-declares-independence-nil-restrictions>.

<sup>36</sup> Shannon Vavra, *Americans Think Legalized Sports Betting Will Hurt Integrity of the Game*, AXIOS: SPORTS (Feb. 2, 2019), <https://www.axios.com/by-the-numbers-more-americans-think-sports-betting-will-hurt-integrity-of-sports-3c5bfe03-e8d4-41ee-b20f-3bea2ee03686.html>.

<sup>37</sup> *Sports Wagering*, NCAA, <https://www.ncaa.org/sports/2016/4/29/sports-wagering.aspx> (last visited Apr. 16, 2023).

<sup>38</sup> See generally Ken Belson, *N.F.L. Hands Calvin Ridley a 1-Year Suspension for Betting on Games*, N.Y. TIMES: FOOTBALL (Mar. 7, 2022), <https://www.nytimes.com/2022/03/07/sports/football/calvin-ridley-nfl-betting.html>.

<sup>39</sup> See generally Greg Wyshynski & David Purdum, *Evander Kane Betting Allegations: What We Know and What We Don't*, ESPN (Aug. 2, 2021), [https://www.espn.com/chalk/story/\\_/id/31944608/evander-kane-betting-allegations-know](https://www.espn.com/chalk/story/_/id/31944608/evander-kane-betting-allegations-know).

<sup>40</sup> *Black Sox Scandal*, BASEBALL REFERENCE, [https://www.baseball-reference.com/bullpen/Black\\_Sox\\_Scandal](https://www.baseball-reference.com/bullpen/Black_Sox_Scandal) (last visited Apr. 4, 2022).

<sup>41</sup> Ryan Young, *Pete Rose, Banned from Baseball for Betting on Games, Launches Gambling Podcast*, YAHOO! SPORTS (Oct. 7, 2021), <https://sports.yahoo.com/pete-rose-banned-from-mlb-baseball-for-betting-on-games-launches-gambling-podcast-231709480.html>.

This dynamic comes at a time when college athletics and gaming have grown synonymous. After the Professional and Amateur Sports Protection Act (PASPA) was overturned in 2018, betting on the NCAA's five largest conferences ("the power five") has transformed into a \$11 billion industry annually.<sup>42</sup> The 2022 College Football Playoff (CFP) alone drew \$500 million worth of bets.<sup>43</sup> As of January 2022, twenty-five of the power five conferences' sixty-seven schools operate in states with legalized sports betting, with several more of these states introducing legislation.<sup>44</sup> With that large of an influx of capital and a patchwork of state policies, integrity concerns—including match-fixing, point shaving, players betting on themselves, and NIL sponsorships—indirectly affect outcomes.

Policymakers are beginning to raise concerns over the gaming industry's sponsorship of NCAA athletes. In Nevada, Legislative Assembly members have voiced concerns over "the void of Federal legislation" and have recommended the Nevada Gaming Control Board "conduct a study concerning NIL implications for the gaming industry in Nevada."<sup>45</sup>

U.S. Senators Joe Manchin and Tommy Tuberville stated that the "lack of clear enforceable rules" in the post-*Alston* NIL landscape "prioritizes short-term financial gain" and "means that the U.S. Congress must set clear ground rules for Student-Athletes and institutions alike" in a letter to the commissioner of the Southeastern Conference (SEC).<sup>46</sup>

Finally, in congressional testimony to the Subcommittee on Consumer Protection and Commerce (Consumer Protection), Central Intercollegiate Athletic Association (CIAA) Commissioner Jacqueline (Jacquie) D. McWilliams advocated for additional federal mandates and consistency among state regulations to prohibit NIL agreements with gaming companies and other advertising categories inconsistent with the values of higher education.<sup>47</sup> While preserving the façade of college athletes representing anything more than money

---

<sup>42</sup> *BetDetect, a JV of U.S. Integrity and LEARFIELD, to Monitor Activity as Collegiate Sports Wagering Grows*, U.S. INTEGRITY, <https://www.usintegrity.com/news/betdetect-a-jv-of-us-integrity-and-learfield-to-monitor-activity-as-collegiate-sports-wagering-grows> (last visited Apr. 16, 2023).

<sup>43</sup> *Id.*

<sup>44</sup> Bill King, *U.S. Integrity, Learfield Believe BetDetect Will Help Colleges Navigate Online Betting Explosion*, SPORTS BUS. J. (Jan. 17, 2022), <https://www.sportsbusinjournal.com/Journal/Issues/2022/01/17/Upfront/Sports-Betting.aspx>.

<sup>45</sup> COMM. TO CONDUCT AN INTERIM STUDY CONCERNING THE USE OF NAME, IMAGE, AND LIKENESS OF A STUDENT ATHLETE, WORK SESSION DOCUMENT (Assemb. B. 254) Interim Comm. 2-3 (Nev. 2022).

<sup>46</sup> Letter from Sens. Joe Manchin and Tommy Tuberville to Greg Sankey, Comm'r, Se. Conf. (Aug. 3, 2022).

<sup>47</sup> *Subcommittee on Consumer Protection and Commerce Virtual Hearing "A Level Playing Field: College Athletes' Rights to Their Name, Image, and Likeness"*, 117th Cong. 1-2 (2021) (statement of Jacqueline (Jacquie) D. McWilliams, Comm'r, Central Intercollegiate Athletic Assoc.).

to the NCAA seems idealistic, McWilliams' testimony gives voice to the growing regulatory concerns surrounding sportsbook operators sponsoring college athletes.

Sports sponsorship has always had a complicated history with vice industries. Absent responsible practices, advertising in vice industries like alcohol, tobacco, and now gaming can go so far as to harm consumers and lead to regulation.<sup>48</sup> For example, European Union (EU) member states have already placed a whistle-to-whistle ban on all gambling-related advertising during matches.<sup>49</sup> Further, studies have shown a higher positive correlation between exposure to alcohol-related sports sponsorship and increased levels of risky drinking, proving the unique relationship between fans and sports sponsorship and prompting many countries to consider bans.<sup>50</sup> Following the same logic, the NBA previously banned the advertising of all liquor products.<sup>51</sup>

Just because an advertising vehicle is legal in some jurisdictions does not mean the practice is prudent in facilitating the long-term growth of that industry. For that reason, when it comes to the sponsorship of college athletes and college athletics in general, the sports betting industry faces an interesting dilemma. At a time when operators are furiously spending to capture their share of maturing markets,<sup>52</sup> the possibility of advertising their services with student-athletes creates a Sophie's Choice: either proceed without caution or lose the opportunity. However, at the very least, the optics and ill-considered externalities of combining both without regulatory clarity is precarious.

Concerning this sponsorship opportunity, the maturity of the gaming industry is not in question; rather, the competence of intercollegiate athletics and their governance partners are. Nevertheless, this sponsorship trend remains at the penumbra of possibility. NIL sponsorship of college athletes is still incredibly new. However, every day more college athletes are sponsored by corporations connected to legalized gambling. And, after years of predicting the potential dire consequences of any type of compensation, those in charge seem completely unconcerned with a sponsorship trend that is, at best, rife with perverse incentives and, at worst, threatens a future crisis of confidence in both industries.

---

<sup>48</sup> Cf. *Sponsoring Sports in Today's Digital Age: A Use Case from the 2019 FIFA Women's World Cup*, DELOITTE (2022), <https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/sports-consulting/lu-sponsoring-sports-today-digital-age.pdf>.

<sup>49</sup> Richard Conway, *Gambling Firms Agree 'Whistle-to-Whistle' Television Sport Advertising Ban*, BBC SPORTS NEWS (Dec. 6, 2018), <https://www.bbc.com/sport/46453954>.

<sup>50</sup> See Katherine Brown, *Association Between Alcohol Sports Sponsorship and Consumption: A Systemic Review*, 51 ALCOHOL & ALCOHOLISM 747, 747–55 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5091292/pdf/agw006.pdf>.

<sup>51</sup> John Lombardo & Terry Lefton, *NBA Bans Ban on Liquor Ads*, SPORTS BUS. J. (Jan. 19, 2009), <https://www.sportsbusinessjournal.com/Journal/Issues/2009/01/19/This-Weeks-News/NBA-Cans-Ban-On-Liquor-Ads.aspx>.

<sup>52</sup> *Id.*



### III. CHAMPIONS OF IRE: THE NCAA'S OPPOSITION TO AND THE LEGAL HISTORY OF GAMING AND STUDENT-ATHLETE COMPENSATION

#### A. Gaming

##### 1. *The Legal History of American Sports Betting and the NCAA*

Throughout its history, the NCAA has made considerable efforts to untether college sports from gambling.<sup>53</sup> In early committee hearings that would give rise to PASPA, NCAA executives expressed concern that “[any] [s]tate-sponsored gambling schemes would demean not only the integrity of intercollegiate sports, but also would invade the property rights of . . . member institutions.”<sup>54</sup> Therefore, after the 1992 passage of PASPA, the connections between college athletics and legal gambling largely laid dormant.

PASPA—or the Bradley Act, after the bill’s sponsor and champion, Bill Bradley, the New Jersey Senator and former basketball star—prohibited all state-sanctioned or state-run gambling schemes.<sup>55</sup> The Department of Justice (DOJ) opposed PASPA over concerns that it fundamentally infringed “on the rights of states” and their ability “to raise revenues.”<sup>56</sup> However, PASPA carved out a narrow exception for any state that, between 1976 and 1990, “allowed or operated a sports betting scheme.”<sup>57</sup> The exemption grandfathered in Nevada’s sportsbooks, as well as the Oregon and Delaware sports lotteries, and pool-based betting in Montana.<sup>58</sup> Additionally, PASPA’s original language extended “a one-year window for New Jersey to legalize sports betting, or else face PASPA prohibition.”<sup>59</sup> However, the New Jersey state legislature was unable to “pass appropriate legislation in time.”<sup>60</sup> This missed opportunity to legalize sports betting from the windowing available after PASPA’s passage made New Jersey

---

<sup>53</sup> See generally Rodenberg, *Irreparable Harm*, *supra* note 22; see generally also Brennan, *supra* note 22; *Protecting the Integrity of College Athletics*, COMM. JUDICIARY (Jul 22, 2020) <https://www.judiciary.senate.gov/meetings/protecting-the-integrity-of-college-athletics> (at 2:17); Neil H. Huffey, *College Sports Wagering: A Case Study About Gambling on College Athletics and the Motivations and Consequences Surrounding Legislation Wanting to Ban Wagering on College Sports*, UNLV THESES, DISSERTATIONS, PRO., PAPERS, AND CAPSTONES (2001), <https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1436&context=thesesdissertations>.

<sup>54</sup> Rodenberg, *Irreparable Harm*, *supra* note 22.

<sup>55</sup> See *id.*; PASPA, NAT’L FOOTBALL POST, <https://www.nationalfootballpost.com/sports-betting-legalization/paspa/> (last visited May 3, 2023).

<sup>56</sup> Meer, *supra* note 23, at 288.

<sup>57</sup> *Id.* at 287.

<sup>58</sup> *Id.* at 288.

<sup>59</sup> *Id.* at 287.

<sup>60</sup> *Id.* at 289.

a habitual challenger to the constitutionality of the Act.<sup>61</sup> New Jersey attempted “federal litigation, state legislation, and [a] voter referendum.”<sup>62</sup>

Finally in 2011, New Jersey challenged the constitutionality of PASPA and adopted a constitutional amendment permitting sports gambling. Thus, the NCAA promptly sued the Garden State. In *NCAA v. Murphy*, the Court applied the anticommandeering doctrine of *New York v. United States* and *Printz v. United States* to prohibit federal intervention on state sanctioned sports gambling.<sup>63</sup> Specifically, the 6–3 opinion held that PASPA prohibition of state sponsored sports gambling violated the anticommandeering doctrine of the Tenth Amendment.<sup>64</sup> In so holding, the Court shifted state sponsored gaming from federal prohibition under PASPA to state authorization and permitted the repeal of laws prohibiting sports gaming.<sup>65</sup>

## 2. *The Current Advertising and Commercial Environment of Sports Betting*

Today, legal sports gaming sits as a blossoming and robust entertainment industry, searching for expansion. In week one of the 2021 NFL season, the NFL’s league sportsbook partners spent over \$21.4 million across CBS, Fox, and NBC, for a total of ninety advertisements on a single Sunday.<sup>66</sup> The two most dominant players in the space, DraftKings and Fan Duel, outspent the entirety of the beer industry in 2021, spending nearly \$206 million combined.<sup>67</sup> The benefits of these sponsorship deals are obvious. For sportsbooks, there is a natural synergy between the fans of sports and those willing to place a wager on the outcome of a game. For the leagues, sportsbook partners represent new and exciting sponsors interested in the mass market audience when engagement with new industry and old media was dwindling.<sup>68</sup>

In college athletics, athletic directors that once complained about the threats that gambling posed are now willing “to reexamine the revenue potential

---

<sup>61</sup> *Id.* at 289–90.

<sup>62</sup> Meer, *supra* note 23, at 289.

<sup>63</sup> See *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1477 (2018).

<sup>64</sup> See *id.* at 1478.

<sup>65</sup> *Id.* at 1484–85.

<sup>66</sup> Sean Keeley, *Sportsbooks Spent over \$24 Million on Ads During NFL Week 1 in Sign of Things to Come*, AWFUL ANNOUNCING (Sept. 14, 2021), <https://awfulannouncing.com/gambling/sportsbooks-advertising-nfl-week-1-fanduel-draftkings-caesars.html>.

<sup>67</sup> Tom Kludt, *DraftKings and FanDuel Ads Seem to Be Everywhere on TV Because They Are*, CNN (Oct. 8, 2015, 5:23 PM), <https://money.cnn.com/2015/10/08/media/fanduel-draftkings-commercials/index.html>; Ilan Mochari, *Why DraftKings and FanDuel Spent \$206 Million on Ads This Year*, INC. (Oct. 9, 2015), <https://www.inc.com/ilan-mochari/fantasy-sports-betting-startups-206-million-tv-ads.html>. The exact amount is \$205.9 million (\$131.4M DraftKings and \$74.5M FanDuel). *Id.*

<sup>68</sup> See Mochari, *supra* note 67.

that could come from sportsbook sponsorships.”<sup>69</sup> Industry titan William Hill partnered with UNLV in 2017 and University of Nevada, Reno (UNR) in 2018.<sup>70</sup> In 2020, PointsBet partnered with the University of Colorado, Boulder.<sup>71</sup> And finally in 2021, Louisiana State University became the first SEC school to partner with a gaming company when the ink dried on their multi-year, multimillion-dollar contract with Caesars Sportsbook.<sup>72</sup> This sort of market activity is exciting. This spending comes at a time when athletic departments across the nation, whose primary source of revenue was ticket sales, are cash strapped after the COVID-19 pandemic.<sup>73</sup> However, the potential problems these deals create are “really above and beyond the athletic department[s]” and the corporate sponsors who sign them.<sup>74</sup> Further, “[t]he inconvenient timing . . . does not lessen [their] potential impact.”<sup>75</sup> The sponsorship of college sports is market activity that is difficult for which to blame any individual. Individual participants are ill-equipped to examine the externalities, potential risks, and self-regulate.

The ubiquity and consistency of gaming related sports advertising is reminiscent of the gaming industry in the United Kingdom. Over several years, political pressure mounted against the gaming industry’s advertising during soccer matches. Critics pointed to the rise of “problem gamblers” as well as the advertisements influence on younger viewers.<sup>76</sup> As a result, the United Kingdom’s Betting & Gaming Council (BGC) enforced a “whistle to whistle ban” on all gambling related advertising.<sup>77</sup> The ban was not only effective, but also contributed to the positive public perception of the gaming industry operating in a responsible manner.<sup>78</sup>

---

<sup>69</sup> Bill King & Michael Smith, *Cut the Cards: First Big Bets Down in the College Betting Space; Odds are High on More Deals Soon*, SPORTS BUS. J. (Oct. 25, 2021), <https://www.sportsbusinessjournal.com/Journal/Issues/2021/10/25/Portfolio/Sports-betting.aspx>.

<sup>70</sup> Amanda Christovich, *As Partnerships Emerge, Are College Sports Embracing Betting Sponsors?*, FRONT OFF. SPORTS (Sept. 11, 2020, 5:57 PM), <https://frontofficesports.com/college-sports-betting-partnerships-grow/>.

<sup>71</sup> *Id.*

<sup>72</sup> Associated Press, *LSU Becomes First SEC School to Partner with Gambling Company, Agrees to Caesars Sportsbook Deal*, ESPN (Sept. 17, 2021), [https://www.espn.com/college-football/story/\\_/id/32225468/lsu-becomes-first-sec-school-partner-gambling-company-agrees-caesars-sportsbook-deal](https://www.espn.com/college-football/story/_/id/32225468/lsu-becomes-first-sec-school-partner-gambling-company-agrees-caesars-sportsbook-deal).

<sup>73</sup> King & Smith, *supra* note 69.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> 90 MIN, *Betting Companies Agree to ‘Whistle to Whistle’ Ban on Gambling Adverts During Live Games*, SPORTS ILLUSTRATED (Dec. 6, 2018), <https://www.si.com/soccer/2018/12/06/betting-companies-agree-whistle-whistle-ban-gambling-adverts-during-live-games>.

<sup>77</sup> *‘Whistle to Whistle’ Ban Success*, BETTING & GAMING COUNCIL (Aug. 21, 2020), <https://bettingandgamingcouncil.com/news/whistle-to-whistle-ban-dramatically-reduces-number-of-betting-adverts-seen-by-children>.

<sup>78</sup> *Id.*

## B. The NCAA and NIL Activities

While PASPA's external constraints on states were struck down, the NCAA still enjoyed limited anti-trust oversight regarding the regulation of college athletes and their compensation.<sup>79</sup>

### 1. Board of Regents

Previously in the 1981 case *NCAA v. Board of Regents of the University of Oklahoma* ("*Board of Regents*"), the NCAA had entered negotiations with broadcasters ABC and CBS to sell the exclusive rights to televise NCAA football games.<sup>80</sup> The NCAA long feared live broadcasts would decrease attendance, and for that reason, the organization devised this scheme to artificially cap the market of available games.<sup>81</sup> Each company would be granted the right to air fourteen live games in the coming season, as well as exclusively negotiate with the event holding schools.<sup>82</sup> Additionally, the NCAA did not permit member institutions to negotiate outside of these plans.<sup>83</sup> In essence, the NCAA was assuming the position of an economic cartel, where through the organization's control of the product, in this case television broadcasting rights, it could fix the price.<sup>84</sup> Thus, the University of Oklahoma and the University of Georgia, members of the College Football Association (CFA), a group within the NCAA formed to represent the interests of football schools, sued alleging that the scheme hurt their ability to negotiate and their overall revenues in a season.<sup>85</sup> The Court ruled that the NCAA's proposed broadcasting scheme created a structure that cannot respond to consumer demands.<sup>86</sup> Not only did the NCAA's plan raise the price of telecasts, but it also lowered output, making both non-responsive to consumer demands.<sup>87</sup> Explicitly, in capping the number of live broadcasts, the scheme created the type of monopoly the Sherman Antitrust Act was meant to prevent.<sup>88</sup> Therefore, the Supreme Court applied a rule of reason standard and struck down the NCAA's television broadcasting restrictions as violating antitrust law.<sup>89</sup>

However, in applying the rule of reason standard, the Court also held that rules regarding the eligibility standards for college athletes are subject to a

---

<sup>79</sup> Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984).

<sup>80</sup> *Id.* at 92–93.

<sup>81</sup> *Id.* at 86.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 93–94 n.11.

<sup>84</sup> *Id.* at 95–96.

<sup>85</sup> *See Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 95.

<sup>86</sup> *Id.* at 106.

<sup>87</sup> *Id.* at 120.

<sup>88</sup> *Id.* at 125.

<sup>89</sup> *Id.* at 103, 120.

less stringent standard than other types of antitrust cases.<sup>90</sup> The Court reasoned that the “product” of college athletics requires “a certain degree of cooperation” between the competing member institutions and the governing body of the NCAA to compete on the field.<sup>91</sup> Essentially, because the business of college athletics requires coordination to appropriately facilitate competition—i.e. developing standard rules for games, coordinating schedules, etc.—the NCAA requires “ample latitude” to play “a critical role in the maintenance of [the] revered tradition of . . . college sports.”<sup>92</sup> Justice Stevens, writing for the majority, advised future courts that “[it] is reasonable to assume that most regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletics teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.”<sup>93</sup> While this language was dicta, the broad comments allowed the NCAA to argue for lenient consideration under the antitrust doctrine for their restrictions of “athlete compensation to promote competitive equity and distinguish college athletics from professional sports.”<sup>94</sup>

The idiosyncratic dicta in *Board of Regents* made college athletics a uniquely American institution. While exploding into a billion-dollar industry in the decades that preceded the decision, college athletics maintained the veneer of necessitating amateurism to further the educational experiences of athletes. In his dissent, Justice White voiced concern that the majority’s opinion would impose “profit making objectives [that] would overshadow educational objectives.”<sup>95</sup> As the NCAA evolved into a “monolith generating billions in revenues on the backs of student-athletes,” many argued Justice White’s fears came to fruition.<sup>96</sup>

---

<sup>90</sup> *Id.* at 117 (explaining the Court’s decision not to apply a per se rule to the NCAA in recognition of the need for a “certain degree of cooperation”).

<sup>91</sup> *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 117.

<sup>92</sup> *Id.* at 120.

<sup>93</sup> Joel Mitnick & Ngoc Hulbig, *A Slam Dunk from the Supreme Court for College Athletes: No Antitrust Immunity for the NCAA*, WESTLAW TODAY, 1 (June 23, 2021), [https://www.cadwalader.com/uploads/books/331468fb48c3b8d6fec880e5b84e87a1.pdf?utm\\_source=mondaq&utm\\_medium=syndication&utm\\_content=inarticlelink&utm\\_campaign=article](https://www.cadwalader.com/uploads/books/331468fb48c3b8d6fec880e5b84e87a1.pdf?utm_source=mondaq&utm_medium=syndication&utm_content=inarticlelink&utm_campaign=article) (quoting *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 117).

<sup>94</sup> *National Collegiate Athletic Association v. Alston*, OYEZ, <https://www.oyez.org/cases/2020/20-512> (last visited Apr. 5, 2022).

<sup>95</sup> *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 123.

<sup>96</sup> Mitnick & Hulbig, *supra* note 93.

## 2. Challenges for Board of Regents

The unique carveout of dicta in *Board of Regents* led numerous challenges to the NCAA's belief in absolute discretion.<sup>97</sup> Notably, in *Law v. NCAA*, the NCAA attempted to reduce what were, at the time, spiraling costs for members institutions by artificially restricting the earnings of coaches at the Division 1 level.<sup>98</sup> On appeal, the Tenth Circuit granted a permanent injunction prohibiting the NCAA from reenacting the same or a similar horizontal price fixing rule.<sup>99</sup> The Tenth Circuit's decision in *Law* caused many to question whether the NCAA's presumption of discretion still existed, especially when it came to college athletes' compensation.<sup>100</sup>

The NCAA's belief in absolute discretion to limit athlete compensation was first directly challenged in *O'Bannon v. NCAA*, where former star UCLA basketball player, Ed O'Bannon, challenged the NCAA's use of his name, image, and likeness for commercial purposes under the Sherman Antitrust Act.<sup>101</sup> O'Bannon, long after his playing career ended, observed a family friend's son playing a NCAA basketball video game. In the game, there was a UCLA team modeled after the team he played on, including a character that looked like O'Bannon and bearing his name and basketball skillset.<sup>102</sup> The former Bruin argued that a former student-athlete should be entitled to financial compensation for the NCAA's commercial use of her name, image, or likeness. The NCAA, however, contended that paying student-athletes would violate their special conception of amateurism.<sup>103</sup> District Court Judge Claudia Wilken found in favor of O'Bannon, holding that the NCAA's rules created an unreasonable restraint of trade, and, therefore, violated antitrust law. However, the Ninth Circuit affirmed and reversed in part, and in 2016, the Supreme Court denied certiorari upon appeal.<sup>104</sup>

---

<sup>97</sup> See Richard E. Kaye, Annotation, *Application of Federal Antitrust Laws to Collegiate Sports*, 87 A.L.R. Fed. 2d 43 (2014).

<sup>98</sup> Ralph D. Mawdsley & Charles J. Russo, *Antitrust Law and Limiting Coaches' Salaries: The Saga of Law v. NCAA*, 131 ED. LAW REP. 895, 896 (1999).

<sup>99</sup> *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1024 (10th Cir.1998).

<sup>100</sup> See *id.*

<sup>101</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1055 (9th Cir. 2015).

<sup>102</sup> See *id.*

<sup>103</sup> *Id.* at 1058.

<sup>104</sup> Marc Edelman, *By Denying Certiorari in O'Bannon v. NCAA, the Supreme Court Aids Future Reform to College Sports*, FORBES (Oct. 7, 2016, 10:30 AM), <https://www.forbes.com/sites/marcedelman/2016/10/07/by-denying-certiorari-in-obannon-v-ncaa-the-supreme-court-aids-future-reform-to-college-sports/?sh=220ec499270f>.

### 3. *Alston and Its Implications*

Finally, in *NCAA v. Alston*, the Supreme Court struck down NCAA rules capping education-related benefits due to their anti-competitive nature under the Sherman Antitrust Act.<sup>105</sup> In a 2014 class action case, former West Virginia football player, Shawne Alston, and other Division 1 football and basketball players filed a lawsuit against the NCAA arguing that, in limiting their “non-cash education-related benefits,” the NCAA again violated the Sherman Antitrust Act. In so ruling, the Court rejected the NCAA’s argument for a deferential treatment and used the traditional “rule of reason” standard for anti-competitive practices. The unanimous ruling went on to clarify that *Board of Regents* does not shield the NCAA from challenges to restrictions on any type of compensation and, thus, signaled a paradigm shift and abrupt challenge to the restrictions placed on student-athletes by the NCAA.

In an almost equal and opposite form to the dicta of Justice Stevens in *Board of Regents*, Justice Brett Kavanaugh’s broad concurrence created an unresolved legal environment for the NCAA, its member institutions, and policymakers to guess at the proper balance. Sports leagues require some cooperation that under normal consideration might be construed as anti-competitive, but what rules strike that balance? In this case, the Court almost explicitly went out of its way to question remaining restrictions on athletes that were outside of *Alston*’s inquiry. Justice Kavanaugh went so far as to say that, while the NCAA’s remaining compensation rules were not before the Court, “there are serious questions whether . . . [they] . . . can pass muster under ordinary rule of reason scrutiny.”<sup>106</sup>

At the center of the *Alston* decision sat the fact that the NCAA had transformed into a “massive business” and commercial monolith.<sup>107</sup> The NCAA’s broadcast of March Madness Basketball tournament is worth \$1.1 billion annually.<sup>108</sup> In the year of the *Alston* decision, the NCAA’s television deal for the FBS Conference’s College Football Playoff was worth nearly \$470 million annually.<sup>109</sup> Further, conferences within the NCAA umbrella were bringing in exorbitant sums. For example, the NCAA’s SEC made more than \$409 million in television contracts in 2017 alone.<sup>110</sup> The Court observed that “those who run [the college sports] enterprise profit in a different way than the student-athletes whose activities they oversee.”<sup>111</sup> The obvious irony in an organization attempting to maintain the amateur status of athletes, while the president of the NCAA made \$4 million yearly and the broader college sports industry generated at least \$14 billion in revenue, made the NCAA laughable, if

---

<sup>105</sup> See Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141, 2166 (2021).

<sup>106</sup> *Id.* at 2167.

<sup>107</sup> *Id.* at 2150.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Alston*, 141 S. Ct. at 2151.

not untenable.<sup>112</sup> Allowing such a large industry to operate outside of a typical anti-trust environment felt hypocritical.

Further, the Court delivered *Alston*'s ruling in a legislative environment of growing hostility toward the NCAA.<sup>113</sup> Before the Court even agreed to hear *Alston*, several states introduced legislation that effectively prohibited schools from punishing athletes for accepting compensation.<sup>114</sup> For instance, Governor Gavin Newsom signed into law California's "Fair Pay to Play Act" after it passed the state assembly 72–0.<sup>115</sup> The NCAA responded to the bill in classic form by threatening to bar California schools from competing in national championships just months before the *Alston* ruling.

With so many laws set to go into effect, the NCAA likely saw costly litigation to continue amateurism that it no longer had the judicial carveout to enforce. While the *Alston* decision exclusively examined education-related benefits, the sweeping language of Justice Kavanaugh's concurrence, combined with policymakers going out of their way to challenge the presumptions of amateurism, forced the NCAA to adopt NIL policies. Therefore, in June of 2021, after exhausting all hypothetical alternative responses to *Alston*, the NCAA's Board of Directors adopted an interim policy that opened the door for student-athletes to participate in NIL activity.

#### 4. *How These Industries Are Connected*

Facially, *Alston*'s affective deregulation of college athletics seems to only have cursory relation to legal sports gaming, but the Court's near-simultaneous deregulation of both forced their relationship. The NCAA must now defer to state legislation and interests in their mission to "promote competitive equity and distinguish college athletics from professional sports," while a growing number of states simultaneously legalize sports gambling and develop NIL policy.<sup>116</sup> Where previously legalized, sports gambling and intercollegiate athletics were akin to church and state—running as separate but parallel industries and interests—their simultaneous structural upheaval now inextricably links them. It will be in the best interest of the NCAA, its member institutions, and the sports betting industry to recognize their congruent concerns and legal questions.

---

<sup>112</sup> Louisa Thomas, *California's Endorsement-Deal Law and Unintended Consequences of the NCAA*, NEW YORKER (Oct. 3, 2019), <https://www.newyorker.com/sports/sporting-scene/californias-endorsement-deal-law-and-the-unintended-consequences-of-the-ncaa>.

<sup>113</sup> *Id.*

<sup>114</sup> Dan Murphy, *Everything You Need to Know About the NCAA's NIL Debate*, ESPN (Sept. 1, 2021), [https://www.espn.com/college-sports/story/\\_/id/31086019/everything-need-know-ncaa-nil-debate](https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate).

<sup>115</sup> Thomas, *supra* note 112.

<sup>116</sup> *National Collegiate Athletic Association v. Alston*, *supra* note 94.



#### IV. FIELD OF SCHEMES: THE HISTORY OF COLLEGE SPORTS AND SPORTS BETTING

##### A. The NCAA

Understanding the current legal environment and necessary future policy recommendations for legal gaming's sponsorship of college athletes requires examining the history and stakeholders of the NCAA. From their very inception, the sports played at American colleges and universities have maintained a complicated relationship with money, sponsorship, and gambling.<sup>117</sup> For example, in 1852, student teams from Harvard and Yale participated in a boat race across New Hampshire's Lake Winnepesaukee in what many consider the nation's first intercollegiate competition.<sup>118</sup> That very boat race also began college athletics' association with money and sponsorship; a wealthy railroad executive sponsored the event to promote train travel, offering competitors an all-expense paid vacation, lavish prizes, and unlimited alcohol.<sup>119</sup>

The popularity of college football in the late 1800s remains the primary vehicle that intercollegiate athletics drove to arrive at the commercial enterprise they are known as today.<sup>120</sup> For example, by the 1880s, "the traditional rivalry between Princeton and Yale was attracting 40,000 spectators and generating in excess of \$25,000 . . . in gate revenues."<sup>121</sup> The commercial success for universities brought with it a monetary incentive to cheat. Corrupt teams with phantom students ruled the era. Yale kept a \$100,000 slush fund and reportedly enticed a star tackle with free meals, full tuition, an all-expenses paid trip to Cuba, the exclusive rights to sell his memorabilia after games, and a job with the American Tobacco Company.<sup>122</sup>

The impressive speed at which college athletics ascended to popularity was hindered only by the shocking headlines surrounding the game. In the unregulated era that preceded the NCAA, college football was wildly popular but also wildly violent. By the early 1900s, newspapers reported twenty-five deaths in a single season, and the *New York Times* described Harvard's "flying wedge" as a "half ton of bone and muscle coming into collision with a man weighing 160 to 170 pounds."<sup>123</sup>

The unabashed violence and utter shamelessness of cheating generated enough public backlash to force the executive branch's action.<sup>124</sup> In 1905, President Theodore Roosevelt responded to the emerging crisis by calling a

---

<sup>117</sup> See *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2148 (2021); see also *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1470 (2018).

<sup>118</sup> *Alston*, 141 S. Ct. at 2148.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 2149. See also Branch, *supra* note 9, at 83.

<sup>121</sup> *Alston*, 141 S. Ct. at 2148 (internal citations omitted).

<sup>122</sup> *Id.* See also Branch, *supra* note 9, at 83.

<sup>123</sup> Branch, *supra* note 9, at 83.

<sup>124</sup> *Id.*; *Alston*, 141 S. Ct. at 2148.

meeting between Harvard, Princeton, and Yale leaders.<sup>125</sup> At Roosevelt's request, reform came in the form of sixty-eight colleges founding a new organization that would later become the modern NCAA.<sup>126</sup> Publicly, the founding of the NCAA gave college football the facelift it needed; however, the organization retained no real authority for nearly fifty years. Notably, the NCAA was not even able to mandate helmets until 1939.<sup>127</sup>

Ultimately, the NCAA's complicated relationship with gaming, public fear of foul play, and a slew of worker's compensation claims gave the NCAA the centralized power it needed.<sup>128</sup>

The NCAA needed the capability to do more than admonish member institutions; therefore, in 1948 it adopted the "Sanity Code," giving member institutions the authority to pay student-athletes but also providing for the "suspension or expulsion" of "proven offenders" of NCAA bylaws.<sup>129</sup> The Code marked "the beginning of the NCAA behaving as an effective cartel" by enabling member institutions to set and enforce "rules that limit the price they have to pay for their inputs [the labor of student-athletes]."<sup>130</sup>

In 1951, following a point-shaving conspiracy, including five New York colleges and the reigning national champion Kentucky Wildcats, the NCAA's power was further justified.<sup>131</sup> Mob-connected gamblers paid players to perform poorly, thus threatening the credibility of all intercollegiate competition.<sup>132</sup> Amid scandal, there is often an appetite for cathartic action. Then-Executive Director of the NCAA, Walter Byers, rushed to impanel a small infractions committee to set penalties while waiting to assemble a full convention of NCAA member institutions, who would have been inclined toward forgiveness.<sup>133</sup> After the infractions committee meeting, Byers directly lobbied the University of Kentucky to suspend college basketball and legendary coach Adolph Rupp for one year, an action that had never been taken or authorized.<sup>134</sup> Without the full convention of member schools, the adolescent NCAA lacked actual authority to penalize the coach or institution. Therefore, Byers, a "master of pervasive, anonymous intimidation," threatened the institution with penalties if they did not enforce the sanctions.<sup>135</sup> The precedent of an established enforcement mechanism available to the NCAA restored public confidence in college athletics, and amid scandal, it also legitimized power that barely existed.<sup>136</sup>

---

<sup>125</sup> Branch, *supra* note 9, at 83.

<sup>126</sup> *Id.* at 8–9; *Alston*, 141 S. Ct. at 2148.

<sup>127</sup> Branch, *supra* note 9, at 84.

<sup>128</sup> *Id.*

<sup>129</sup> *Alston*, 141 S. Ct. at 2149.

<sup>130</sup> *Id.* at 2149.

<sup>131</sup> Branch, *supra* note 9, at 84.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

The consequences of this gambit were later seen in *NCAA v. Tarkanian*.<sup>137</sup> In the years that followed, while nearly every state-funded institution participated in athletics under the NCAA banner, the NCAA's actions were not considered that of a state actor.<sup>138</sup> In *Tarkanian*, the NCAA alleged that hall of fame UNLV basketball coach Jerry Tarkanian ("Tark the Shark"), 1990 national champion and pioneer of the amoeba defense, participated in improper recruiting practices under NCAA bylaws.<sup>139</sup> As a result, the NCAA Committee ("the Committee") on infractions forced UNLV, a member institution of the NCAA, to impose penalties on their basketball coach.<sup>140</sup> Following the enforcement maneuvers of the 1951 point-shaving scandal, the Committee had the authority to conduct investigations, make factual determinations, and was expressly authorized to impose penalties upon member institutions through their bylaws, but not employees of member institutions directly.<sup>141</sup> Tarkanian, facing both demotion and a drastic pay cut, sued both the NCAA and UNLV in Nevada State Court, alleging the enforcement of sanctions deprived him of his Fourteenth Amendment right to due process under 42 U.S.C. § 1983.<sup>142</sup> The Nevada Supreme Court affirmed the trial court's ruling that NCAA's conduct constituted state action.<sup>143</sup> However, the U.S. Supreme Court reversed and remanded, holding that the NCAA's participation in the events that led to Tarkanian's suspension did not arise to that of "state action," as UNLV's decision to comply with NCAA rules did not delegate power to the NCAA and the NCAA took no specific action against any University employee.<sup>144</sup>

In *Tarkanian*, the Court reversed and remanded the Nevada Supreme Court holding; however, in the decade between the original suspension and the Supreme Court ruling, public scrutiny revealed that the NCAA's enforcement process was heavily stacked in the NCAA's favor.<sup>145</sup> Continuing the NCAA's tradition of anonymous intimidation, the enforcement staff was allowed to build cases on hearsay alone and shared little, if any, information with the targeted school.<sup>146</sup> Although the coach's original case was reversed, the NCAA later settled outside of court for a separate harassment case related to the incident,

---

<sup>137</sup> See Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 197 n.16 (1988).

<sup>138</sup> *Id.* at 179.

<sup>139</sup> *Id.* at 181.

<sup>140</sup> *Id.* at 179.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 187–88.

<sup>143</sup> *Tarkanian*, 488 U.S. at 188 (1988).

<sup>144</sup> *Id.* at 197 n. 16, 199.

<sup>145</sup> *Id.* at 199. See also Rachel George, *Many Taking the Fight to the NCAA These Days*, USA TODAY, <https://www.usatoday.com/story/sports/ncaaf/2013/04/25/ncaa-lawsuits-jerry-tarkanian-todd-mcnair/2114469/> (Apr. 25, 2013, 11:58 PM); Branch, *supra* note 9, at 86.

<sup>146</sup> *Tarkanian*, 488 U.S. at 199. See also George, *supra* note 145; Branch, *supra* note 9, at 86.

paying him \$2.5 million.<sup>147</sup> Tarkanian is often credited with challenging the status quo of NCAA enforcement and limiting their authority as the NCAA rarely involved itself with those who would fight back and win.<sup>148</sup>

While the NCAA's mechanism of enforcement over member institutions remained, the NCAA acted instinctually to keep the control they had. Where the previous era of college athletics was mired in the controversy of under-the-table compensation for students, the NCAA now recognized that sustaining the amateur status of athletes was critical to maintaining their authority and financial position over intercollegiate athletics.<sup>149</sup> The former executive director of the NCAA plainly stated that "[the NCAA] crafted the term 'student-athlete'" to avoid member institutions needing to pay workmen's compensation to athletes injured during a competition.<sup>150</sup>

In *State Compensation Insurance Fund v. Industrial Commission of Colorado* ("State Comp.")—one of the first cases using the term "student-athlete"—the widow of Ray Herbert Dennison, a Fort Lewis A&M Aggies football player, filed suit for the death benefits of her deceased husband.<sup>151</sup> Dennison was the beneficiary of an athletic scholarship and also worked on campus. In the opening play of a game against Trinidad State Junior College, Dennison sustained head injuries and was rushed to the hospital, where he later died.<sup>152</sup> Fort Lewis A&M employees were fully covered by the Workmen's Compensation Act as a state-run institution.<sup>153</sup> In reviewing the benefits Dennison enjoyed, the Colorado Supreme Court felt that the athletic scholarship was not compensation for playing football, as Fort Lewis A&M "was not in the football business," but rather Dennison's scholarship was a product of the institution's desire to offer a holistic education. Dennison was a student-athlete; therefore, his scholarship did not qualify as consideration of an employee-employer relationship.<sup>154</sup> The fatal collision did not arise from a work-related accident.<sup>155</sup>

Reviewing the history of the term student-athlete is an exercise in the forced observance of preventable tragedy. Kent Waldrep, a Texas Christian University (TCU) Horned Frog running back, was paralyzed on the afternoon of October 26, 1974, while playing the Paul "Bear" Bryant (legendary football coach) led Alabama Crimson Tide.<sup>156</sup> Waldrep, from his wheelchair, initiated a lawsuit for worker's compensation lasting through the 1990s.<sup>157</sup> His family had

---

<sup>147</sup> George, *supra* note 145.

<sup>148</sup> *Id.*

<sup>149</sup> Branch, *supra* note 9, at 88.

<sup>150</sup> *Id.* at 17.

<sup>151</sup> *State Comp. Ins. Fund v. Indus. Comm'n*, 314 P.2d 288, 289 (Co. 1957).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 290.

<sup>154</sup> *Id.* at 289.

<sup>155</sup> *Id.* at 289–290.

<sup>156</sup> Branch, *supra* note 9, at 88–89.

<sup>157</sup> *Id.*

been forced to cope for years through the charity of others while TCU refused to pay no more than nine months of his medical bills.<sup>158</sup> His attorneys pressed TCU and the state worker compensation fund over what constituted “employment.”<sup>159</sup> School officials went so far as to claim that Waldrep was recruited as a student, not an athlete, a farcical claim.<sup>160</sup> The appellate court finally rejected Waldrep’s claim in 2000, reasoning that he was not an employee because he did not pay taxes on his financial aid.<sup>161</sup> The prolonged saga legitimized the NCAA’s “student-athlete” concept at a private institution.

As a legal confection, the term “student-athlete” stood as purposefully nebulous and “deliberately ambiguous.”<sup>162</sup> Participants in intercollegiate athletics were not exclusively students, which might understate their commitments to athletics and, in turn, the NCAA’s commercial interest. However, they were also not athletes on the campuses of member institutions, which might hint at some form of professionalism. The Supreme Court reinforced the constructed notion of a relationship outside of regular employee-employer considerations in *Board of Regents*, where the eligibility standards for college athletes were subject to less stringent scrutiny than typical antitrust cases.<sup>163</sup> From there, the NCAA’s moral authority, as the once necessary governing body proposed by President Theodore Roosevelt, transformed into a wholly economic one as a cartel.<sup>164</sup>

Year after year, the public’s interest in college sports grew and, therefore, so too did the NCAA. After securing legislative and legal carveouts for their anti-trust, compensation, and enforcement practices, the money surrounding college athletics made the NCAA’s position as a rich but insecure governing body. In 2019, two years before the *Alston* decision, the NCAA granted exclusive rights to broadcast the men’s basketball tournament to CBS Sports and Turner Media, and the subsequent ad revenue generated approximately \$1 billion.<sup>165</sup>

All the while, the tournament itself continued as a contest for amateurs, and student-athletes were treated as unpaid laborers. Prior to *Alston*, the NCAA

---

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Branch, *supra* note 9, at 88–89.

<sup>163</sup> Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 117 (1984).

<sup>164</sup> *Id.* at 95–96.

<sup>165</sup> Eben Novy-Williams, *March Madness Daily: The NCAA’s Billion-Dollar Empire Is Built on Basketball*, SPORTICO (Mar. 18, 2021, 10:30 AM), <https://www.sportico.com/leagues/college-sports/2021/march-madness-daily-the-ncaas-billion-dollar-empire-is-built-on-basketball-1234625021/>. See also Jabari Young, *With \$1-Billion on the Line, March Madness Is Ready for Its Comeback*, CNBC (2021), <https://www.cnn.com/2021/03/16/with-1-billion-on-the-line-march-madness-is-ready-for-its-comeback.html>.

leveraged its power as a pseudo-legislative and governmental body to facilitate only incremental change in the face of public backlash. For example, when University of Connecticut Basketball star Shabazz Napier, in a televised press conference after an NCAA tournament game, said that he went to bed starving because he could not afford food, the NCAA made marginal changes to remove restrictions on food provided to athletes.<sup>166</sup> When the NCAA faced substantial legal threats to its model, it would settle outside of court.<sup>167</sup>

## B. The History of College Sports and Gambling

This lack of compensation left college athletics vulnerable to bribery. Therefore, the NCAA insisted that any form of legalized gaming would corrupt college athletics, but purposefully ignored the fact that forced amateurism maintained this corrupt status quo. Unfortunately, and unfairly, to the legal gaming community, on this specific issue, the NCAA maintained the illusion of the moral high ground in the eyes of the public and policymakers. For that reason, before *Alston*, gaming primarily entered college sports in scandal. The previously mentioned 1951 University of Kentucky scandal was the first in several gaming related scandals, near scandals, and accusations, all of which likely contributed to paranoia surrounding legalized gaming.<sup>168</sup>

In 1978, the Boston College Basketball team members, including Rick Kuhn and team captains Ernie Cobb and Jim Sweeney, were ensnared in one of collegiate sport's darkest hours—a conspiracy with mob connected fixers to manipulate scores and outcomes.<sup>169</sup> The players were approached by several members of the Lucchese crime family, including the infamous Henry Hill, whose life served as the inspiration for the Martin Scorsese movie “*GoodFellas*.”<sup>170</sup> Hill, through associates, fronted the players with money secured from the 1978 Lufthansa heist, the largest cash robbery in U.S. history,

---

<sup>166</sup> Soraya Nadia McDonald, *National Champ. U-Conn. 's Napier Says He Goes to Bed Starving*, WASH. POST (Apr. 8, 2014, 2:25 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2014/04/08/national-champ-uconn-napier-says-he-goes-to-bed-starving/>. See also Alicia Jessup, *The NCAA Approves Unlimited Meals For Division I Athletes After Shabazz Napier Complains of Going Hungry: The Lesson for Other College Athletes*, FORBES (Apr. 15, 2014, 6:42 PM), <https://www.forbes.com/sites/aliciajessop/2014/04/15/the-ncaa-approves-unlimited-meals-for-division-i-athletes-after-shabazz-napier-complains-of-going-hungry-the-lesson-for-other-college-athletes/?sh=70f936c715bd>.

<sup>167</sup> See Branch, *supra* note 9, at 84, 86, 96.

<sup>168</sup> *Id.*

<sup>169</sup> Bob Hohler, *When 'Goodfellas' Collided with BC Basketball*, BOS. GLOBE (Mar. 16, 2014, 12:00 AM), <https://www.bostonglobe.com/sports/2014/03/15/and-goodfellas-sports-scandal-and-its-lingering-toll/nvIXKiXCYSgPqBUtg9BRN/story.html>.

<sup>170</sup> *Id.*

as payment to manipulate the score of several preselected games.<sup>171</sup> However, the scheme was uncovered in 1980 when Hill turned state's witness in exchange to avoid prison time for his connection to the Lufthansa heist.<sup>172</sup> Current Auburn University basketball head coach, Bruce Pearl, was a student aid and said he never suspected any type of point shaving.<sup>173</sup> Cobb admitted to accepting \$1,000 from the conspirators.<sup>174</sup> However, the NBA prospect insisted it was not for helping to fix games.<sup>175</sup> While the exact details of the scheme and fixed games are unknown, Rick Kuhn received the longest ever sentence for an American athlete convicted of sports racketeering—ten years.<sup>176</sup>

Richard “The Fixer” Perry, who was a part of the Boston College scheme, was later photographed in a hot tub with three members of UNLV's 1990 NCAA basketball title team: Moses Scurry, Anderson Hunt, and David Butler.<sup>177</sup> The photo taken in 1989 and published in 1991, less than two months after UNLV's stunning loss to Duke in the Final Four, launched investigations the NCAA investigations that would give rise to Tarkanian's settlement as well as one from the FBI.<sup>178</sup> While there was no evidence of point shaving, the photo with the twice convicted sports fixer essentially ended the nineteen-year career of Jerry Tarkanian at UNLV.<sup>179</sup>

In 1994, Star Arizona State point guard Stevin “Hedake” Smith became involved in a point shaving scandal.<sup>180</sup> Smith and a teammate, Isaac Burton, received \$20,000 for shaving points in a game against Oregon State.<sup>181</sup> In 1997, Smith plead guilty to conspiracy charges and admitted to fixing four games in

---

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> David Purdam, ‘*The Worst Fix Ever*’, ESPN (Oct. 3, 2014), [https://www.espn.com/espn/chalk/story/\\_/id/11633538/betting-chronicling-worst-fix-ever-1978-79-bc-point-shaving-scandal](https://www.espn.com/espn/chalk/story/_/id/11633538/betting-chronicling-worst-fix-ever-1978-79-bc-point-shaving-scandal).

<sup>174</sup> *Id.*

<sup>175</sup> Hohler, *supra* note 169.

<sup>176</sup> *Id.*

<sup>177</sup> Todd Dewey, *Hot Tub Photo with Convicted Fixer, UNLV Players Doomed Jerry Tarkanian*, L.V. REV. J. (Sept. 8, 2017, 2:29 PM), <https://www.reviewjournal.com/sports/betting/hot-tub-photo-with-convicted-fixer-unlv-players-doomed-jerry-tarkanian/>.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Stevin (Hedake) Smith, *Confessions of a Point Shaver: Former Arizona State Star Hedake Smith Reveals How He and His Accomplices Fixed Basketball Games*, SPORTS ILLUSTRATED (Nov. 9, 1998), <https://vault.si.com/vault/1998/11/09/confessions-of-a-point-shaver-former-arizona-state-star-hedake-smith-reveals-how-he-and-his-accomplices-fixed-basketball-games>.

<sup>181</sup> *Id.* See Bill Goodykoontz, ‘*Hoop Schemes*’ on Netflix Revisits the Stevin ‘Hedake’ Smith Point-Shaving Scandal at ASU, AZ CENT. (Oct. 4, 2021, 11:13 AM), <https://www.azcentral.com/story/entertainment/movies/billgoodykoontz/2021/10/04/315etflix-hoop-schemes-review/5931553001/>.

the 1994 season.<sup>182</sup> Before his formal sentencing, Smith, reflecting on an environment where student-athletes received so little, stated that “having been there, I can tell you how easily players can be drawn into fixing games. Poor, naive teenagers plus rich, greedy gamblers equal disaster. As simple, as it was for me, it can only be that simple elsewhere.”<sup>183</sup>

The legitimate concerns of point shaving often boiled over into outright paranoia. For instance, Rick Neuheisel, the head football coach of the University of Washington Huskies, was fired by the university at the request of the NCAA after investigation revealed he participated in petty gambling in an NCAA March Madness basketball pool.<sup>184</sup> Neuheisel sued the University and the NCAA for wrongful termination, where he eventually collected \$4.5 million in an out-of-court settlement.<sup>185</sup>

Continuing the NCAA’s aversion to gaming in a 2001 federal bill pushed by John McCain, the NCAA supported calls to ban college sports betting nationwide, including in Nevada.<sup>186</sup> While the senate floor never saw the bill, the Nevada Gaming Commission lifted a long-standing betting ban on the state’s college teams in direct response to the NCAA endorsement of the bill.<sup>187</sup> Nevada sportsbooks then began accepting bets on UNLV and UNR basketball and football games to exhibit the integrity of regulation in wagering, and there have been no issues since the lifted ban.<sup>188</sup>

In fighting tooth and nail to get rid of all forms of sports wagering, the NCAA often made enemies with the industry even when it was trying to help. The NCAA went out of its way to shame arguments that betting data might offer a detection tool to address integrity concerns. NCAA lawyer Elsa Kircher Cole wrote that the NCAA understood the sentiment that “internet gambling can actually protect the integrity of sports because of the alleged capacity to monitor gambling patterns more closely in a legalized environment,” but felt that “this argument is generally asserted by those who would profit from legalized gambling and the same point was raised in 1992. Congress dismissed it then and should dismiss it now. The harms caused by government endorsement of sports betting far exceed the benefits.”<sup>189</sup>

In 1990, NCAA executive Richard Hilliard went so far as to say that the NCAA would find any “[s]tate legislative scheme which legalizes gambling on

---

<sup>182</sup> Smith, *supra* note 180.

<sup>183</sup> *Id.*

<sup>184</sup> *Settlement Reached in Neuheisel’s Lawsuit*, SEATTLE TIMES (Mar. 7, 2005, 3:26 PM), <https://www.seattletimes.com/sports/uw-huskies/settlement-reached-in-neuheisels-lawsuit/>.

<sup>185</sup> *Id.*

<sup>186</sup> John Lancaster, *Panel Acts to Close Gambling Loophole*, WASH. POST (May 4, 2001), <https://www.washingtonpost.com/archive/politics/2001/05/04/panel-acts-to-close-gambling-loophole/8e81c546-899c-47a5-af06-5b95b4035999/>.

<sup>187</sup> Dewey, *supra* note 177.

<sup>188</sup> *Id.*

<sup>189</sup> Rodenberg, *NCAA Pivots*, *supra* note 22.



sports” as “particularly offensive.”<sup>190</sup> Further, in the months preceding the *Murphy* decision, the NCAA actively lobbied state legislatures to proactively restrict the passage of gaming legislation if the ruling went against them.<sup>191</sup>

Fast-forwarding through the decades of public hostility to legalized sports betting, including the six years the NCAA stood as the titular plaintiff in the New Jersey lawsuit that eventually overturned PASPA, the institution transitioned to a policy of forced acceptance.<sup>192</sup> In 2019, a NCAA executive commented on the “dramatic impact” sports wagering will have on the NCAA, stating that “it’s going to threaten the integrity of college sports in many ways unless [the NCAA is] willing to act boldly and strongly.”<sup>193</sup> Today, the NCAA remains the “last major U.S. organization to oppose legal sports wagering.”<sup>194</sup>

While the NCAA was brought through inevitable sports betting legalization kicking and screaming, member institutions quickly realized its potential. In September 2020, The University of Colorado announced a five-year agreement with PointsBet, an online sportsbook licensed in the state.<sup>195</sup> Under the agreement, the University will receive \$1.6 million to promote the sportsbook through its media channels and at in-person events.<sup>196</sup> Further, the University of Colorado will receive \$30 for each person that signs up for the service after being referred by the school.<sup>197</sup> As a result of lost revenue due to the COVID-19 pandemic, athletic departments are desperate for new revenue streams, including partnerships like Colorado’s.<sup>198</sup> “I think if you’re an athletic director, you’re

---

<sup>190</sup> Rodenberg, *Irreparable Harm*, *supra* note 22.

<sup>191</sup> See John Brennan, *NCAA Makes Case to Senators to Ban Betting on College Sports*, SPORTS HANDLE (July 22, 2020), <https://sportshandle.com/ncaa-makes-case-to-senators-to-ban-betting-on-college-sports/>.

<sup>192</sup> David Purdum, *NCAA to Keep Close Tabs on Betting for Men’s Basketball Tournament*, ESPN (Mar. 17, 2021), [https://www.espn.com/chalk/story/\\_/id/31081059/ncaa-keep-close-tabs-betting-men-basketball-tournament](https://www.espn.com/chalk/story/_/id/31081059/ncaa-keep-close-tabs-betting-men-basketball-tournament). See also Rodenberg, *NCAA Pivots*, *supra* note 22.

<sup>193</sup> Dustin Gouker, *NCAA Head: Sports Betting Is ‘Going to Threaten the Integrity of College Sports in Many Ways’*, LEGAL SPORTS REP. (Jan. 25, 2019), <https://www.legalsportsreport.com/28038/ncaa-says-sports-betting-will-threaten-integrity/>; Rodenberg, *NCAA Pivots*, *supra* note 22.

<sup>194</sup> John Holden, *Opinion: How NCAA Concession on NIL Rules Could Affect US Sports Betting Industry*, LEGAL SPORTS REP. (July 29, 2021), <https://www.legalsportsreport.com/54286/analysis-ncaa-nil-sports-betting/>.

<sup>195</sup> Rodenberg, *Irreparable Harm*, *supra* note 22.

<sup>196</sup> *Id.*

<sup>197</sup> Wayne Parry, *Problem Gambling Foes Warn on Sports Betting College Deals*, U.S. NEWS (Mar. 23, 2021, 3:14 PM), <https://www.usnews.com/news/health-news/articles/2021-03-23/problem-gambling-foes-warn-on-sports-betting-college-deals>.

<sup>198</sup> Andy Uhler, *One Way for College Athletics Departments to Make up for Lost Income: Gambling Partnerships*, MARKETPLACE (Dec. 16, 2020), <https://www.marketplace.org/2020/12/16/one-way-for-college-athletic-departments-to-make-up-for-lost-income-gambling-partnerships/>.

saying to yourself, look, there's too much revenue to be made here," said Patrick Rishe, Director of Sports Business Programs at Washington University in St. Louis.<sup>199</sup>

That lucrative business opportunity is not only discouraged for student-athletes by the NCAA, but a Kafkaesque nightmare to navigate legally. The NCAA's NIL policy defers to state laws, whose various restrictions often differ. While standard provisions bar student-athletes from competing with pre-existing university sponsorships, multiple states have implemented categorical bans. New Jersey and Pennsylvania, for example, have restricted athletes from receiving any compensation from vice industries and specifically name gaming.<sup>200</sup>

Further, compliance departments at universities are ill-equipped to handle the legal novelty of real-world scenarios involving gaming companies at the athlete level. In one early controversy, Barstool Sports launched a marketing firm for NCAA athletes.<sup>201</sup> However, multiple compliance departments urged athletes to end all relations with the media company as Barstool operates a subsidiary sportsbook.<sup>202</sup> American International College's (AIC) compliance department went so far as to state that "working with Barstool is not allowed because even if you don't promote gambling directly, you are still promoting a company that owns a sports betting site/app and that goes against NCAA rules and Massachusetts state laws."<sup>203</sup> However, that legal assumption seems dubious. The reaction was in and of itself a "reflection of just how little is known about the enforcement and interpretation of these NIL laws moving forward."<sup>204</sup>

## V. ONE SHINING MOMENT?: HOW THESE INDUSTRIES MATURE TOGETHER

Today, the NCAA stands as a uniquely American institution in transition, thus leaving a vacuum of power and oversight in a once highly regulated industry. The shocking pace of adoption in NIL policy and activities has left many calling the landscape the "the wild west,"<sup>205</sup> and even more,

---

<sup>199</sup> *Id.*

<sup>200</sup> Holden, *supra* note 194.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> AIC Compliance (@AIComplies), TWITTER (July 8, 2021, 9:37 AM), <https://twitter.com/AIComplies/status/1413175306102394886?s=20>.

<sup>204</sup> Holden, *supra* note 194.

<sup>205</sup> Jake Fischer, 'It's the Wild, Wild West': NIL Turning College Hoops Business Upside Down, BLEACHER REP. (Mar. 25, 2022), <https://bleacherreport.com/articles/10030809-its-the-wild-wild-west-nil-turning-college-hoops-business-upside-down>; AJC Sports, *Special Project: Navigating NIL Has Become the 'Wild West'*, ATL. J. CONST. (Mar. 18, 2022), <https://www.ajc.com/sports/special-project-navigating-nil-has-become-the-wild-west/ZJZMSYF57REDVAFY366C6VS7RY>; KC Ifeanyi, *How NCAA Athletes Are Taking Control in the Wild West of Name, Image, Likeness*

including current NCAA President Mark Emmert, proactively calling for federal regulatory action.<sup>206</sup> “We’re dealing with a highly unregulated system, and that has all sorts of dangers” said former NCAA athlete, now law student, Kendall Spencer, in his testimony to the United States Senate Committee on Commerce.<sup>207</sup> While the recent trend of the sports betting industry sponsoring student-athletes is merely a byproduct of that lack of clarity, it signals the lack of institutional control in college athletics and possible collateral damage to the sports betting industry.

In this moment, there is subtle irony in the NCAA’s history of shaming the gaming industry. The *Alston* decision, if nothing else, proved the emperor had no clothes in the institution’s moral arrogance. After years of advocating for the hypocritical, if not morally defunct, position of “amateurism,” treating gaming as an existential threat, and bemoaning the unforeseen consequences of legalizing the gaming industry, the NCAA now so clearly lacks institutional control that it could damage the gaming industry, not the other way around.

#### A. Growing Concerns

In his testimony, Spencer voiced concerns around students being exploited in a hyper- online world where “regulatory uncertainty and the rapid growth of technology places strains” on society and more specifically student-athletes.<sup>208</sup> Unfortunately for the gaming industry, the continued practice of sponsoring student-athletes for their NIL activities could be observed as one of those straining forces. States are now competing for the most liberal NIL policies in order to attract the best athletes.<sup>209</sup> For an industry like gaming that fundamentally relies on the confidence of the public and proactive regulatory boards, it is a significant risk to not read the warning signs of a clearly unstable and corrupt industry.

---

*Deals*, FAST CO. (Mar. 3, 2022), <https://www.fastcompany.com/90725103/ncaa-athletes-creative-control-wild-west-name-image-likeness-deals-march-madness>.

<sup>206</sup> *NCAA Athlete NIL Rights: Hearing Before the S. Comm. on Com., Sci., and Transp.*, 117th Cong. (2021), (statement of Dr. Mark Emmert, President, National Collegiate Athletic Association).

<sup>207</sup> *Name, Image, and Likeness: The State of Intercollegiate Athlete Compensation: Hearing before the Subcomm. on Mfg., Trade, and Consumer Protection*, 116th Cong. (2020) (statement of Kendall Spencer, 3L at Georgetown University Law Center) [hereinafter Spencer Statement]. See also Ari Shapiro et al., *NIL Contracts Are Changing the Landscape of All Collegiate Sports*, NPR (Mar. 28, 2022, 4:52 PM), <https://www.npr.org/2022/03/28/1089311065/nil-contracts-are-changing-the-landscape-of-all-collegiate-sports>.

<sup>208</sup> Spencer Statement, *supra* note 207.

<sup>209</sup> Liz Clarke, *State-by-State Rating System Gives College Recruits Road Map to Evaluate NIL Laws*, WASH. POST (Oct. 21, 2021, 12:34 PM), <https://www.washingtonpost.com/sports/2021/10/21/name-image-likeness-laws-state-rankings/>.

Integrity concerns are glaringly obvious, but operators of sportsbooks are used to them. However, unlike their regulated counter parts, intercollegiate athletics are not currently poised to be proactive governing partners.<sup>210</sup> Due to the *Alston* decision, college sports effectively lack a central governing body to make and enforce policy. Headlines like Calvin Ridley's suspension<sup>211</sup> or the accusations made against Evander Kane<sup>212</sup> would likely turn in to backlash against operators without an umbrella policy from the NCAA. As the Senate Subcommittee continues to litigate concerns over NIL policy, Congress has introduced the "NCAA Accountability Act of 2021," a bipartisan bill that would limit investigations to eight months and cut the statute of limitations from four years to two for all NCAA enforcement activity.<sup>213</sup> Some observers believe the bill would effectively end the NCAA.<sup>214</sup> Intercollegiate athletics remains specifically vulnerable due to the drastic discrepancies in compensation that still exist.

Acknowledging these vulnerabilities, operators—and the regulators that oversee them—should consider the difficulty states have had in legalizing gaming and reckoning with the effects of bad press. While beneficial to state tax revenues, "[g]ambling expansion is often controversial, and most states have . . . restrictive constitutions" requiring a two-step process to legalize sports betting as the "issue of perception also looms."<sup>215</sup> Further, states with tribal gaming compacts, such as California, Arizona, Florida, and Wisconsin, complicate legislation with renegotiation.<sup>216</sup> Even as states with legalized gaming continue

---

<sup>210</sup> Jon Wertheim, *The Big Picture: Once, Leagues Ran From Any Association with Gambling. But as Legal Sports Wagering Expands, It's Easy to See Why Teams (and Commissioners) Have Reversed Field*, SPORTS ILLUSTRATED (Aug. 9, 2021), <https://www.si.com/betting/2021/08/09/gambling-issue-daily-cover>.

<sup>211</sup> Roger Sherman, *26 Questions About Calvin Ridley's Suspension for Betting on the NFL*, RINGER (Mar. 7, 2022, 10:29 PM), <https://www.theringer.com/nfl/2022/3/7/22966292/calvin-ridley-gambling-suspension-atlanta-falcons>.

<sup>212</sup> Thomas Williams, *Evander Kane Details Gambling Problem, Denies Betting on His Own Games*, YAHOO! SPORTS (Sept. 17, 2021), <https://www.yahoo.com/video/nhl-evander-kane-admits-gambling-addiction-denies-betting-on-his-own-games-153617945.html>.

<sup>213</sup> Dennis Dodd, *With NCAA Enforcement on Its Last Legs, Congress Seeks to Place Limits on Investigations*, CBS SPORTS (Mar. 29, 2022, 4:55 PM), <https://www.cbssports.com/college-basketball/news/with-ncaa-enforcement-on-its-last-legs-congress-seeks-to-place-limits-on-investigations/>.

<sup>214</sup> *Id.*

<sup>215</sup> John Holden, *Sports Betting Legalization: Biggest Issues Preventing Widespread Wagering*, ACTION NETWORK (Sept. 23, 2021, 3:07 PM), <https://www.actionnetwork.com/news/sports-betting-legalization-biggest-issues-challenges-hurdles>.

<sup>216</sup> See Buck Wargo, *US Tribal Sovereignty Under Attack in the Courts*, IGAMING BUS. (Mar. 9, 2023), <https://igamingbusiness.com/casino/tribal-gaming-regulation/tribal-sovereignty-under-attack/>; see generally also Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 MARQ. L. REV. 971 (2007).

to grow, legitimate fears exist over the “pace and patchwork nature of state-by-state laws [that fail] to create a proper safety net.”<sup>217</sup> These concerns led Deloitte Consulting to rank negative reaction to sponsorship and federal regulation among sports gaming’s critical uncertainties in the coming years.<sup>218</sup>

While the NIL activities of student-athletes represent a new category of sponsorship, categorical restrictions on advertising by gaming control boards do not.<sup>219</sup> In this new category of sponsorship, state gaming control boards can narrowly tailor their interests of “maintain[ing] a good reputation with citizens”<sup>220</sup> and prioritizing the safety of student-athletes by controlling the commercial free speech of their members, preventing situations like the public outcry about the Hard Rock’s use of sexually suggestive advertising in Nevada.<sup>221</sup> Therefore, gaming control boards should ban this practice and revisit it after the college sports industry stabilizes, much like Nevada did in allowing wagers on in-state college sports.<sup>222</sup>

## VI. CONCLUSION

While the NCAA has been maligned for its promotion of unpaid athletes under the umbrella of “amateurism” through legislative capture to build a multi-billion-dollar industry, it cannot be overlooked that the NCAA was initially beneficial to intercollegiate athletics. In the NCAA’s earliest days, the necessity for a formal organization to govern college sports was clear—college football players were dying, and phantom students were often only on campus to play whatever sport they were hired to compete in.<sup>223</sup> Consumers needed the cooperation of schools to sustain a publicly loved product. The NCAA standardized college football and quieted mounting public backlash. However, the broad language in Justice Kavanaugh’s concurrence, combined with state-

---

<sup>217</sup> Rick Maese, *Sports Betting Will Keep Booming in 2022, But Some See Risks in Growth*, WASH. POST (Jan. 14, 2022, 9:00 AM), <https://www.washingtonpost.com/sports/2022/01/14/legal-sports-betting-states-2022/>.

<sup>218</sup> Pete Giorgio, *How Legalization Impacts Sports Betting Economics: A Closer Look at Factors Shaping the Future of Online Sports Betting*, DELOITTE, <https://www2.deloitte.com/us/en/pages/technology-media-and-telecommunications/articles/sports-betting-economics.html> (last visited Apr. 16, 2023).

<sup>219</sup> Jonathon Peck, *Indecency Sells . . . But It Comes at an Unfortunate Price: A Look at Whether Gaming Authorities Can Regulate Advertising*, 4 UNLV GAMING L.J. 125, 138 (2013).

<sup>220</sup> *Id.* at 134.

<sup>221</sup> Richard N. Velotta, *Casino to Pay \$300,000 Fine*, L.V. SUN (Apr. 22, 2004, 10:53 AM), <https://lasvegassun.com/news/2004/apr/22/casino-to-pay-300000-fine/>.

<sup>222</sup> Kenn Ritter, *Gaming Control Board Allows Betting on Nevada College Sports*, L.V. SUN (Jan. 25, 2001, 6:52 AM), <https://lasvegassun.com/news/2001/jan/25/gaming-control-board-allows-betting-on-nevada-coll/>.

<sup>223</sup> Branch, *supra* note 9, at 83.

based NIL policies that were about to hit the books, threw that baby out with the bathwater of the NCAA's corruption.

Juxtaposing the underlying assumptions of Justice Stevens's majority opinion in *Board of Regents* to Justice Kavanaugh's concurrence in *Alston* demonstrates the novelty of sports leagues in the American antitrust context. As Justice Stevens recognized, the centralization of a league or conference that facilitates a game provides value to consumers. Fans want to watch the best athletes compete against each other in a uniform game. However, using that necessary alignment to justify and impose blanket amateurism, a market constraint that provides no clear value to consumers, forced Justice Kavanaugh to question the remaining restrictions. In practice, policy must strike a balance between the conspiracy necessary to hold competition and the requisite absentee oversight, which allows leagues to exist outside of antitrust considerations. College sports are currently searching for that balance.

With the destabilizing nature of *Alston*, it should be noted that college sports and state-sanctioned legalized gaming are inextricably linked. From the scandals that gave the NCAA more power, to the NCAA's history of constantly asserting itself into efforts to legalize gaming, the history of American gaming also tells the history of American college athletics. However, operators sponsoring college athletes and state regulators now face similar decisions to their international counterparts. The whistle-to-whistle ban on gaming-related advertising was self-imposed to avoid further negative associations with advertising.

State regulatory boards are fully capable of limiting the commercial free speech of their members. The continued direct sponsorship of student-athletes is an avoidable blunder for the industry. Therefore, in reviewing the gaming industry's current NIL trends, chronicling their relationship to the legal environment brought by *Murphy* and *Alston*, examining the history of college athletics, amateurism, and their relationship to gaming, and finally looking at the sponsorship trend's future, this paper discourages the practice until college sports stabilize.