COMMENTS

TIMEOUT: A CASE FOR USING NIL LEGISLATIVE MOMENTUM TO EXTEND THE AUTHORITY OF THE DEPARTMENT OF EDUCATION TO REGULATE THE NCAA

KATIE GALLOP*

* J.D. Candidate, 2023, American University Washington College of Law; B.A. 2017, Williams College. Thank you to my parents and family, for their constant support. Thank you to Cannon Jurrens and Chris Marin, for their incredible guidance throughout the writing and publication process. Thank you also to Professors N. Jeremi Duru, James May, and Andrew Popper, for lending their advice and expertise to this Comment. Lastly, thank you to Professors Susan Dunn and Mason Williams, for showing me how to enjoy learning.

INTRODUCTION

In June 2021, just before the Supreme Court issued its highly anticipated decision in *National Collegiate Athletic Association v. Alston*,[1] the President of the National Collegiate Athletic Association (NCAA), Mark Emmert, testified on the issue of name, image, and likeness (NIL) to the Senate Committee on Commerce, Science and Transportation.[2] The spotlight on President Emmert was hardly favorable; he was required to discuss the NCAA's role in precluding student-athletes from benefitting from the fruits of their labor.[3] Buried in his six-page written testimony, President Emmert seemed to beg for congressional oversight, stating: "[w]hile individual states are legislating NIL and pressing the Association to provide further opportunities for student-athletes, the NCAA and its member schools are target[ed] by lawyers using the weapon of antitrust laws and serial litigation, which diminish[es] our ability to enact change . . . ."[4]

President Emmert's testimony alludes to a unique phenomenon. Throughout its history, the NCAA's authority and reach has been curtailed by jurisprudence rather than regulated by any agency or Congress. Chief Justice John Marshall famously stated, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[5] But the courts may *only* say what the law is—they may not craft regulations, and they may not prescribe a solution beyond the bounds of the law. Even while reigning in the NCAA's reach via one-off claims, courts have necessarily limited their commentary to the issues at hand, leaving the NCAA to its devices.[6] The increased attention drawn to the NCAA in the context of antitrust litigation and NIL has prompted earnest congressional review, suggesting proper oversight is imminent.[7]

---

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

2. *NCAA Athlete NIL Rights Before the S. Comm. on Com., Sci. & Transp.*, 117th Cong. (June 9, 2021) (statement of Mark Emmert, President of the National Collegiate Athletic Association (NCAA)) [hereinafter Emmert Test.], https://www.commerce.senate.gov/services/files/B28D0810-54D7-4C53-8058-B04A8ED4684B.

3. *See id.*

4. *Id.*

5. Marbury v. Madison, 5 U.S. 137, 177 (1803).

6. Christopher Sweeney, Comment, *Judges Are Not 'Super-Referees': Why a Qualified Statutory Exemption to the Sherman Act is Needed to Reform the NCAA and its Exploitive Amateur Model*, 49 J. MARSHALL L. REV. 125, 141–43 (2015).

7. *See* Donald H. Yee, *The Supreme Court's NCAA Ruling Will Turn Sports Upside Down. Here's How.*, WASH. POST (June 22, 2021), https://www.washingtonpost.com/outlook/2021/06/22/ncaa-football-alston-ruling/; Andrew Schaengold, *Another Federal Name, Image, and Likeness Proposal*, REGUL. REV. (Apr. 29, 2021), https://www.theregreview.org/2021/04/29/schaengold-another-federal-name-image-likeness-proposal/.

The attention on the NCAA increasingly focuses on the organization's use of student-athletes to draw in inordinate amounts of money.[8] The contradiction between the NCAA restricting student-athletes from profiting from their own NILs while the organization bolsters its own bottom line via those NILs supports implementing a solution to advance the interests of student-athletes.[9] One counterargument to introducing revenue streams for college athletes posits that "nonrevenue sports" would disproportionately suffer because the revenue raised by sports like men's basketball subsidize the other, less lucrative programs.[10] While questionably condescending, this argument further justifies extensive regulation of whatever program the NCAA may eventually implement to oversee NIL.[11]

In the fall of 2019, the California state legislature passed Senate Bill No. 206, the Student Athlete Bill of Rights, to prevent the NCAA from interfering with student-athletes' right to benefit from their NILs.[12] The legislation

---

8. Steve Cameron, *The NCAA Brings in $1 Billion a Year—Here's Why it Refuses to Pay its College Athletes*, BUS. INSIDER (Mar. 26, 2019), https://www.businessinsider.com/ncaa-college-athletes-march-madness-basketball-football-sports-not-paid-2019-3. Although the NCAA purported to sell nameless jerseys with no interest in profiting from specific athletes, in 2013, one critic found that a search of the name "Johnny Manziel," a popular college athlete at the time, in the NCAA online store yielded results that coincided with his jersey number. *See* Gary Parrish, *ESPN's Jay Bilas Spent Tuesday Afternoon Embarrassing the NCAA*, CBS SPORTS, (Aug. 6, 2013), https://www.cbssports.com/college-basketball/news/espns-jay-bilas-spent-tuesday-afternoon-embarrassing-the-ncaa/.

9. President Emmert's base salary is $2.7 million. *See NCAA President Mark Emmert Receives Contract Extension Through 2025*, THE ATHLETIC (Apr. 28, 2021), https://theathletic.com/news/ncaa-president-mark-emmert-receives-contract-extension-through-2025/DMKiVfy7zkQW/. In 2019, the NCAA earned almost $1.2 billion in revenue, largely from television rights and marketing fees. Christina Gough, *National Collegiate Athletic Association (NCAA) Revenue by Segment 2012–2020*, STATISTA [hereinafter *NCAA Revenue*] https://www.statista.com/statistics/219605/ncaa-revenue-breakdown/ (accounting for the drop-off in 2020 due to the cancellation of men's basketball tournaments in response to COVID-19).

10. *See* Robert Litan, *The NCAA's "Amateurism" Rules*, MILKEN INST. REV. (Oct. 28, 2019), https://www.milkenreview.org/articles/the-ncaas-amateurism-rules (suggesting that concerns over "nonrevenue sports" are "overstated"); Rodger Sherman, *The NCAA's New March Madness TV Deal will Make Them a Billion Dollars a Year*, SBNATION (Apr. 12, 2016), https://www.sbnation.com/college-basketball/2016/4/12/11415764/ncaa-tournament-tv-broadcast-rights-money-payout-cbs-turner (noting skepticism around the NCAA's redistribution of tournament revenue).

11. In his written testimony to the Senate, President Emmert warned that state name, image, and likeness (NIL) laws would "most certainly lead to the end of many nonrevenue college sports programs." Emmert Test., *supra* note 2. He also warned that a labor-model would have "debilitating implications for Title IX" because revenue from men's teams "tend[s] to significantly exceed that of women's teams." *Id.*

12. *See* CAL. EDUC. CODE §§ 67,456–57 (Deering 2021); *see also* Nancy Skinner & Scott Wilk, *In California, We Forced the NCAA's Hand on Paying Athletes. But More States Must Step Up.*,

prompted other states to follow suit.[13] The interest at the state level accelerated congressional action, but several emergent federal legislative proposals take narrow approaches; they too largely leave the NCAA to chart its own course.[14]

Just as plaintiffs often rely on antitrust law in the courts to take action against the NCAA, many in Congress have looked to the Federal Trade Commission (FTC), the agency charged with enforcing fair trade, to oversee NIL laws.[15] While agency oversight is important, the current proposals do not provide the kind of comprehensive change that is needed. They whiff on the opportunity to address recent scandals in intercollegiate athletics involving the unequal treatment of women's tournaments, ambivalence toward incidents of sexual assault, discriminatory treatment of Black student-athletes, and failures in education.[16] These scandals warrant greater attention; while they seem to fall beyond the scope of NIL, they will be implicated by the implementation of related policies.[17] Congress should

---

USA TODAY (Jan. 16, 2020), https://www.usatoday.com/story/opinion/2020/01/15/ncaa-california-student-athletes-pay-image-likeness-column/4456723002/ ("[T]he collegiate model has historically been completely incompatible with student-athletes having access to a free market, which is the clear intent of California's law and other states' legislation.").

13. Daniel Libit, *Eleven States Have Still Done Nil on Name, Image and Likeness*, SPORTICO (Mar. 25, 2021), https://www.sportico.com/leagues/college-sports/2021/college-sports-nil-reform-123462 5647/; *see* Louise Radnofsky & Laine Higgins, *In Fight Over College Athlete Compensation, States Are Now Clearly in Charge*, WALL ST. J. (June 9, 2021), https://www.wsj.com/articles/ncaa-college-athlete-compensation-states-11623266304.

14. Joshua J. Despain, Note, *From Off the Bench: The Potential Role of the U.S. Department of Education in Reforming Due Process in the NCAA*, 100 IOWA L. REV. 1285, 1313–14 (2015) (remarking on the increased interest in reforming the NCAA via legislation); *see* Schaengold, *supra* note 7. Almost every congressional proposal contains similar language to the California bill regarding rights to NIL, with some key differences. *Compare* S.B. 206 § 1–2 (Cal. 2019) (California bill), *with* S. 4004, 116th Cong. § 3 (2020) (allowing student-athletes to profit from their NILs and authorizing the Federal Trade Commission (FTC) to enforce violations), H.R. 8382, 116th Cong. § 3 (2020) (creating a "Covered Athletic Organization Commission" to advise Congress on NIL implementation), S. 5003, 116th Cong. § 6 (2020) (creating a self-regulatory, nonprofit "entity" to develop rules regarding collegiate athletics and NIL implementation), H.R. 9033, 116th Cong. § 11 (2020) (creating a Commission through a federally chartered corporation to govern NIL compliance), S. 5062, 116th Cong. § 6 (2020) (creating a medical trust fund for sports-related injuries and requiring higher institutions to offer financial literacy and life skills programs), S. 414, 117th Cong. § 9 (2021) (vesting the FTC with enforcement power), *and* S. 238, 117th Cong. § 5 (2021) (defining a violation of NIL as a violation of the FTC Act and a per se violation of the Sherman Act).

15. *See* Federal Trade Commission Act 15 U.S.C. § 41; *see, e.g.*, S. 4004, 116th Cong. § 4 (2020); S. 414, 117th Cong. § 9 (2021); S. 238, 117th Cong. § 5 (2021).

16. *See* discussion *infra* Part III (discussing issues pertaining to gender inequity, sexual assault, discrimination, and education).

17. *See id.*

instead turn to the Department of Education because the problems with the NCAA's governance of collegiate athletics extend beyond the scope of the NIL controversy but fall well within the bounds of the agency.

Part I of this Comment examines the fragmented and disparate decisions through which the courts historically examined claims against the NCAA. Part II discusses the role of the Department of Education broadly and the possible role it may play in governing a private entity like the NCAA. Part III investigates areas of concern within the NCAA that indicate oversight is long overdue. Finally, Part IV recommends that Congress extend the reach of the Department of Education to the NCAA to ensure that legislation appropriately addresses issues pertaining to and extending beyond NIL implementation.

I. AN ORGANIZATION STUCK IN THE COURTS

A. The NCAA and Jurisprudential Oversight

In June of 2021, the Supreme Court issued its decision in *National Collegiate Athletic Association v. Alston*.[18] The decision marked both an end and a beginning; it punctuated a school year in which college athletes protested their treatment under the NCAA more vocally than ever before, and it accelerated a legislative movement to codify NIL.[19] In *Alston*, the Court undertook a task that harkened back to early NCAA jurisprudence—it highlighted the outdated legal approach that the NCAA took to defend its anticompetitive activities.[20] The NCAA's relationship with the courts reflects a flaw in the system for two reasons: 1) the NCAA had been exclusively reviewed by the courts, and its issues extend beyond the scope of judicial review; and 2) constraints on the NCAA have largely come from antitrust claims, an area of law that the NCAA relied upon to evade greater oversight.[21]

---

18. 141 S. Ct. 2141 (2021).

19. *See* Laurel Wamsley, *Before March Madness, College Athletes Declare They Are #NotNCAAProperty*, NAT'L PUB. RADIO (Mar. 18, 2021), https://www.npr.org/2021/03/18/978829815/before-march-madness-college-athletes-declare-they-are-notncaaproperty (highlighting player protests regarding NIL prior to the March Madness tournament); Radnofsky & Higgens, *supra* note 13 (describing state-level interest in reform).

20. The NCAA suggested the Court was bound to the precedent set by *NCAA v. Board of Regents*, which the NCAA argued "expressly approved its limits on student-athlete compensation—and [that] approval foreclose[d] any meaningful review of those limits today." *Alston*, 141 S. Ct. at 2157 (discussing NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984)). The Court disagreed with that interpretation. *Id.*

21. NCAA case law extends beyond antitrust litigation, but its participation in the development of antitrust case law is unique. *See, e.g.*, *Bd. of Regents*, 468 U.S. at 85; Association for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577 (D.C. Cir. 1984); Worldwide Basketball

If it is the province of the Court to say what the law is, as it pertains to the NCAA, it has hardly done so in layman's terms. Since *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*,[22] the courts have been tasked with the complicated exercise of applying antitrust law to the NCAA.[23] The NCAA has played a part in complicating the exercise by placing an emphasis on the "procompetitive justification[s]" of protecting amateurism.[24] In *Board of Regents*, the Court decided on the ability of the NCAA to stipulate strict schedules in its television contract negotiations, which the NCAA argued bolstered live attendance at college football games by barring unrestrained access to televised football.[25] When the College Football Association negotiated its own contract with the National Broadcasting Company, the NCAA announced it would issue sanctions against the offenders.[26] The necessary analysis was plainly antitrust, but did the NCAA's price-fixing and reduction of output constitute an unreasonable restraint of trade in violation of the Sherman Antitrust Act?[27] The Court determined that it did and rejected the NCAA's proffered procompetitive justification that restrictive television rules promoted live attendance at college football games.[28]

Yet the Court's deference to the NCAA's nonprofit status gave way to the application of a more lenient analysis of antitrust claims against the NCAA.[29] Instead of applying the per se rule to the NCAA's activity, the Court employed the Rule of Reason analysis, allowing the NCAA the opportunity to establish "an affirmative defense which competitively justifies [the] apparent deviation

---

& Sport Tours, Inc. v. NCAA, 388 F.3d 955 (6th Cir. 2004); O'Bannon v. NCAA, 739 Fed. App'x 890 (9th Cir. 2018) *aff'd* 739 Fed. App'x 890, 895 (9th Cir. 2018); *see also* discussion *infra* note 29 (discussing the court's acceptance of certain NCAA procompetitive justifications for its restraints).

22. 468 U.S. 85 (1984).

23. *Id.* at 88.

24. Even though the Court determined that the NCAA unreasonably restrained trade, it recognized that the NCAA played an important role in preserving "a tradition that might otherwise die." *Id.* at 119–20.

25. Appearance limitations, per the contract negotiated between the NCAA and the networks, provided that the networks could not televise a member institution's football games more than a total of six times and not more than four times nationally. The plan also restricted the ability of schools to negotiate television contracts for themselves. *See id.* at 91–94.

26. *See id.* at 94–95.

27. *Id.* at 98–99. The Court also engaged in an extensive evaluation of the possible procompetitive justifications offered by the NCAA. *See id.* at 113–19.

28. *See id.* at 118–20.

29. The Court stated that applying the per se rule would be inappropriate because of the Court's "respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics." *Id.* at 100–101. It further determined that a per se analysis was inappropriate because the case "involve[d] an industry in which horizontal restraints on competition [were] essential if the product [was] to be available at all." *Id.*

from the operations of a free market."[30] Though the Court was unpersuaded by the NCAA's defense, it created a precedent that ensured future NCAA antitrust claims would be analyzed under the Rule of Reason.[31]

In doing so, the Court emphasized the importance of the NCAA's role in its "maintenance of a revered tradition of amateurism in college sports."[32] *Board of Regents* set the standard by tolerating the NCAA's argument that the mission of preserving amateurism in college athletics served as a sufficient procompetitive justification for anticompetitive behavior under a fuller Rule of Reason analysis.[33] It also demonstrated the shortcomings of jurisprudential review of NCAA activity. As long as the defendant can demonstrate an adequate reason for its anticompetitive practices, the plaintiff faces an uphill battle.[34] The concept of amateurism provided the NCAA with a shield in antitrust lawsuits that made courts hesitate prior to issuing groundbreaking rulings.[35]

B. Shortcomings of Judicial Review

Several lesser-known cases highlight other shortcomings of jurisprudential analysis of the NCAA. They stem from the NCAA's foray into dominance of the college sports market and mark the solidification of the NCAA's monopoly over college sports. Moreover, they demonstrate the limited capacity of the courts to intervene in NCAA activity. First, consider *Association for Intercollegiate Athletics for Women v. NCAA*.[36] Prior to the fall of 1981, the NCAA exclusively governed men's

30. "[A] *per se* rule is applied when 'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.'" *See id.* at 100, 113 (citing Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979)). The Rule of Reason, by contrast, focuses on "whether the challenged agreement is one that promotes competition or one that suppresses competition. The purpose . . . 'is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.'" *Id.* at 134 (citing Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 690–91 (1978)).

31. *See id.* at 113; *see also* Sweeney, *supra* note 6, at 141–42 (discussing the Court's deference to NCAA amateurism arguments).

32. *See Bd. of Regents*, 468 U.S. at 120. The Court added: "There can be no question but that [the NCAA] needs ample latitude to [preserve amateurism in college sports], or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." *Id.*

33. *See id.* at 120. In ruling this way, the Court established a precedent the NCAA would rely upon in coming years to defend the concept of "amateurism." *See* Cody J. McDavis, Comment, *The Value of Amateurism*, 29 MARQ. SPORTS L. REV. 275, 303 (2018).

34. John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 506–08 (2019).

35. Even while courts began to recognize that the NCAA was motivated by commercial interests and its behavior could fall within the bounds of antitrust law, they "remained reluctant to find that any of those rules actually violated the Sherman Act." Sweeney, *supra* note 6, at 141–43.

36. 735 F.2d 577 (D.C. Cir. 1984).

college athletics and championships; women's tournaments were governed by the Association for Intercollegiate Athletics for Women (AIAW).[37] The AIAW—which hosted tournaments for its members, negotiated television contracts, and promoted women's college athletics—quickly lost its members and participants when the NCAA introduced women's championship tournaments to its repertoire.[38] The AIAW shut down in 1982, just one season after the NCAA entered the women's college sports market. In its suit, the AIAW alleged that the NCAA "us[ed] its monopoly power in men's college sports to facilitate its entry into women's college sports and to force the AIAW out of existence."[39]

The suit specifically alleged that the NCAA unlawfully employed predatory pricing and that its actions constituted an illegal "tying" agreement.[40] The AIAW alleged that the NCAA intentionally refrained from charging a separate fee for its members to introduce their women's programs to NCAA events, incentivizing the members to do so.[41] It also alleged that the NCAA revised its revenue distribution formula to incentivize member schools to enroll their women's programs into the NCAA.[42] Finally, it alleged the NCAA, in negotiating television rights to its new women's basketball event, inappropriately utilized the television rights to the men's basketball event as leverage to induce contractors to enter into an agreement with the NCAA.[43] The district court applied a Rule of Reason analysis to find that the NCAA did not demonstrate an intent to "destroy" the AIAW; on appeal, the D.C. Circuit agreed with the district court and upheld its ruling.[44] The AIAW was no more.[45]

---

37. *Id.* at 579.

38. *Id.* at 579–80.

39. *Id.* at 580.

40. *Id.* The allegedly anticompetitive conduct was bucketed into three categories: 1) the NCAA's policy for collecting member dues; 2) the NCAA's distribution of proceeds; and 3) the NCAA's television rights negotiations. *Id.* at 580–81.

41. *Id.*

42. *Id.* at 581.

43. *Id.*

44. The district court applied a Rule of Reason analysis, which the D.C. Circuit implicitly accepted in its review of the Association for Intercollegiate Athletics for Women's (AIAW's) appeal. *See id.* at 582, 585. Specifically, the district court was persuaded by the NCAA's argument that it wanted to coexist with the AIAW; that it viewed the AIAW as a "healthy alternative" to the NCAA. *Id.* at 585, 587–88. This author is unpersuaded and wonders how the court believed that the NCAA perceived the AIAW as a healthy alternative when, for example, it scheduled sixteen of its women's events for dates that conflicted with AIAW tournaments, forcing schools to pick one or the other. *See* Laine Higgens, *Women's College Sports Was Growing. Then the NCAA Took Over*, WALL. ST. J. (Apr. 3, 2021), https://www.wsj.com/articles/women-college-sports-ncaa-aiaw-11617422325.

45. *See AIAW*, 735 F.2d at 590 (affirming that the AIAW failed to prove that the NCAA violated the Sherman Act); *see also* Higgens, *supra* note 44 (commenting on the collapse of the AIAW

The NCAA found similar favor in *Worldwide Basketball & Sports Tours, Inc. v. NCAA*.[46] In this case, the plaintiff-operator of a basketball tournament sought an injunction of the NCAA's "Two in Four Rule" as a violation of the Sherman Act.[47] The court applied a Rule of Reason analysis to determine that the plaintiff failed to define the relevant market, so the court could not determine whether the plaintiff suffered an antitrust injury.[48] Once more, the antitrust analysis favored the NCAA: the leeway permitted the NCAA to prevent possible competitors from entering the amateur sports market.[49] As a result, student-athletes were stuck with the NCAA.

C. A Loophole Closes on Itself

While the NCAA did enjoy some latitude in its antitrust litigation, the court's decision in *O'Bannon v. NCAA*[50] marked an important deviation from the usual deference given to the NCAA's procompetitive justification of preserving amateurism.[51] In *O'Bannon*, the court analyzed whether the NCAA's rules precluding students from being compensated for their NILs were subject to antitrust laws.[52] The case arose when Ed O'Bannon, a former college basketball player, realized his likeness was being used by videogame-maker Electronic Arts (EA)—"O'Bannon had never consented to the use of his likeness in the video game, and he had not been compensated for it."[53]

At the district court level, the NCAA argued that four procompetitive justifications permitted the NCAA to prohibit its student-athletes from receiving compensation for their NILs.[54] The district court was

---

in 1982 "amidst ballooning legal fees and shrinking revenue").

46. 388 F.3d 955 (6th Cir. 2004).

47. The NCAA believed "powerful" basketball schools had greater access to the early-season "certified" tournaments than some other schools and were using the tournaments to their advantage, so the NCAA introduced the "Two in Four Rule" to prevent member schools from participating in more than one certified event in an academic year, and more than two certified events every four years. *Id.* at 957–59, 966. The plaintiffs alleged that the NCAA adopted the rule "purely to deny outside promoters the opportunity to make money from the certified events." *Id.* at 958.

48. *Id.* at 963–64.

49. The court, in declining to engage with the plaintiff's claim, approved the NCAA's "Two in Four Rule." *See id.*

50. 802 F.3d 1049 (9th Cir. 2015).

51. *Id.* at 1052.

52. *Id.*

53. O'Bannon's suit was joined with a similar suit from Sam Keller, a former college quarterback, who alleged the NCAA "wrongfully turned a blind eye" to Electronic Art's (EA's) use of his NIL for a video game. *Id.* at 1055–56.

54. The justifications were: "(1) preserving 'amateurism' in college sports; (2) promoting competitive balance in FBS football and Division I basketball; (3) integrating academics and

unpersuaded.[55] On appeal, the NCAA attempted to subvert the district court with its time-honored antitrust arguments.[56] The NCAA not only argued that the antitrust claim "fail[ed] on the merits," it also suggested that the Ninth Circuit was "precluded . . . from reaching the merits" because the Supreme Court held that NCAA regulations on amateurism were "valid as a matter of law."[57] The NCAA further argued that the issue of student-athlete compensation was not an antitrust issue because it did not involve a commercial activity.[58] Lastly, it argued that the plaintiffs did not have standing because "they [had] not suffered an 'antitrust injury.'"[59] The Ninth Circuit rejected each argument in turn.[60] The court ultimately upheld the district court in part by determining that the NCAA and its regulations were subject to antitrust analysis under the Rule of Reason; that true procompetitive purposes could justify upholding restrictive regulations; and that the rules in place were "more restrictive than necessary to maintain its tradition of amateurism. . . ."[61] While *O'Bannon* opened the door to NIL legislation, it nevertheless reaffirmed the court's willingness to entertain the concept of procompetitive justifications and apply a Rule of Reason analysis.

The Court in *Alston*[62] took the NCAA antitrust analysis to the next level when it affirmed the district court on the basis of antitrust law and in doing so, chipped away at the once-impenetrable armor of "amateurism" as the procompetitive justification for the NCAA's restraint on student-athletes' compensation from NIL.[63] However, the courtroom is hardly the appropriate forum to promulgate regulation; in addressing antitrust claims, courts will always be restricted to applying the law rather than ruling on the plain fairness of NCAA activity.

---

athletics; and (4) increasing output in the college education market." *Id.* at 1058.

55. The district court disposed of two of the NCAA's justifications and agreed with the plaintiffs that a "less-restrictive alternative" existed to accomplish the other two. *Id.* at 1060.

56. *Id.* at 1061.

57. *Id.*

58. *Id.*

59. *Id.* at 1061, 1079 (rejecting the district court's determination that the NCAA must allow its member schools to compensate athletes beyond the cost of attendance and finding the Rule of Reason analysis only required the NCAA to "permit its schools to provide up to the cost of attendance . . . .").

60. *See id.* at 1061–69.

61. *Id.* at 1079.

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

63. *See id.* at 2163, 2166. The Court also noted that the district court could not find a consistent definition of amateurism from the NCAA and cited testimony of a former Division I conference commissioner who had "never been clear on [it]." *Id.* at 2152.

II. THE ROLE OF THE DEPARTMENT OF EDUCATION

A. What is the Department of Education?

Executive agencies serve an important function and regulate areas of society to which their authority is congressionally delegated.[64] In 1979, Congress created the Department of Education.[65] While education is primarily the interest and responsibility of the states and local governments, Congress recognized that endowing a federal entity with the power to oversee education would facilitate the states in meeting educational goals.[66] Congress established the Department of Education to "help ensure that education issues receive proper treatment at the Federal level, and . . . enable the Federal Government to coordinate its education activities more effectively."[67]

Within the Department, several offices exist to accomplish these goals, such as the Assistant Secretary for Postsecondary Education and the Secretary for Civil Rights.[68] The language delegating power to the Assistant Secretary for Postsecondary Education calls for the Assistant Secretary to "administer such functions affecting postsecondary education, both public and private, as the Secretary shall delegate, and shall serve as the principal adviser to the Secretary on matters affecting postsecondary education."[69] The Office of Civil Rights (OCR) has broad latitude to report on civil rights issues and to advance the goals of the Department through data collection and audits.[70] The departmental infrastructure demonstrates a vast capability to govern a variety of issues pertaining to education.[71]

While the language may foreseeably extend to entities and organizations that are not themselves educational but that have an impressionable impact on education, the absence of specific language to

64. *See* Yakus v. United States, 321 U.S. 414, 425 (1944). The limited scope of this Comment precludes a more in-depth discussion of privatization issues. *See, e.g.*, OFFICE OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (2003), 68 Fed. Reg. 12,388 (Mar. 12, 2003).

65. Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) (codified as amended at 20 U.S.C. § 3401).

66. 20 U.S.C. § 3401.

67. 20 U.S.C. § 3402.

68. *See generally* 20 U.S.C. § 3412 (Principal Officers); *see also* 20 U.S.C. § 3415 (Office of Postsecondary Education).

69. 20 U.S.C. § 3415.

70. *See* 20 U.S.C. § 3413.

71. *See, e.g.*, 20 U.S.C. § 3415. The Office of Postsecondary Education is just one of several specialized offices listed in the statute. Others include, for example, the Office of Non-Public Education (§ 3423b) and the Office of Educational Research and Improvement (§ 3419).

that effect suggests that the Department is restricted in that capacity.[72] Even if the issues affecting the NCAA may reasonably relate to education, the Department may not simply regulate the NCAA.[73] This is especially so because the Department of Education Organization Act never explicitly mentions the NCAA, and it does not mention the Department's ability to govern independent entities that are not themselves educational institutions.[74] While there is a strong connection between the NCAA and education, the statutory language does not evince an intention on the part of Congress to reach that far.[75]

B. Independent Regulatory Entities

The NCAA is a regulatory entity—it governs collegiate athletics and has the authority to enforce its rules against its member institutions.[76] As a private regulatory entity, its need for oversight poses an interesting problem. If the NCAA cannot sustainably persist in its current form, how can the government appropriately intervene? Should the organization be replaced with some arm of a government agency? Should it be dissolved entirely? Such drastic measures are probably ill-advised. How then, can the Department of Education appropriately regulate the NCAA?

---

72. *See* 20 U.S.C. § 3415.

73. An agency may not simply "take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself." La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) (agencies may only act upon state legislation under the direction of Congress); Nat'l Ass'n of Regul. Util. Comm'rs v. FCC, 533 F.2d 601, 617–18 (D.C. Cir. 1976) ("[T]he allowance of 'wide latitude' in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority.").

74. *See* 20 U.S.C. § 3401. Where Congress has not "directly spoken to the precise question at issue," the intent of Congress is not clear and it is necessary to consider the "permissible construction of the statute." Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

75. While courts sometimes recognize that agency authority is implicit, the absence of language regarding the NCAA or any such ancillary organization suggests that a court probably would not find the authority in vague language pertaining to the governance of postsecondary education. *See Chevron*, 467 U.S. at 844.

76. The NCAA's enforcement capacity is outlined in its Infractions Program. The mission of the program is "to uphold integrity and fair play among the NCAA membership, and to prescribe appropriate and fair penalties if violations occur. . . . The ability to investigate allegations and penalize infractions is critical to the common interests of the Association's membership and the preservation of its enduring values." NCAA DIV. I MANUAL, *Infractions Program*, art. 19, NAT'L COLLEGIATE ATHLETIC ASSOC., [hereinafter NCAA MANUAL—*Infractions Program*], https://web3.ncaa.org/lsdbi/reports/getReport/90008.

First, it is necessary to dispose of one intriguing solution: the creation of a Self-Regulatory Organization (SRO) under the Department of Education. Consider a similar regulatory entity in the financial industry, the Financial Industry Regulatory Authority (FINRA), an organization that operates separately from the Securities and Exchange Commission (SEC) but reports to it as an SRO with quasi-administrative capabilities.[77] Like the NCAA, FINRA is a nonprofit entity created by the very institutions it seeks to regulate.[78] It serves as a compelling comparison because of its role as a regulatory body as well as its shortcomings in executing that role.[79] For example, FINRA requires violations to be arbitrated within its system and as a result, may disavow plaintiffs of due process.[80] It has also come under intense scrutiny for missing scandalous industry abuses.[81] Further, the SEC's hands-off approach leaves room for problems.[82] The shortcomings of FINRA highlight "the limited ability of administrative agencies overseeing SROs to guide SROs toward the direction of the public interest."[83]

---

77. The Financial Industry Regulatory Authority (FINRA) "[w]ork[s] under the supervision of the Securities and Exchange Commission [to] . . . write and enforce rules governing the ethical activities of all registered broker-dealer firms and registered brokers in the U.S.; examine firms for compliance with those rules; foster market transparency; and educate investors." *FINRA: What We Do*, FINRA, https://www.finra.org/about/what-we-do (last accessed Feb. 19, 2022).

78. FINRA is comprised of a Board of Governors with ties to the financial industry; of twenty-three seats, ten are designated for industry representatives. *FINRA: Board of Governors*, FINRA, https://www.finra.org/about/governance/finra-board-governors (last accessed Feb. 19, 2022); *see also* Roberta S. Karmel, *Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?*, 14 STAN. J.L. BUS. & FIN. 151, 168–69 (2008) (describing industry pushback to the Security and Exchange Commission's (SEC's) proposed reforms to FINRA governance).

79. FINRA violations are disputed via FINRA's arbitration process, rather than through the courts. Lesesne Phillips, Note, *If It Quacks Like a Duck: The Financial Industry Regulatory Authority and Federal Jurisdiction*, 74 WASH. & LEE L. REV. 1695, 1710 (2017).

80. *Compare id.*, *with* NCAA DIV. I MANUAL, *Committee on Infractions*, art. 19.3, NAT'L COLLEGIATE ATHLETIC ASSOC., https://web3.ncaa.org/lsdbi/reports/getReport/90008 (Committee charged with reviewing violations of NCAA policies).

81. "FINRA allegedly failed to adequately supervise the capital requirement compliance of Lehman, Bear Sterns and AIG; to uncover Bernard Madoff's Ponzi scheme; and to adequately respond to information allegedly received by FINRA from five sources that Stanford Financial Group was engaging in fraud." Jennifer M. Pacella, *If the Shoe of the SEC Doesn't Fit: Self-Regulatory Organizations and Absolute Immunity*, 58 WAYNE L. REV. 201, 223 (2012).

82. A 2012 report from the Government Accountability Office revealed concerns with SEC oversight of FINRA over advertising, conflicts of interest, and transparency of governance. *Id.* at 219–22.

83. *Id.* at 201, 221–22.

The NCAA would make for a peculiar SRO under the authority of the Department of Education. For one, while the NCAA is a nonprofit, much of its day-to-day operations involve generating revenue. The quasi-administrative capacity of an SRO also presents a problem: it would vest the NCAA with a power to adjudicate in a way that would likely perpetuate the same issues discussed in the pages that follow. Even with the oversight of the Department of Education, the NCAA would maintain an autonomy not different from the freedom it currently enjoys. Finally, while FINRA was created to address a problem, the NCAA is a preexisting entity with its own unique infrastructure and procedures. Laterally transitioning the NCAA to house it under a federal agency as an SRO poses a plethora of logistical hurdles.

The creation of an SRO is not necessary to extend the reach of the Department of Education to the NCAA. Under the Commerce Clause of the Constitution, the courts have determined that Congress has leeway to use its delegation powers to prescribe regulatory solutions where it sees fit.[84] Consider Congress's delegation of regulatory oversight to the Food and Drug Administration (FDA).[85] Congress enacted the Family Smoking Prevention and Tobacco Control Act in 2009 to amend the Food, Drug, and Cosmetic Act and extend the power to regulate tobacco products to the FDA.[86] Congress felt such an extension was necessary to address public health concerns related to the pervasive and problematic use of tobacco products.[87] The NCAA presents a similarly alarming problem, and so long as Congress can adequately define the bounds of the Department of Education's reach, Congress has the authority to delegate such oversight.[88]

---

84. The Commerce Clause of the U.S. Constitution holds that Congress may "regulate Commerce with foreign Nations, and among the several States . . . ." U.S. CONST., art. I, § 8; *see also* J.W. Hampton Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."); Am. Power & Light Co. v. SEC, 329 U.S. 90, 99 (1946) ("Congress . . . has undoubted power under the commerce clause to impose relevant conditions and requirements on those who use the channels of interstate commerce. . . . Thus to the extent that corporate business is transacted through such channels . . . Congress may act directly with respect to that business to protect what it conceives to be the national welfare.")

85. *See* Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301–399i.

86. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776. *See* Big Time Vapes, Inc. v. Food & Drug Admin., 963 F.3d 436, 438–39 (5th Cir. 2020).

87. *See id.* at 436.

88. Congress may enact legislation to regulate interstate commerce, and the NCAA is a billion-dollar enterprise that stretches across the nation. *See* U.S. CONST., art. I, § 8; *cf. Big Time Vapes*, 963 F.3d at 443–44 (rejecting plaintiff's suggestion that Congress did not specifically delegate regulatory authority over its product to the Food and Drug Administration via the

C. Foundations for Agency Oversight

The NCAA has historically evaded constitutional obligations normally imposed upon federal entities. Even though it oversees institutions that receive federal funding, courts have rejected arguments that the NCAA is subject to Title IX or Title VI requirements.[89] But the NCAA is inextricably linked to higher education—its entire existence is premised on governing college athletics and enhancing the college experience.[90] Even while the NCAA has successfully argued that it has no duty to ensure student-athletes earn a degree or obtain a viable education, it emphasizes the link between education and the student-athlete experience.[91] Further, the NCAA is comprised of member institutions that fit squarely within the scope of the Department of Education.[92]

Tobacco Control Act); *see also* Yakus v. United States, 321 U.S. 414, 425 (1944) ("The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function."); *see also NCAA Revenue*, *supra* note 9.

89. *See* Smith v. NCAA, 525 U.S. 459, 462, 468 (1999) (finding no evidence that NCAA member schools paid NCAA dues with federal funds earmarked for students); NCAA v. Tarkanian, 488 U.S. 179 (1988) (finding the NCAA is not a state actor).

90. The NCAA's Division I manual states that "[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." NCAA DIV. I MANUAL, *The Principle of Amateurism*, art. 2.9, NAT'L COLLEGIATE ATHLETIC ASSOC., [hereinafter NCAA MANUAL—*Amateurism*], https://web3.ncaa.org/lsdbi/reports/getReport/90008. The language dates to the first appearance of the concept of amateurism in NCAA bylaws in 1916—when the NCAA did not enforce it so stringently. *See* Jayma Meyer & Andrew Zimbalist, *A Win Win: College Athletes Get Paid for Their Names, Images, and Likenesses and Colleges Maintain the Primacy of Academics*, 11 HARV. J. OF SPORTS & ENT. L. 247, 251 (2020).

91. *See* McCants v. NCAA, 201 F. Supp. 3d 732, 738 (M.D.N.C. 2016), *aff'd on other grounds*, 251 F. Supp. 3d 952 (2017) (agreeing with the NCAA that it has no duty to "safeguard the education and educational opportunities of student-athletes"); *What We Do: Academics*, NCAA.ORG, https://www.ncaa.org/about /what-we-do/academics, ("Student-athletes commit to academic achievement and the pursuit of a degree, and they are required to meet yearly standards to be able to compete. College athletes' success is tracked using three measures: grades, minimum credit hours per year and progress toward earning a degree."); NCAA DIV. I MANUAL, *The Principle of Sound Academic Standards*, art. 2.5, NAT'L COLLEGIATE ATHLETIC ASSOC., [hereinafter NCAA MANUAL—*Academic Standards*], https://web3.ncaa.org/lsdbi/reports/getReport/90008 ("Intercollegiate athletics programs shall be maintained as a vital component of the educational program, and student-athletes shall be an integral part of the student body. The admission, academic standing and academic progress of student-athletes shall be consistent with the policies and standards adopted by the institution for the student body in general.").

92. The NCAA boasts a membership of 1,098 colleges and universities. *What is the*

The mere quality of being a private institution does not exempt an entity from government oversight, particularly when disreputable behavior is a common feature of that entity.[93] The Department is charged with "ensur[ing] that education issues receive proper treatment at the Federal level."[94] NCAA governance of college athletics squarely meets the criteria of an education issue by virtue of the NCAA's position as the sole proprietor of intercollegiate athletic governance.

III. NCAA SHORTCOMINGS

A. The NCAA's Role in Gender-Based Inequality in Intercollegiate Athletics

The discrepancies between the NCAA's treatment of women's championship tournaments and its treatment of corresponding men's tournaments not only highlight the NCAA's inability to govern both arenas equally but also prevent women's tournaments from earning revenue to the same extent that the men's do and reinforce the mistaken concept that women's athletics are incapable of drawing meaningful revenue.[95] The NCAA itself creates the obstacles its women's tournaments must overcome in order to earn revenue.

Take, for example, the Women's NCAA tournament for college basketball. This women's tournament has seen tremendous growth in the past decade and boasted 2.9 million viewers in the 2021 Final Four—the championship game averaged 4.1 million viewers.[96] Even still, the NCAA's failure to provide equal training facilities arose as the dominant story of the tournament; a story that gained widespread attention when University of Oregon basketball player Sedona Prince used social media to highlight the differences between the facilities provided for the women compared with

---

NCAA?, NCAA.ORG, https://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa; *see also* 20 U.S.C. § 3401 (identifying the importance of federal oversight of education).

93. *Cf.* Am. Power & Light Co. v. SEC, 329 U.S. 90, 100 (1946) ("Such evils are so inextricably entwined around the interstate business of the holding company systems as to present no serious question as to the power of Congress under the commerce clause to eradicate them.")

94. 20 U.S.C. § 3402.

95. *See* Kaplan Hecker & Fink LLC, *NCAA External Gender Equity Review: Phase I: Basketball Championships* 2–3 (Aug. 2, 2021) [hereinafter Kaplan-Hecker Report], https://ncaagenderequityreview.com/; *see also* Rachel Bachman & Laine Higgens, *NCAA Undervalued Women's Basketball Tournament by Millions While Prioritizing Men's Tourney, Report Finds*, WALL. ST. J. (Aug. 3, 2021), https://www.wsj.com/articles/ncaa-undervalued-womens-basketball-tournament-11628018560.

96. *See* Kaplan-Hecker Report, *supra* note 95, at 76.

those provided for the men.[97] The NCAA apologized for the lapse.[98] But other discrepancies cropped up. Although the official March Madness trademark belongs to both the men's and women's tournament, the NCAA only displayed the insignia on the men's basketball courts.[99] The NCAA also failed to provide the women's tournament with photographers until the Sweet Sixteen round of the tournament, while the men's tournament was well-photographed from its first round to its last.[100] The lack of coverage obviously inhibits student-athletes in the women's tournament from profiting from their NILs.

The Kaplan-Hecker Report confirmed that the discrepancies begin and end with the NCAA itself.[101] The report found that the Division I Women's Basketball Championship was "one of the most valuable U.S. sports media properties" and would be worth an estimated $81–112 million per year

97. *See* Sedona Prince (@sedonaprince_), TWITTER (Mar. 18, 10:46 PM), https://twitter.com/sedonaprince_/status/1372736231562342402 (showing a single training table and a single, small rack of dumbbells, compared to a large room full of workout equipment for the men's tournament); *see also* Julie Alexandria, La Vida Basketball (@JulieAlexandria), TWITTER (Mar. 19, 10:47 AM), https://twitter.com/JulieAlexandria/status/1372922744241725447 (highlighting discrepancies between swag-bags and meals).

98. President Emmert told reporters "[w]hen you lay the men's and women's championships side by side . . . it is pretty self-evident that we dropped the ball in supporting our women's athletes, and we can't do that . . . . That's a failure that should not exist." Heather Dinich, *NCAA President Mark Emmert Admits Inequality but Wants Women's Basketball Leaders to Push Progress*, ESPN (Mar. 31, 2021), https://www.espn.com/womens-college-basketball/story/_/id/31172132/ncaa-president-mark-emmert-admits-inequality-wants-women-basketball-leaders-push-progress; *see also* NCAA (@NCAA), TWITTER, (Mar. 19, 2021, 6:06 PM), https://twitter.com/NCAA/status/1373033133784846348 (NCAA apology statements).

99. The women's tournament "made at least one request to use the March Madness brand in recent years" and was denied by the NCAA. *See* Rachel Bachman, Louise Radnofsky & Laine Higgins, *NCAA Withheld Use of Powerful 'March Madness' Brand from Women's Basketball*, WALL ST. J. (Mar. 22, 2021), https://www.wsj.com/articles/march-madness-ncaa-tournament-womens-basketball-11616428776. The NCAA recently announced it will use March Madness branding for future tournaments. *Id.*; Mechelle Voepel, *NCAA to use 'March Madness' to help market Division I women's basketball tournament*, ESPN.com (Sep. 29, 2021), https://www.espn.in/womens-college-basketball/story/_/id/32305521/ncaa-use-march-madness-help-market-division-women-basketball-tournament.

100. *See* AJ McCord (@AJ_McCord), Twitter (Mar. 22, 12:09 AM), https://twitter.com/AJ_McCord/status/1373849223347765249 (finding thousands of photographs from the men's basketball tournament but zero from the women's on the NCAA media site); *see also* AJ McCord (@AJ_McCord), Twitter (Mar. 22, 1:08 AM), https://twitter.com/AJ_McCord/status /1373864084752437249 (reporting the NCAA stated it did not have the budget to staff photographers at the women's tournament until the Sweet Sixteen round).

101. *See* Kaplan-Hecker Report, *supra* note 95, at 75–81.

beginning in 2025, but it was bundled and sold to ESPN along with twenty-eight other sports for an average annual value of $34 million.[102] It also determined that the NCAA had "not put the women's championship to competitive bid since 2001."[103] While the initial report focused on basketball, similar problems persist in other sports.[104]

The NCAA's contention that it seeks to promote athletics uniformly does not square with the unequal treatment of the women's tournament.[105] Even if the men's basketball tournament does bring in money to help support other important NCAA ventures, the NCAA has prevented its women's tournaments from profiting at a time when interest in women's athletics is at an all-time high.[106] The shortcomings, if ignored, may subvert the goals of NIL laws by creating artificial barriers to entry by simply not showcasing women's tournaments to the extent that the men's tournaments are showcased.[107]

---

102. *Id.* at 75–76.

103. *Id.* at 78 (finding the tournament is precluded from receiving a fair market value).

104. ESPN aired the winner-take-all, championship game of the Women's College World Series (WCWS) Game Three at 3 P.M. on a Thursday. Though the game drew an average of 1.57 million viewers, the chosen broadcast time limited the tournament's exposure and the ability for it to reach new or casual viewers. If the primetime broadcast of Game Two averaged more than 2 million viewers, what possibilities were prevented by the earlier broadcast time of Game Three? *See* Paulsen, *Ratings: WCWS, NBA, NASCAR, NHL*, SPORTS MEDIA WATCH (2021), https://www.sportsmediawatch.com/2021/06/wcws-game-3-ratings-nba-clippers-jazz-espn-nascar-fox-stanley-cup/ (WCWS ratings exceeded viewership for National Hockey League Playoff games); *2021 Women's College World Series Schedule*, NCAA.COM (June 4, 2021), https://www.ncaa.com/news/softball/article/2021-06-04/womens-college-world-series-2021-schedule. Other discrepancies exist between the NCAA's treatment of the men's and women's College World Series, including: a more compact schedule with fewer off-days for the women's side; a smaller-capacity tournament venue; a lack of locker rooms; and no "free massage day" or VIP golf outings. Molly Hensley-Clancy, *College Softball Coaches Decry Treatment by NCAA: 'What's Lower Than an Afterthought?'*, WASH. POST (Apr. 23, 2021), https://www.washingtonpost.com/sports/2021/04/23/ncaa-softball-college-world-series-disparities/.

105. The NCAA encourages diversity and gender-equity through an online pledge. *See Presidential Pledge*, NCAA.ORG, https://d67oz7qfnvgpz.cloudfront.net/about/resources/inclusion/ncaa-presidential-pledge (last visited Feb. 19, 2022).

106. Paul Lee, Kevin Westcott, Izzy Wray, & Suhas Raviprakash, *Women's Sports Gets Down to Business: On Track for Rising Monetization*, DELOITTE INSIGHTS (Dec. 7, 2020), https://www2.deloitte.com/xe/en/insights/industry/technology/technology-media-and-telecom-predictions/2021/womens-sports-revenue.html.

107. Exposure creates opportunities: James Madison University pitcher Odicci Alexander, who wowed viewers with stunning pitching prior to her team's elimination in the WCWS semifinals, gained more than 50,000 followers on Instagram within a week of her shutout

The Department of Education's capacity to ensure the equal treatment of women's tournaments falls within the purview of the OCR and its Title IX enforcement.[108] Title IX prohibits discrimination on the basis of sex and holds that no person, on such a basis, shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program . . . ."[109] The statute governs discriminatory activity at educational institutions.[110] If participants in NCAA women's tournaments are barred from the kinds of opportunities and exposure delineated above, they are barred from benefiting from NIL to the same extent that their counterparts in the men's tournaments do. It is impossible to consider their participation in those tournaments, though intrinsically athletic, as distinct or separate from their academic experiences.

B. Title IX and the NCAA's Failure to Address Sexual Misconduct

The NCAA has also failed to ensure its programs and member schools comply with Title IX as it pertains to sexual assault.[111] Although the NCAA itself is not required to adhere to Title IX, its sexual assault policy includes language that requires schools' athletic departments to comply with Title IX by reporting incidents and disciplining violations.[112] While the policy may in

---

performance against the University of Oklahoma. *See* Cliff Brunt, *Women's College Sports Get Boost in TV Ratings, Visibility*, ABC NEWS, (June 19, 2021, 9:29 AM), https://abcnews.go.com/Entertainment/wireStory/womens-college-sports-boost-tv-ratings-visibility-78373009.

108. *Regulations Enforced by the Office for Civil Rights*, DEP'T OF EDUC., [hereinafter *OCR Enforcement*], https://www2.ed.gov/policy/rights/reg/ocr/index.html.

109. 20 U.S.C. § 1681(a).

110. 20 U.S.C. § 1681(c) (defining "Educational institution" under Title IX as "any public or private . . . institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.").

111. 20 U.S.C. §§ 1681–88.

112. Not only does the NCAA Division I manual contain specific provisions regarding student-athlete conduct that call for adherence to basic principles of Sportsmanship and Ethical Conduct, the NCAA also maintains a sexual assault policy to guide schools. The first provision of the policy requires a university representative to "attest annually that: [1] The athletics department is informed on, integrated in, and compliant with institutional policies . . . regarding sexual violence prevention and proper adjudication and resolution of acts of sexual and interpersonal violence." NCAA BD. OF GOVERNORS, *Policy on Campus Sexual Violence*, NCAA.ORG, (revised Apr. 27, 2021), https://ncaaorg.s3.amazonaws.com/ssi/violence/NCAA_CampusSexualViolencePolicy.pdf; *Board of Governors Expands Sexual Violence Policy*, NCAA.ORG, (May 1, 2020), https://www.ncaa.org/about/resources/media-center/news/board-governors-expands-sexual-violence-policy.

some ways detach the NCAA from responsibility for any sexual misconduct perpetrated by its member-schools' athletic programs, it premises adherence with penalties tied to athletics.[113] The policy explicitly states, "[i]f a school is not able to attest [its] compliance with the above requirements, it will be prohibited from hosting any NCAA championship competitions for the next applicable academic year."[114] Though the consequences are minimal, the language demonstrates the NCAA's ability to act with authority when the policy is violated.[115] Still, the policy fails to stipulate punishments for individual athletes who perpetrate sex crimes, though other student-athlete behavior, such as participation in offseason workouts or drug use, is closely monitored and harshly punished.[116]

In recent years, while schools have come under public scrutiny for failures related to sexual assault perpetrated by college athletes and covered up by athletic programs, the NCAA has idled. In 2019, USA Today investigated the NCAA's treatment of sex-offenders and found that from 2014 to 2019, at least twenty-eight athletes who transferred from one school to another after facing disciplinary action for a sexual offense were permitted to play their sport; the investigation uncovered an additional five athletes who continued to play even after being convicted in or disciplined by a U.S. court.[117] The NCAA commissioned a study group—the Commission to

---

113. *See Policy on Campus Sexual Violence*, *supra* note 112, at 3.

114. *Id.* The policy also explicitly decries sexual discrimination, harassment, and sexual and interpersonal violence as antithetical to human decency and the NCAA's core values. *See id.* at 1.

115. The NCAA views even minor infractions as grounds for suspensions. *See, e.g.*, Gary Parrish, *NCAA Puts Texas A&M on Probation, Suspends Coach Buzz Williams for Two Games for 'Multiple' Rules Violations*, CBS SPORTS (Aug. 20, 2021, 1:29 P.M.), https://www.cbssports.com/college-basketball/news/ncaa-puts-texas-a-m-on-probation-suspends-coach-buzz-williams-for-two-games-for-multiple-rules-violations/ (NCAA suspended basketball coach for two games for "impermissible contact" with a recruiting prospect and put the school on a two-year probation).

116. *See* NCAA MANUAL—*Infractions Program*, *supra* note 76; *see, e.g.*, *Kuran Iverson Suspended by NCAA*, ESPN (Oct. 30, 2013), https://www.espn.com/mens-college-basketball/story/_/id/9903950/kuran-iverson-suspended-memphis-tigers-season-opener (basketball player suspended one game for playing in summer league game without permission from his school); Manie Robinson, *Clemson Football Players' Drug Test Appeal Denied by NCAA*, GREENVILLE NEWS (May 24, 2019), https://www.greenvilleonline.com/story/sports/college/clemson/2019/05/24/clemson-football-players-drug-test-appeal-denied-ncaa/1219740001/ (football players suspended for entire 2019 season after testing positive for banned anabolic substance, though players passed later drug and polygraph tests after insisting they did not have knowledge of taking it).

117. The NCAA transfer portal allows schools to avoid disclosing a student-athlete's disciplinary history if they were only placed on probation and, even when disciplinary history is reported, schools may ignore the disclosures. Kenny Jacoby, *NCAA Looks the Other Way as College Athletes Punished for Sex Offenses Play On*, USA TODAY (Dec. 12, 2019),

Combat Campus Sexual Violence—and promptly disbanded it after it advocated for tying student-athlete eligibility to behavior.[118] As recently as the summer of 2021, the NCAA waffled after finding Baylor University failed to report sexual assaults committed by its student-athletes in direct violation of the NCAA's reporting policy.[119] President Emmert blamed the inaction on the NCAA's "very limited" authority to address such failures.[120]

The problems are not limited to student-athlete perpetrators. After investigating Michigan State University (MSU) for its role in allowing convicted sex-offender Larry Nassar continued access to girls and young women despite frightening reports of abuse, the NCAA found MSU did not violate NCAA rules.[121] The NCAA's inability to govern sexual misconduct not only disadvantages the survivors, many of them athletes themselves, it also perpetuates harmful campus environments in which criminal offenses are trivialized at the expense of the survivors in order to preserve the status quo of athletic programs.[122]

The Department of Education plays an important role in addressing Title IX infractions. The OCR enforces Title IX and violations of it, including sex-based harassment and violence.[123] The schools and programs governed

---

https://www.usatoday.com/in-depth/news/investigations/2019/12/12/ncaa-looks-other-way-athletes-punished-sex-offenses-play/4360460002/ (the investigation was not exhaustive; five out of every six schools from which USA Today requested records declined to give them). For example, a student expelled from the University of South Florida (USF) for a violation of rules relating to "Non-Consensual Sexual Intercourse" under the USF Code of Conduct, and charged with several counts of felony sexual battery, false imprisonment, and misdemeanor battery, transferred and played football at the University of Tennessee. USA Today reported that his transcript contained a note of bad disciplinary standing due to his expulsion and that "[a] Google search also would have yielded alarming results." *Id.*

118. *Id.*

119. Joe Hernandez, *NCAA Won't Punish Baylor for Failing to Report Sexual Assault Claims Against Players*, NAT'L PUB. RADIO (Aug. 12, 2021), https://www.npr.org/2021/08/12/1027070133/ncaa-baylor-sexual-assault-claims-failure-to-report.

120. *See id.*; *see also* Wade Goodwyn, *Baylor Sanctioned by Big 12 After New Revelations About Sexual Assault Controversy*, NAT'L PUB. RADIO, (Feb, 8, 2017), https://www.npr.org/2017/02/08/514172776/baylor-sanctioned-by-big-12-after-new-revelations-about-football-team-controvers (stating that Baylor previously fined $7.5 million by its conference for its well-documented lapses).

121. Cheyna Roth, *The NCAA Tells Michigan State No Rules Violated in Larry Nassar Scandal*, NAT'L PUB. RADIO (Aug. 30, 2018), https://www.npr.org/2018/08/30/643465851/the-ncaa-tells-michigan-state-no-rules-violated-in-larry-nassar-scandal.

122. *See* Kenny Jacoby, Nancy Armour & Jessica Luther, *LSU Mishandled Sexual Misconduct Complaints Against Students, Including Top Athletes*, USA TODAY, (Nov. 16, 2020), https://www.usatoday.com/in-depth/sports/ncaaf/2020/11/16/lsu-ignored-campus-sexual-assault-allegations-against-derrius-guice-drake-davis-other-students/6056388002/.

123. *OCR Enforcement*, *supra* note 108.

by the NCAA are also subject to Title IX enforcement by the Department of Education.[124] Even though sexual misconduct occurs off the field, the prevalence of excused misconduct among student-athletes is necessarily intertwined with postsecondary education.

C. Title VI and the NCAA's Shortcomings in Addressing Discrimination

While the NCAA has capitulated to outcry over its strict academic eligibility standards in the past, the changes come from within.[125] No oversight exists to ensure that the NCAA maintains a fair academic eligibility standard, and any possible future claim against discrimination would be required to overcome rigid precedent.[126] The NCAA's academic eligibility standards rely heavily on the Scholastic Aptitude Test (SAT) and American College Testing (ACT), though they have become more lenient since the original standard (Proposition 48) was abandoned for a newer standard (Proposition 16).[127] The current standard requires a student to demonstrate a combined score of a Core GPA calculated from sixteen mandatory pre-college courses and a minimum SAT or ACT score.[128] A lower GPA can be made adequate if paired with a certain SAT or ACT score, and vice versa.[129]

---

124. 20 U.S.C. § 1681(a), (c).

125. *See* Andrew M. Habenicht, Comment, *Has the Shot Clock Expired? Pryor v. NCAA and the Premature Disposal of a "Deliberate Indifference" Discrimination Claim under Title VI of the Civil Rights Act of 1964*, 11 GEO. MASON L. REV. 551, 607 (2003).

126. *See* Cureton v. NCAA, 198 F.3d 107, 118 (3d Cir. 1999) (NCAA not bound by requirements of Title VI); *see also* Pryor v. NCAA, 288 F.3d 548, 560–61 (2002) (rejecting plaintiffs' "deliberate indifference" claim, but finding the NCAA considered race in adopting its eligibility standards). *Pryor* "set bad precedent for future Title VI challenges, not only by prospective student athletes, but by others similarly situated who may not be able to prove actual discriminatory animus . . . ." Habenicht, *supra* note 125, at 607. While the Third Circuit found the plaintiffs in *Pryor* appropriately stated a claim for which relief could be granted under Fed. R. Civ. P. 12(b)(6), the NCAA settled out of court, eliminating the possibility for greater clarity from the courts. *See* Phillip C. Blackman, *The NCAA's Academic Performance Program: Academic Reform or Academic Racism?*, 15 UCLA ENT. L. REV. 225, 264 (2008).

127. *See* Kenneth L. Shropshire, *Colorblind Propositions: Race, the SAT, & the NCAA*, 8 STAN. L. & POL'Y REV. 141, 143 (1997). *See generally* NCAA DIV. I MANUAL, art. 14.3 *Freshman Academic Requirements*, art. 14.3, NAT'L COLLEGIATE ATHLETIC ASSOC., [hereinafter NCAA MANUAL—*Academic Requirements*], https://web3.ncaa.org/lsdbi/reports/getReport/90008. The standards were first introduced to increase student-athlete graduation rates and to lend credence to the concept of the student-athlete and credibility to the NCAA. *See* Habenicht, *supra* note 125, at 557–59. It is worth noting that Black student-athlete graduation rates increased after the adoption of the eligibility standards; but the standards risk preventing some Black student-athletes from ever earning the opportunity to graduate. *See Pryor*, 288 F.3d at 556.

128. *See* NCAA Manual—*Academic Requirements*, *supra* note 127, at art. 14.3.1.1.3.

129. *See id.*

But the reliance on the SAT and ACT as academic qualifiers still disproportionately impacts socioeconomically disadvantaged student-athletes who did not have access to the same test-preparation opportunities or test-taking environments that other prospective students benefited from.[130] The impact is two-fold: not only might a student-athlete be precluded from an opportunity to compete in college athletics, the student-athlete is also precluded from qualifying for an athletic scholarship.[131] In particular, these requirements risk disparately impacting racially diverse prospective student-athletes who may rely on athletics as an avenue for a college education and who perform well academically in college even if they did not have access to support systems that would have bolstered their success in standardized testing.[132] Jurisprudential precedents limit student-athletes' ability to raise discrimination claims against the NCAA should new conflicts arise.[133]

Further, the NCAA's reliance on Academic Progress Rates, used to measure a team's academic success, can be used to exclude programs from postseason opportunities, and therefore revenue opportunities.[134] This measurement disproportionately impacts Historically Black Colleges and Universities (HBCUs), which cannot support student-athletes to the extent that other schools with behemoth athletic programs do and often comprise the majority of programs banned from postseason play.[135]

---

130. *See* Abigail J. Hess, *Rich Students Get Better SAT Scores—Here's Why*, CNBC (Oct. 3, 2019), https://www.cnbc.com/2019/10/03/rich-students-get-better-sat-scores-heres-why.html; Ezekiel J. Dixon-Roman, Howard T. Everson & John J. McArdle, *Race, Poverty and SAT Scores: Modeling the Influences of Family Income on Black and White High School Students' SAT Performance*, 115 TCHRS. COLL. REC. 1, 22–24 (2013). While many institutions have made optional (or entirely eliminated) required standardized testing leading up to and in the wake of the COVID-19 pandemic, it is unclear how student-athletes will be impacted. If the NCAA moves in a similar direction, will it create a new academic eligibility standard on the basis of a grade or GPA alone? If so, would the GPA be calculated to consider circumstances beyond the reputation of the prospective student-athlete's high school or junior college? Ironically, the return to a grade-based academic standard may set the NCAA back and further preclude some student-athletes from athletic scholarships and academic opportunities. The possible fallout must be further analyzed.

131. *See* NCAA MANUAL—*Academic Requirements*, *supra* note 127, at art. 14.3.2.1.1.

132. *See* Shropshire, *supra* note 127, at 148–49 (noting that "victims" of Proposition 48 "were in good academic standing once given the opportunity to succeed"); *see also* NCAA MANUAL—*Academic Requirements*, *supra* note 127, at art. 14.3; Hess, *supra* note 130.

133. *See* 42 U.S.C. § 2000d (Title VI of the Civil Rights Act); *see also* Cureton v. NCAA, 198 F.3d 107, 118 (3d Cir. 1999).

134. *See* Blackman, *supra* note 126, at 242–43.

135. Louisiana State University (LSU), University of Alabama, and University of Texas at Austin spend hundreds of thousands of dollars on their student-athletes; far outspending

On another level, the NCAA's reliance on Black student-athletes has helped to make it the billion-dollar enterprise it is today; a significant percentage of student-athletes who participate in the two biggest revenue-driving sports, football and men's basketball, are Black.[136] Broadly speaking, access to NIL-related benefits would appear to open the door for the many Black student-athletes who have been crucial to the financial successes of the NCAA.[137] But obstacles remain, especially within sports that are underserved by the NCAA or are considered nonrevenue.

For example, the NCAA has inhibited women's basketball, a sport in which Black student-athletes comprise forty-six percent of the players, from generating greater revenue.[138] To ensure Black student-athletes participating in these tournaments benefit from NIL implementation, the existing barriers to financial success must be investigated and removed; such changes require intense oversight. Further, the increasing trend of eliminating "nonrevenue" sports, such as outdoor track, has disproportionately impacted Black student-athletes.[139] If the NCAA is unable to protect the interests of *all* sports, Black

---

nearby Historically Black Colleges and Universities (HBCUs). Derrick Z. Jackson, *NCAA Must Stop Perpetuating Academic and Financial Disparities for HBCUs*, THE UNDEFEATED (May 27, 2020), https://theundefeated.com/features/ncaa-must-stop-perpetuating-academic-and-financial-disparities-for-hbcus/. For example, the University of Alabama lists sixteen "academics" staff members in the athletic department, including three "learning specialists" (one for every thirty-five student-athletes). Staff Directory, University of Alabama Athletics, https://rolltide.com/staff-directory (last visited Feb. 19, 2022). Alabama Agricultural & Mechanical University (Alabama A&M), an HBCU, lists three staffers in the "Academic Enhancement Center" of its athletic department (one for every 156 student-athletes). Staff Directory, Alabama A&M Athletic Department, https://aamusports.com/staff-directory (last visited Feb. 19, 2022); *Equity in Athletics Data Analysis*, DEP'T OF EDUC., https://ope.ed.gov/athletics/#/institution/search.

136. Forty-eight percent of football players and fifty-six percent of men's basketball players are Black. *NCAA Demographics Database*, https://www.ncaa.org/about/resources/research/ncaa-demographics-database (last visited Feb. 19, 2022) [hereinafter *Demographics Database*] (Division I football and men's basketball); *see also* Faith Karimi, *What the NCAA Ruling Really Means for Student Athletes*, CNN (June 23, 2021), https://edition.cnn.com/2021/06/23/us/ncaa-supreme-court-ruling-explainer-trnd/index.html.

137. "College-athletes—especially black athletes, who are disproportionately represented in revenue-generating sports—are a massive source of revenue for colleges and media companies, yet they aren't allowed to share in the enormous value they create[.]" Rohan Nadkarni, *Study: NCAA 'Robs Predominantly Black Athletes' of Opportunity to Build Generational Wealth*, SPORTS ILLUSTRATED (Jul. 31, 2020), https://www.si.com/college/2020/07/31/ncaa-athlete-compensation-cost-revenue-study (quoting Sen. Cory Booker).

138. *See Demographics Database*, *supra* note 136 (Division I women's basketball); *see also supra* Part III.

139. Twenty-six percent of men's and women's outdoor track athletes are Black. *See Demographics Database*, *supra* note 136.

athletes participating in the so-called "nonrevenue" sports risk losing out on the benefits of NIL implementation, or worse, the educational opportunities borne out of athletic excellence.[140]

Issues related to discrimination within the NCAA are closely tied to the educational experiences of student-athletes. The Department of Education, through the OCR, has the capacity to enforce Title VI compliance and ensure the NCAA's implementation of NIL and other academic policies do not shortchange racially diverse student-athletes.[141]

D. The NCAA's Role in Student-Athlete Educational Lapses

The NCAA *does not* have a duty to ensure that its student-athletes receive an education while playing their sports at NCAA member-schools, yet its student-athletes' athletic experiences are entirely tied to their educational experiences.[142] As much is apparent in the NCAA's definition of amateurism, as well as its extensive rules for academic eligibility.[143] The contradiction resulted in scandalous headlines when it became apparent that the University of North Carolina (UNC) pushed its student-athletes into "paper classes" to maintain GPAs and thereby remain eligible to compete in NCAA-run activities.[144] The NCAA did not punish UNC for its behavior, even though the behavior certainly appeared to violate the NCAA's codes of ethical conduct.[145] The scandal also highlighted the seemingly dichotomous

---

140. Daniel Petty, *Amid Athletic Department Shortfalls, Men's College Running Programs Get the Axe*, RUNNER'S WORLD (Nov. 11, 2020), https://www.runnersworld.com/news/a34619452/mens-college-running-programs-get-the-axe/ (remarking on the increasing number of schools canceling track and field programs to shore up revenue, particularly in the aftermath of the COVID-19 pandemic).

141. *Regulations Enforced by the Office for Civil Rights*, DEP'T OF EDUC., https://www2.ed.gov/policy/rights/reg/ocr/index.html.

142. Student-athletes at the University of North Carolina (UNC) sued the NCAA, arguing that it "'voluntarily assumed a duty to protect the education and educational opportunities of student-athletes . . . participating in NCAA-sponsored athletic programs at NCAA member institutions.' Specifically, they claim[ed] 'the NCAA had a duty . . . to institute, supervise, regulate, monitor, and provide adequate mechanisms to safeguard the education and educational opportunities of student-athletes at NCAA member schools—and to detect and prevent the provision of academically unsound courses to student-athletes.'" McCants v. NCAA, 201 F. Supp. 3d 732, 738 (M.D.N.C. 2016). The court disagreed with the plaintiffs and ruled for the NCAA. *Id.*

143. NCAA MANUAL—*Amateurism*, *supra* note 90.

144. Jon Solomon, *UNC Investigation: Athletes Pushed into Fake Classes by Counselors*, CBS, (Oct. 22, 2014), https://www.cbssports.com/college-football/news/unc-investigation-athletes-pushed-into-fake-classes-by-counselors/.

145. Marc Tracy, *NCAA: North Carolina Will Not Be Punished for Academic Scandal*, N.Y.

emphasis on both athletics and academics, as the rigor of some athletic programs can interfere with the ability of student-athletes to dedicate adequate attention to their academic endeavors.[146]

The NCAA has the power to withhold athletic eligibility of students who violate certain codes of conduct; it has the ability to suspend entire programs for the same.[147] The NCAA is simply not the NCAA without universities and colleges: even if the NCAA may only govern collegiate athletic conferences and tournaments, athletic participation in those events ties into academic activities that take place beyond the fields, the courts, the pools, or the mats. Hardly anything could be more within the purview of the Department of Education than education itself. The Department has unique knowledge of education standards and issues and an interest in preserving the integrity of education.

IV. RECOMMENDATION

A. Legislative Proposals Miss the Mark

As has been stated, the issues facing the NCAA extend beyond student-athlete compensation. As a result, a limited approach to NIL guarantees that the same issues that have plagued student-athletes will persist, and student-athletes will still be required to raise their issues with the NCAA or turn to the courts for relief. Congress must enact legislation that deals comprehensively with the NCAA's activities.

The current emphasis on FTC oversight is problematic. The FTC is authorized to investigate and enforce penalties for violations involving unfair trade practices.[148] At first glance, the FTC appears to be the appropriate regulatory authority because it deals in anticompetitive practices, and NCAA issues are often litigated on the basis of antitrust theories.[149] But even if Congress continues to only focus on NIL, the aforementioned issues with equal access to exposure suggest the FTC is ill-equipped to handle the plethora of problems posed by NIL implementation.[150]

TIMES (Oct. 13, 2017), https://www.nytimes.com/2017/10/13/sports/unc-north-carolina-ncaa.html; NCAA MANUAL—*Academic Standards*, *supra* note 91.

146. *See* Dennis Dodd, *Pac-12 Study Reveals Athletes 'Too Exhausted to Study Effectively'*, CBS SPORTS (Apr. 21, 2015, 5:05 AM), https://www.cbssports.com/college-football/news/pac-12-study-reveals-athletes-too-exhausted-to-study-effectively/.

147. *Enforcement: Division I Internal Operating Procedures*, NCAA, https://ncaaorg.s3.amazonaws.com/enforcement/D1Enf_EnforceIOP.pdf; NCAA MANUAL—*Infractions Program*, *supra* note 76.

148. *See* 15 U.S.C § 41; *see also* Sherman Act, 15 U.S.C. §§ 1–7; Clayton Act, 15 U.S.C. § 12–27.

149. *See* 15 U.S.C. § 41. As some legislative proposals reveal, violations will be treated as "unfair and deceptive act[s]" subject to FTC enforcement. *See, e.g.*, H.R. 8382 116th Cong. (2020).

150. *See supra* Part III.; *see also Enforcement*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement (last visited Feb. 19, 2022).

The FTC is tasked with protecting consumers, not student-athletes.[151] Although a legislative mandate may very well encompass the protection of student-athletes, the FTC's inexperience in dealing with the complicated relationships among student-athletes, the NCAA, and institutions of higher education poses a problem. Further, the FTC would only be given enforcement power to oversee violations of NIL laws, making it entirely prescriptive rather than active.[152] Congress should use its legislative power and the benefit of momentum not to create a student-athlete bill of rights but to overhaul regulatory oversight of the NCAA. In exercising its delegatory authority, Congress should amend the Department of Education Organization Act to extend regulatory oversight to reach intercollegiate athletics.

The Department of Education is best equipped to oversee the operations of the NCAA because its offices are experienced in dealing with issues involving postsecondary education.[153] The Department, with its OCR, understands the importance of securing equal opportunities for *all* student-athletes—it may hold the NCAA accountable for its unequal treatment of women's programs while also helping the NCAA to ensure NIL laws benefit more than just the "revenue" sports.[154] Moreover, the NCAA has demonstrated shortcomings in areas beyond student-athlete compensation. While NIL has seized the spotlight, with comprehensive change, other issues may finally be meaningfully addressed.[155]

B. The Department of Education and a New Way Forward

The NCAA is not all bad.[156] In many ways, it is well-equipped to handle the unique problems confronting it; however, it is clear it requires some

151. *See Enforcement*, *supra* note 150.

152. *See, e.g.*, H.R. 8382.

153. *See supra* Part II.A. (describing the role of the Department).

154. *See id.*

155. *See supra* Part III. (outlining issues ancillary to but intertwined with intercollegiate athletics).

156. While the Department is susceptible to policy changes resulting from changing administrations, the NCAA has a greater ability to promote a policy and stand by it. For example, the NCAA demonstrated a strong commitment to LGBTQ+ rights by pulling seven championship tournaments from North Carolina after the state enacted a law discriminating against transgender people, while the Department has flipped back and forth on its policy. *See* Elisha Fieldstadt & Associated Press, *NCAA Pulls Seven Championships Out of North Carolina Over HB2* (Sep. 13, 2016), https://www.nbcnews.com/feature/nbc-out/ncaa-pulls-seven-championships-out-north-carolina-over-hb2-n647386; Dear Colleague Letter, DEP'T OF EDUC. & DOJ (Feb. 22, 2017) https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf; *U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity*, DEP'T OF EDUC. (June 16, 2021), https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity.

oversight. While turning the NCAA into some sort of SRO presents a compelling option, the NCAA should not be adopted as an SRO for reasons exemplified by FINRA.[157] Not only are there many shortcomings with FINRA's status that indicate the NCAA's status as an SRO would be impractical, but FINRA arose specifically as an answer to issues with regulation in the financial industry, and the NCAA has developed far beyond that point.[158]

It is the NCAA's relationship to colleges and universities that makes the Department of Education a more appropriate regulatory agency than, for example, the FTC. In part, this stems from the NCAA's time-honored argument that it serves as the arbiter of amateur sports—a precious commodity that requires NCAA governance.[159] NCAA bylaws mandate that the college athlete experience is distinctly not commercial and provides students with the opportunity to pursue hobbies (athletics) while they study.[160] The concept of amateurism, however farcical, emphasizes that a university or college educational experience is inextricably linked to college athletics—sports are a mere "avocation."[161] As President Emmert recently told legislators, "[w]e are proud of the role that college sports have played in creating opportunities for our nation's student-athletes, especially those who might not otherwise have had the opportunity to pursue higher education."[162] Further, the issues that consistently plague the NCAA are beyond the scope of antitrust law and the capacity of the FTC because although antitrust law considers social welfare as a procompetitive justification, it prefers to ignore social consequences of anticompetitive practices, judging the activity solely by whether it creates a competitive harm.[163]

---

157. An SRO is a "Self-Regulatory Organization." *See supra* Part II.B.

158. The NCAA morphed into the organization it is today after undergoing a considerable transformation over the course of several decades that began in the early 1900s. By the 1950s, the NCAA had solidified its position as an enforcer. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 15 (2000).

159. *See* Meyer & Zimbalist, *supra* note 90, at 311.

160. *See* NCAA MANUAL—*Amateurism*, *supra* note 90.

161. Some commentators posit that "[t]he NCAA purposely created the term 'student-athlete' as propaganda" to reinforce the concept of amateurism. *Id. See* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 74, 86 (2006). An avocation is "a subordinate occupation pursued in addition to one's vocation especially for enjoyment: HOBBY." MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/avocation (last visited Feb. 19, 2022); *see also* NCAA MANUAL—*Amateurism*, *supra* note 90.

162. *See* Emmert Test., *supra* note 2.

163. *See, e.g.*, United States v. Brown Univ., 5 F.3d 658, 668–69 (3d Cir. 1993) (citing Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978)) (detailing that social

Congress should extend the authority of the Assistant Secretary for Postsecondary Education and create a subsidiary office within it to reach intercollegiate athletic competition. The office should then be given the authority to work alongside the NCAA, rather than to overhaul it entirely, to ensure that issues such as the equal application of NIL laws and issues regarding sexual and interpersonal violence, discrimination, education, and other issues impacting postsecondary institutions are properly addressed.[164] This could be done through frequent audits of NCAA enforcement actions and other reports to the Department on the aforementioned issues. Congress should also still implement one of the commission-like entities, such as those suggested in some current congressional proposals and merely house it under the Department of Education.[165] In that way, NIL violations could be addressed more immediately than they would be through court actions. The NCAA serves as a voice for its member institutions; the Department should serve as a safeguard for student-athletes.[166]

CONCLUSION

The NCAA is a private, nonprofit organization whose mission is undeniably inseparable from higher education. While the courts historically served as the sole reviewer of many of the NCAA's actions and policies, interest in NIL laws has sparked a legislative movement. But recent legislative proposals to implement NIL fall short of legitimately holding the

---

welfare arguments may factor into a defendant's procompetitive justifications but cannot alone justify anticompetitive conduct); *see also* Gabe Feldman, *A Modest Proposal for Taming the Antitrust Beast*, 41 PEPP. L. REV. 249, 257–58 (2014) (arguing that "the Rule of Reason is simply not . . . designed to balance social welfare with economic effects.").

164. There are shortcomings in the Department's capacity to oversee these issues. For example, under Secretary Betsy DeVos, the Office of Civil Rights "facilitated a confidential deal between [an alleged sex offender's] mother and the [school], in which [the school] agreed to change the athlete's transcript to remove reference to the sexual assaults." Kenny Jacoby, *A Football Star was Expelled for Rape Twice. A Secret Deal Scrubbed it from His Transcript*, USA TODAY (Dec. 12, 2021), https://www.usatoday.com/in-depth/news/investigations/2019/12/12/oregon-ducks-player-accused-rape-plays-different-ncaa-school/4366387002 (noting that the Department insisted it merely acted as a neutral facilitator).

165. Some current congressional proposals create distinct oversight entities governed by a diverse board of experts to oversee NIL regulatory issues. The proposed quasi-governmental entities are not specifically overseen by any federal agency. *See, e.g.*, S. 5003, 116th Cong. (2020) (creating a self-regulatory, nonprofit "entity"); H.R. 9033, 116th Cong. (2020) (creating a federally chartered "Commission").

166. The NCAA Board of Governors consists of twenty-five members representing various conferences. *Board of Governors*, NCAA.ORG, http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=EXEC, (last visited Feb. 19, 2022).

NCAA accountable. The Department of Education, tasked in part with overseeing postsecondary education across the nation, is well-equipped to regulate the NCAA's lapses in its governance of college athletics pertaining to gender inequality, sexual misconduct, discrimination, and education. The NCAA's impact on higher education warrants regulation, and the Department of Education is the agency best suited for the job. Congress should extend the oversight authority of the Assistant Secretary for Postsecondary Education to oversee and work with the NCAA to promote a more equitable college athletic environment and to implement NIL opportunities in an equitable manner.