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Dealer's Choice: Pressuring the NCAA to Allow Student-Athletes to Participate in Certain Gambling Activities

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COMMENTS

DEALER'S CHOICE: PRESSURING THE NCAA TO ALLOW STUDENT-ATHLETES TO PARTICIPATE IN CERTAIN GAMBLING ACTIVITIES

I. INTRODUCTION: ELIMINATING THE NCAA'S PER SE GAMBLE AND YOU ARE GONE STANCE

Imagine being Bryce Young, the University of Alabama football team's star quarterback, or Suni Lee, an Auburn University gymnast.¹ On your recruiting trip, you pledged your allegiance to your college's nationally recognized athletic program.² Later, you signed your letter of intent in front of your family, friends, and maybe even the local press.³ Unbeknownst to you, on that very day, you correspondingly forged away several rights that many "regular" Americans freely enjoy.⁴ This Comment addresses athlete's waiving their right to gamble.⁵

*Murphy v. National Collegiate Athletic Association*⁶ allows fans to merge their sports interests with one of the most predominant parts of American culture: gambling.⁷ Sports gamblers can analyze statis-

1. See Joey Blackwell, *Bryce Young Breaks Multiple Alabama Single-Season Passing Records*, SPORTS ILLUSTRATED (Dec. 31, 2021, 3:48 PM), <https://www.si.com/college/alabama/bamacentral/bryce-young-breaks-alabama-single-season-passing-touchdown-record-blackwell> [<https://perma.cc/VN6B-5QD8>] (highlighting Bryce Young's career and statistics); see also *Athletes Menu*, USA GYMNASTICS, <https://usagym.org/pages/athletes/athleteListDetail.html?id=467541> [<https://perma.cc/2MLF-GSXW>] (last visited June 18, 2022) (identifying Suni Lee's statistics).

2. See Michael Casagrande, *Five-star QB Bryce Young Signs with Alabama*, ADVANCE LOCAL (Dec. 18, 2019, 3:24 PM), <https://www.al.com/alabamafootball/2019/12/five-star-qb-bryce-young-signs-with-alabama.html> [<https://perma.cc/3ZGG-QC3N>] (highlighting five-star quarterback Bryce Young signed his letter of intent to play for the University of Alabama).

3. See *id.* (explaining signing day processes).

4. See Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/3BMS-TYBD>] (articulating NCAA policies deprive college athletes of many rights American citizens enjoy).

5. For further discussion on the NCAA's restraint on athletes partaking in wagering activities, see *infra* notes 94-99 and accompanying text.

6. *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

7. See Matt Farnum, *Moving the Line: Leveraging the Legalization of Sports Gambling to Protect Student-Athletes and Preserve Amateuism*, 29 CORNELL J. L. & PUB. POL'Y 491, 492 (2019) (hypothesizing sports gambling activity increases with viewership statistics).

tics and predict athletes' and their teams' performances in return for a potential monetary gain.⁸ In the absence of illegal bribery, there is no evident correlation between the money a third-party gambles and an athlete's performance.⁹

Irrespective of statutory adoptions, the National Collegiate Athletic Association ("NCAA") maintains a traditional anti-gambling stance to uphold college sports' integrity and amateurism principles.¹⁰ Indeed, the NCAA cannot prohibit spectators from participating in wagering activities.¹¹ However, it can regulate athletes from participating in certain conduct.¹² As such, the NCAA enforces Bylaw 10.3 (the "Bylaw"), which prohibits athletes from participating in any gambling activity.¹³

Monetary prohibitions must comply with antitrust laws.¹⁴ Thus, Bylaw 10.3 is presumably subject to the Rule of Reason test because it restricts athletes from earning gambling compensa-

8. See *id.* at 495 ("Sports gambling is derivative of sports spectatorship, and just as sports fanatics personally identify with and cheer for certain teams or players, sports gamblers enjoy the thrill of watching a game and having a personal stake in its outcome."); see also *Sports Betting 101*, FANDUEL SPORTSBOOK, https://www.fanduel.com/sports-betting-strategy?gclid=Cj0KCQjwspKUBhCvARIsAB2IYusiIDiCe0GbMscsYanQwmoBf_Voo89SyidsWG6TZ1QfkAfgMZwj2YAaAvEkEALw_wcB [https://perma.cc/9QFX-AM82] (last visited June 6, 2022) (providing sports betting strategies).

9. See Farnum, *supra* note 7 (recognizing sports gambling is merely fantasy); see also William N. Thompson, *Gambling and Sports*, BRITANNICA, <https://www.britannica.com/sports/sports/Gambling-and-sports> [https://perma.cc/59PJ-79FF] (last visited June 6, 2022) ("A bet placed on a race or a game allows fans to prove their knowledge of a sport or to show their loyalty to a particular team or competitor.").

10. See Farnum, *supra* note 7, at 492–93 ("Critics argue that the NCAA is utilizing its amateurism model to exploit unpaid student-athletes.").

11. See *Murphy v. NCAA*, 138 S. Ct. 1461, 1484–85 (2018) (providing states regulate its citizens' gambling activities); see also Farnum, *supra* note 7 at 492–93 (highlighting NCAA's stronghold only over athletes).

12. For further discussion of the NCAA's power to regulate its athletes, see *infra* notes 100–101.

13. See *Sports Wagering*, NCAA, <https://www.ncaa.org/sports/2016/4/29/sports-wagering.aspx> [https://perma.cc/4Z59-SHYV] (last visited June 6, 2022) ("NCAA rules prohibit participation in sports wagering activities and from providing information to individuals involved in or associated with any type of sports wagering activities concerning intercollegiate, amateur or professional athletics competition."); see also *Sports Wagering: What Student-Athletes Need to Know*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/wagering/WA-GER_DontBetOnItWhatSANEedToKnow.pdf [https://perma.cc/W3RU-GZ6A] (last visited June 6, 2022) (advising student-athletes sports wagering includes, but not limited to, "fantasy leagues, March Madness® brackets, Super Bowl squares, Calcuttas, sports pools, online sports bets, sports betting apps, parlay and prop bets, live in-game betting and single-game sports bets.").

14. See Marc Edelman, *Why The NCAA's Basketball Player Advisor Limit Is Its Latest Legal Blunder*, FORBES (Oct. 25, 2021, 8:31 AM), <https://www.forbes.com/sites/marcedelman/2021/10/25/ncaa-agent-regulations-are-latest-legal-faux-pas/>

tions.¹⁵ Under a strict application, the blanket restraint unreasonably deprives athletes from the opportunity to use their knowledge to earn compensation.¹⁶ Therefore, a court would hypothetically strike down Bylaw 10.3 if judicially challenged.¹⁷

This Comment intends to address the Bylaw's illegitimate restrictions.¹⁸ Section II discusses the historical background of both general and sports gambling.¹⁹ It provides an array of historical sports betting scandals, highlighting arguments in favor of limiting student-athlete's gambling activities.²⁰ Then, it provides an authentic review of gambling's economic benefits to modern America.²¹ Finally, it concludes with a discussion of reformatory measures that may permit athletes the ability to gamble.²² Section III of this Comment analyzes the NCAA's anti-gambling Bylaw under the Rule of Reason.²³ It finds that Bylaw 10.3 violates antitrust laws and proposes an alternative restraint that accurately addresses both the NCAA's and athletes' respective concerns in a manner that adheres to antitrust laws.²⁴

?sh=15612315d90e [https://perma.cc/4ECT-7W82] (providing NCAA is subject to Section 1 of the Sherman Act under antitrust laws).

15. See Carl Hittinger, Lauren Lyster, & Julian Perlman, *Supreme Court Holds That the 'NCAA Is Not Above the Law' and Issues Warning to Colleges, Universities and Other Not-for-Profit Institutions*, JD SUPRA (July 1, 2021), <https://www.jdsupra.com/legalnews/supreme-court-holds-that-the-ncaa-is-3282382/> [https://perma.cc/CUE3-SQYL] (stating NCAA's amateur student-athlete compensation regulations will be scrutinized under antitrust laws).

16. For further discussion of Bylaw 10.3 analyzed under the antitrust standard of review, see *infra* notes 126–137 and accompanying text.

17. For further discussion of Bylaw 10.3 analyzed under the antitrust standard of review, see *infra* notes 126–137 and accompanying text.

18. For further discussion of Bylaw 10.3 violating judicial scrutiny, see *infra* notes 129–137 and accompanying text.

19. For further discussion of the history of gambling, see *infra* notes 25–40 and accompanying text.

20. For further discussion of sports betting scandals, see *infra* notes 25–33 and accompanying text.

21. For further discussion of NCAA's need to adopt reformatory measures, see *infra* notes 110–115 and accompanying text.

22. For further discussion of the recent judicial and legislative approaches, see *infra* notes 106–115 and accompanying text.

23. For further discussion of Bylaw 10.3, see *infra* notes 100–101 and accompanying text.

24. For further discussion of the proper limitation to athlete sports gambling, see *infra* notes 164–173 and accompanying text.

II. WANNA BET? THE FOUNDATIONS OF GAMBLING WITHIN AMERICANS' CULTURE

A. Historical Sports Scandals that Stained the Playbooks

Historically, professional leagues have experienced the highest-profile sports betting scandals among other playing tiers.²⁵ The NCAA, remarkably, has not recently addressed a major cheating scandal.²⁶ Regardless, it is essential to recognize preceding disparagements where athletes engaged in fraudulent activity to understand the NCAA's sports wagering concerns.²⁷

Collegiate basketball depicts the most notorious scandals among other sports.²⁸ This makes logical sense because bribery and illegal activity correlate with basketball's powerful, moneymaking atmosphere.²⁹ Additionally, there is a greater opportunity to point shave with a small group of athletes.³⁰ Point-shaving occurs during a game when a team deliberately limits the number of points scored to conform with a corrupt gambler.³¹ In short, a sports gambler bribes an athlete with monetary or economic incentives to purposely impede their team from scoring points.³² This misbehavior has not raised significant bribery concerns since 1995, when the federal government indicted former Northwestern football and basketball players for engaging in point-shaving and running a bookmaking operations on the schools' campus.³³

25. See Haley M. Robb, *Hedge Your Bets: How the Legalization of Sports Betting Could Be the Downfall of Intercollegiate Sports*, 122 W. VA. L. REV. 351, 372 (recognizing notable cheating scandals are recognized in profit-bearing sports).

26. See *id.* (providing NCAA has minimal number of cheating scandals).

27. See *id.* (noting most notorious scandals occurred several years ago).

28. See *id.* (stating most NCAA cheating scandals happen within college basketball); see also Mike Singer, *Ranking the 10 Most Shocking Scandals in College Basketball History*, BLEACHER REPORT (May 2, 2013), <https://bleacherreport.com/articles/1625497-ranking-the-10-most-shocking-scandals-in-college-basketball-history> [<https://perma.cc/6KEC-TF3P>] (listing top ten college basketball scandals).

29. See Singer, *supra* note 28 (explaining college basketball is a moneymaking entity). Money and power are the roots of sports scandal cases. *Id.* (providing underlying cause of basketball sports scandals).

30. See Robb, *supra* note 25, at 372 (illustrating monetary promises influence young athletes in exchange for point-shaving).

31. See *id.* at 373 (defining point-shaving as a betrayal of one's team).

32. See *id.* (providing gambler persuades athlete to intentionally not cover a game spread).

33. See e.g., Associated Press, *Gambling Scandal Strikes Again Northwestern Players Face Federal Charges*, THE SPOKESMAN-REVIEW (Mar. 27, 1998), <https://www.spokesman.com/stories/1998/mar/27/gambling-scandal-strikes-again-northwestern/> [<https://perma.cc/BJ38-SZ52>] (providing details of Northwestern athletics scandal); see also Mark Asher, *Northwestern Rocked by Scandal*, L.A. TIMES (Mar. 27, 1998, 12 AM) <https://www.latimes.com/archives/la-xpm-1998-mar-27-sp-33220-story.html> [<https://perma.cc/86RT-CDQV>] (highlighting scandal details). A fed-

B. Betting on the Foundations of the United States: The Historical Background of Gambling

Gambling is an integral part of the United States' longstanding history and tradition.³⁴ Colonists perceived gambling as a "civic responsibility" and utilized raised monies to fund local necessities, such as street pavements, churches, and western expansion.³⁵ Ultimately, state-sponsored gambling and policy measures built early America.³⁶

In the early nineteenth century, most states banned gambling practices because of corruption and negative influence on religious moral concerns.³⁷ The prohibition endured until gambling returned later in the era through the sport of baseball.³⁸ In 1964, New Hampshire enacted a state lottery and revenue scheme to fund education.³⁹ Shortly thereafter, twelve other states adopted lotteries, and the trend progressed throughout the rest of the country.⁴⁰

eral grand jury indicted former Northwestern University basketball players for shaving points in Big Ten Conference Games. *See id.* (indicating judicial punishments athletes who disrupt the outcome of a game). Additionally, a federal grand jury indicted a former football player for running a sports bookmaking operation while enrolled in the University. *See id.* (providing deterring measures to dissuade athletes from participating in illegal sports wagering).

34. *See* Farnum, *supra* note 7, at 493 ("Gambling was an integral part of early American life."); *see also* Robb, *supra* note 25, at 354 (providing American cultural gambling background); *see also* Ed Crews, *Gambling Apple-Pie American and Older Than the Mayflower*, COLONIAL WILLIAMSBURG, <https://research.colonialwilliamsburg.org/Foundation/journal/Autumn08/gamble.cfm> [<https://perma.cc/X8TN-VXDF>] (last visited Aug. 12, 2022) (stating Native Americans gambled before colonists arrived in United States).

35. *See* G. Robert Blakey, *Gaming, Lotteries, and Wagering: The Pre-Revolutionary Roots of the Law of Gambling*, 16 RUTGERS L.J. 211, 238 (1985) (explaining gambling's purpose in colonial America). Early America had limited capital, and Colonies desperately needed roads and schools. *See id.* (highlighting colonists did not have funds to establish the country). To fund these expenditures, the colonists established lotteries to raise revenue. *See id.* (explaining colonists relied on lotteries to build early America); *see also* Farnum, *supra* note 7, at 493 (discussing how gambling connected to early fiscal policy measures in America).

36. *See* Farnum, *supra* note 7, at 493–94 (providing gambling contributed to building America).

37. *See id.* at 494 (emphasizing nationwide ban on sports gambling because of negative impacts on society).

38. *See id.* (noting professional baseball reintroduced gambling).

39. *See* Robb, *supra* note 25, at 354 (discussing reentrance of lotteries to derive state funds); *see also* *What You Need to Know About The NH State Lottery*, STATE IMPACT, <https://stateimpact.npr.org/new-hampshire/tag/lottery/> [<https://perma.cc/WJ97-XVK4>] (last visited Nov. 9, 2022) (explaining New Hampshire adopted lottery as a means to raise funds beyond taxation).

40. *See id.* (providing other states established lotteries after New Hampshire).

C. The Feds Swing at Striking out Gambling: Sports Betting Legislation

1. *Sports Gambling through the Black Market*

States traditionally employed their police power to regulate and ban all gambling activity.⁴¹ However, during the Great Depression, some jurisdictions legalized gambling segments to generate funds for their local governments.⁴² The illegality of sports betting continued across the country.⁴³ States, nevertheless, permitted upper-class gambling activities that enhanced social status, such as horse wagering.⁴⁴

Despite gambling laws relaxing throughout the nation, the public opposed sports wagering.⁴⁵ As baseball and other sports popularized, though, individuals took advantage of inconsistent laws and engaged in illegal gambling through the black market.⁴⁶

41. See Farnum, *supra* note 7, at 499 (providing states refrained from permitting gambling until Great Depression); see also *Police Powers*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/police_powers [<https://perma.cc/VQM4-6KU2>] (last visited June 18, 2022) (“[D]ivision of police power in the United States is delineated in the Tenth Amendment, which states that ‘[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.’”). The states’ broad regulatory power includes the right to regulate gambling. See *id.* (articulating states’ power to govern conduct within its borders).

42. See Farnum, *supra* note 7, at 499 (stating Great Depression era granted ability to begin gambling). For example, New Jersey allowed horse race gambling to increase state revenue. See *Murphy v. N.C.A.A.*, 138 S. Ct. 1461, 1469 (2018) (providing historical background on New Jersey’s use of state lotteries to raise revenues).

43. See *id.* at 1484 (noting sports betting legalization supporters produce state revenue).

44. See John Pinfold, *Horse Racing and the Upper Classes in the Nineteenth Century*, 28 *SPORT IN HIST.* 414, 414 (Aug. 21, 2008) (states permitted horse gambling because the upper class considered it a respectable activity that enhanced social status and prestige).

45. See Farnum, *supra* note 7, (articulating citizens continued to oppose gambling activities and viewed them as morally destructive).

46. See *id.* at 494 (indicating sports viewership pressured gamblers to place bets on the black market); see also *id.* (“As baseball became more popular, so too did sports gambling.”) (citing Chil Woo, *All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 *CARDOZO ARTS & ENT. L.J.* 569, 572 (2013)); see also Kendall Howell, *You Can Bet on It: The Legal Evolution of Sports Betting*, 11 *HARV. J. OF SPORTS & ENT. LAW* 73, 75–80 (2020) (providing baseball’s deep history of sports gambling). Major League Baseball’s (“MLB”) Rule 21 prohibits sports betting by any player, coach, umpire, or official. See *id.* at 75 (outlining MLB’s strict restraint on gambling). The sport maintains a strong anti-gambling stance and exemplifies that through the Pete Rose case. See *id.* (explaining participating in sports wagering case led to severe penalties). In August 1989, the MLB fired and banned Pete Rose, the manager of the Cincinnati Reds, for life for gambling on the sport. See *id.* at 75–76. (Rose faced severe repercussions for violating Rule 21). The Dowd investigative report found Rose gambling on base-

This occurred when sports wagerers placed bets with underground bookmakers run by organized crime syndicates and bootleggers.⁴⁷

Congress passed several anti-betting laws in an attempt to deter illegal activity and preserve the integrity of sports.⁴⁸ These statutory measures included the Wire Act, Travel Act, Interstate Transportation of Wagering Paraphernalia Act, Sports Bribery Act, and Illegal Gambling and Business Act.⁴⁹ Each law allowed states to regulate black market betting within its borders.⁵⁰ States and the federal government, however, failed to enforce successful measures against black market betting.⁵¹ Consequentially, the illegal activity continued for many years.⁵²

ball between 1985 and 1987. *See id.* at 76. (explaining Dowd report shed light on Rose's gambling conduct). Rose is banned today and remains ineligible for the National Baseball Hall of Fame. *See id.* at 80. (indicating MLB's seriousness in punishing individuals who violate Rule 21).

47. *See* Chil Woo, *All Bets Are Off: Revisiting The Professional And Amateur Sports Protection Act (PASPA)*, 31 *CARDOZO ARTS & ENT. L.J.* 569, 572 (2013) (explaining organized crime within black market).

48. *See* Farnum, *supra* 7, at 499 (providing Congress intended to protect the integrity of the game).

49. *See id.* (noting Congress designed several laws to deter criminal activity). The Wire Act criminalized the use of interstate telephone lines to operate a betting business. *See* 18 U.S.C. § 1084 (explaining Wire Act encompassed sports gambling). The Travel Act made it a federal crime to use U.S. mail to engage in criminal activities, such as betting. *See* 18 U.S.C. § 1952 (providing Travel Act can be violated if an individual uses mail to participate in illegal gambling). The Interstate Transportation of Wagering Paraphernalia Act made it a crime to transport gambling paraphernalia across state lines. *See* 18 U.S.C. § 1953 (stating the Act forbids the "use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game"). The Sports Bribery Act prohibited individuals from using bribery to influence a sporting event. *See* 18 U.S.C. § 224 (providing Sports Bribery Act violation could result in five years imprisonment). The Illegal Gambling and Business Act criminalized individuals who conduct or engage in the illegal gambling business. *See* 18 U.S.C. § 1955 (articulating federal prohibition on illegal gambling).

50. *See* Farnum, *supra* note 7, at 500 ("[E]ach state was individually responsible for regulating gambling activity occurring within its borders.").

51. *See id.* ("Ultimately, the states' fractured enforcement measures failed to prevent illegal sports gambling, causing the Commission on the Review of the National Policy Toward Gambling to conclude in 1976 that 'effective gambling law enforcement was an impossible task.'") (quoting Justin Fielkow, Daniel Werly, & Andrew Sensi, *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 *DEPAUL L. REV.* 23, 28 (2016)); *see also* Woo, *supra* note 47, at 574 (explaining each Act only prevented large operations from participating in interstate gambling). However, federal laws left states the power to determine the aspects necessary to gamble within their borders. *See id.* (describing federal government did not regulate intrastate gambling).

52. *See id.* (indicating state and federal governments failed to monitor illegal gambling activity).

2. *PASPA: An Attempt to Control Sports Betting*

Gambling created detrimental implications throughout the sports world.⁵³ Accordingly, in 1992, Congress passed the Professional and Amateur Sports Protection Act (“PASPA”) to address sports gambling concerns.⁵⁴ Ultimately, PASPA prohibited states from legalizing any new forms of sports betting.⁵⁵ The purpose of the law was to prohibit all governmental entities from sponsoring, operating, advertising, promoting, licensing, or authorizing by law any “lottery, sweepstakes, or other . . . wagering scheme based . . . competitive games in which amateur . . . athletes participate . . .”⁵⁶ Contrary to popular belief, the new federal regulation did not make sports wagering a federal crime.⁵⁷ Instead, it granted the U.S. Attorney General and sports organizations the ability to enjoin violations through civil lawsuits.⁵⁸

Congress carved out exceptions to PASPA.⁵⁹ First, it fully exempted states that already legalized sports gambling.⁶⁰ Nevada, Delaware, Oregon, and Montana fell under this exemption.⁶¹ Additionally, Congress gave states a one-year window to permit sports gambling within their state.⁶² Many expected New Jersey and a few other states to take advantage of the one-year opportunity to estab-

53. See Robb, *supra* note 25, at 354 (noting gambling turned into individuals hedging bets within sports society).

54. See Professional and Amateur Sports Protection Act, Pub. L. 102–559, §§ 3701–3704, 106 Stat. at 4227–4229 (1992) (providing Act outlawed sports gambling nationwide); see also Robb, *supra* note 25, at 356 (providing Congress passed PASPA to address gambling concerns in sports world).

55. See Robb, *supra* note 25, at 356 (noting PASPA prohibited states from introducing sports betting legislation).

56. See 28 U.S.C. §§ 3701–3704 (1992) (indicating significant definitions, particulars about unlawful sports gambling, penalties, and legal applications).

57. See *Murphy v. NCAA*, 138 S. Ct. 1461, 1470–71 (2018) (explaining PASPA did not impose law enforcement burden on federal government).

58. See 28 U.S.C. § 3703 (1992) (“A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.”).

59. See 28 U.S.C. § 3704 (1992) (addressing PASPA’s two carved-out exceptions).

60. See 28 U.S.C. § 3704 (a) (1) (1992) (listing exemptions to PASPA’s gambling prohibition); see also Farnum, *supra* note 7, at 501 (stating Congress exempted gambling ban from states that already legalized it).

61. See Justin Fielkow, Daniel Werly & Andrew Sensi, *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 DEPAUL L. REV. 23, 23 (2016) (providing four states allowed gambling prior to PASPA, which excluded them from the prohibition).

62. See 28 U.S.C. § 3704 (a) (2) (1992) (providing states could statutorily adopt a gambling scheme within a one-year window); Farnum, *supra* note 7 at 501

lish their sports-gambling scheme.⁶³ However, no state adopted a legislative measure to fall within the exemption.⁶⁴ Thus, only Nevada, Delaware, Oregon, and Montana could participate in sports gambling.⁶⁵

For roughly sixteen years, courts rarely examined the constitutionality of PASPA.⁶⁶ Congress believed it found a way to reestablish the integrity of sports and deter the illegal activity of sports betting.⁶⁷ Nonetheless, opponents questioned the statutes' validity and effectiveness over time.⁶⁸ In 2009, Delaware Governor Jack Markell attempted to sign the Sports Lottery Act into law, which legalized professional and amateur sports gambling at Delaware racetracks.⁶⁹ Sports leagues opposed the bill, and the Third Circuit Court of Appeals hastily struck it down.⁷⁰ It found the non-ex-

(noting PASPA's second exception gave states ability to create their "own sports-gambling schemes").

63. *See id.* at 501–02 (asserting Congress assumed New Jersey would adopt sports gambling legislation).

64. *See id.* at 502 (articulating no state took advantage of opportunity to legalize sports gambling under second exception).

65. *See id.* (noting failure to elect into sports gambling prohibited states from permitting sports gambling activities). Furthermore, Nevada was the only state to permit gambling in collegiate sports. *See id.* (identifying Nevada met PASPA's exemption to conduct gambling schemes in professional and amateur athletics).

66. *See Robb, supra* note 25, at 356 ("Sixteen years after PASPA was passed, cases began to emerge that challenged PASPA."); *see also* Laura Colombell Marshall, Elbert Lin, John J. Delionado & Martha S. Condyles,

Supreme Court Finds PASPA Unconstitutional; Clears Path for States Looking to Successfully Legalize Sports Gambling, HUNTON ANDREWS KURTH (May 2018), <https://www.huntonak.com/images/content/3/7/v2/37238/supreme-court-finds-paspa-unconstitutional.pdf> [<https://perma.cc/VS26-6PQN>] ("Following PASPA, states were dissuaded from taking any legislative action on sports betting, including the repeal of restrictions on sports wagering.").

67. *See Farnum, supra* 7, at 501–02 (noting Congress thought PASPA effectively deterred illegal sports gambling).

68. *See id.* at 502 (indicating opponents challenged the federal ban because of federalism and Commerce Clause concerns). Specifically, opposers believed PASPA violated the Fifth Amendment because it made exceptions for specific states while discriminating against others. *See N.C.A.A. v. Christie*, 926 F. Supp. 2d 551, 557–577 (D.N.J. 2013) (indicating critics asserted a federal ban allowing sports gambling monopolies in four states was unconstitutional since it did not hold all states to the same standard). Additionally, critics believed Congress adopting PASPA violated the Tenth Amendment's Anti-Commandeering and federalism principles. *See id.* at 558 (providing argued Congress could not force States to prohibit sports wagering).

69. *See Eric Meer, The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 281–82 (2011) (providing Delaware governor legalized sports betting to generate funds from taxing sports betting).

70. *See* Off. of the Comm'r of Baseball v. Markell, 579 F.3d 293, 295 (3d Cir. 2009) (noting NCAA, National Basketball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL"), and MLB challenged Delaware's law and sought to enjoin officials from implementing Markel's bill).

empted states could not expand their sports betting laws.⁷¹ Thus, the court forced Delaware to follow the regulatory measures provided by PASPA and prohibited it from legalizing sports betting.⁷²

Delaware's lost battle inspired other state legislative bodies to challenge PASPA.⁷³ In particular, New Jersey's representatives engaged in a decade-long litigation battle, seeking to permit sports gambling in their state.⁷⁴ In 2012, New Jersey Governor Chris Christie reevaluated the benefits of gambling and signed the Sports Wagering Law.⁷⁵ The law allowed individuals to gamble on professional and collegiate events at casinos and racetracks.⁷⁶ Ultimately, this amended New Jersey's constitution and legalized sports gambling.⁷⁷

Professional leagues swiftly opposed New Jersey's legislation.⁷⁸ On August 7, 2012, the NCAA, National Basketball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL"), and Major League Baseball ("MLB") filed a Motion for Summary Judgment, seeking to enjoin Governor Christie, New Jersey's Assistant Attorney General, and the Executive Director of the New Jersey Racing Commission from implementing the Sports Wagering Law.⁷⁹ Both parties presented constitutional arguments.⁸⁰ The leagues argued that New Jersey's law did not adhere

71. *See id.* at 301 (siding with leagues' interpretation of Delaware's proposed legislation).

72. *See id.* at 303–04 (providing Delaware was required to adhere to PASPA). Delaware retained the power to institute sports betting schemes that it had done before 1990, as stated by PASPA. *See id.* at 304 (applying Congress' statutory language based on Delaware's legislative history).

73. *See Farnum, supra* note 7, at 502 (noting Delaware inspired other states to challenge PASPA's constitutionality).

74. *See id.* (highlighting New Jersey's ambition in challenging PASPA).

75. *See NCAA v. Governor of N.J.* [hereinafter *Christie I*], 730 F.3d 208, 217 (3d Cir. 2013) (quoting Brief for Appellants Christopher J. Christie, David L. Rebeck & Frank Zanzuccki at 13) (indicating New Jersey failed to capitalize on PASPA's one-year exemption); *see also* Robb, *supra* note 25, at 357 ("Finally, in 2012, then-New Jersey Governor Chris Christie signed the 'Sports Wagering Law'"); *see also* Farnum, *supra* note 7, at 501 (noting New Jersey had change in heart after deciding against legalizing sports gambling).

76. *See Farnum, supra* note 7, at 503 (articulating New Jersey Sports Wagering Act which allowed state officials to license sports casino and racetrack sports gambling).

77. *See Christie I*, 730 F.3d at 218 (noting Leagues opposed New Jersey legislation because it violated PASPA).

78. *See id.* (providing Leagues sued Chris Christie under 28 U.S.C. § 3703 and alleging Sports Wagering law invalid under PASPA).

79. *See id.* at 217 (explaining leagues' lawsuit against New Jersey governor); *see also* Robb, *supra* note 25, at 357 (identifying leagues that sued New Jersey officials).

80. *See Christie I*, 730 F.3d at 214–15 (providing both parties challenged the validity of PASPA based on traditional constitutional principles).

to PASPA and, thus, violated the Supremacy Clause.⁸¹ The state countered, asserting that PASPA violated the Constitution's Tenth Amendment anti-commandeering principles because it was an "invalid exercise of Congress' Commerce Clause powers, . . . irreconcilable with the principle that all States enjoy equal sovereignty," and violated the Fifth Amendment's Due Process and Equal Protection Clauses.⁸² The Third Circuit rejected New Jersey's argument, suggesting there may be a way for the state to legalize sports gambling without violating federal law.⁸³ Specifically, the court stated:

we do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering. Under PASPA, "[i]t shall be unlawful for . . . a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" a sports wagering scheme. Nothing in these words requires that the states keep any law in place. All that is prohibited is the issuance of gambling "license[s]" or the affirmative "authoriz[ation] by law" of gambling schemes.⁸⁴

3. *Repealing PASPA and Bringing Home Legalization – Murphy v. NCAA*⁸⁵

Even after Christie's lost battle, New Jersey continued to pressure the judiciary to repeal PASPA.⁸⁶ Five years later, the Supreme Court finally struck down PASPA in *Murphy*.⁸⁷ Writing for the ma-

81. *See id.* at 226–31 (providing leagues argued that the Supremacy Clause required state governments to comply with PASPA).

82. *See NCAA v. Christie* [hereinafter *Christie II*], 926 F. Supp. 2d 551, 579, n. 5 (D.N.J. 2013) (articulating New Jersey argued PASPA discriminated against states that did not adopt Pre-PASPA schemes and violated anti-commandeering principles).

83. *See Christie I*, 730 F.3d at 226–31 (providing New Jersey had potential way around statute).

84. *See id.* at 232–33 (citation omitted) (quoting 28 U.S.C. § 3702(1)) (reciting Third Circuit's determination that PASPA was constitutional).

85. *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

86. *See Farnum, supra* note 7, at 505 (noting New Jersey continued to challenge PASPA). In 2014, New Jersey passed Senate Bill 2460, which repealed a state law prohibiting sports gambling. *See id.* (noting New Jersey thought it had found loophole because it did not affirmatively grant right to gamble). However, in 2014, the Leagues again filed a complaint ("Christie II"), challenging the newly passed law. *See id.* (providing Leagues despised New Jersey's law). Ultimately, the Third Circuit held that New Jersey's bill violated PASPA with "clever drafting." *See id.* (citing *NCAA v. Christie*, 799 F.3d 259, 267 (3d Cir. 2015)) (indicating New Jersey could not get around PASPA).

87. *See Murphy*, 138 S. Ct. at 1465–68 (providing Supreme Court struck down PASPA in 2018).

majority, Justice Alito agreed with New Jersey's argument and determined that PASPA violated the anti-commandeering doctrine.⁸⁸ The Court determined, "Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own."⁸⁹

D. The Effects of Murphy and Sports Leagues' Attitude Toward Sports Gambling

1. *Federalism Wins: State's Stances Subsequent to Murphy*

Murphy buried PASPA and gave states discretionary power to legalize sports gambling.⁹⁰ Since then, there has almost been a nationwide legalization of the activity.⁹¹ Roughly thirty states statutorily permit sports betting, including eighteen that allow online wagering.⁹² Experts believe that every state, except Utah, will permit gambling within their borders over the next decade.⁹³

2. *NCAA's Anti-Gambling Stance: History and Tradition*

The NCAA maintains its traditional anti-gambling stance based on integrity and amateurism principles.⁹⁴ First, it believes that gam-

88. *See id.* at 1478 (concluding PASPA "unequivocally dictates what a state legislature may and may not do.").

89. *See id.* at 1484 (holding Congress cannot regulate state governments). In granting states the power to regulate gambling, the court noted, "the legalization of sports gambling requires an important policy choice, but the choice is not ours to make." *See id.* (indicating states can implement rules restraining gambling).

90. *See* Farnum, *supra* note 7, at 509 (articulating that Court's decision did not legalize sports gambling); *see also* Hunter M. Haines, *Passing the Ball: The United States Supreme Court Strikes Down PASPA and Throws Sports Gambling Back to State Legislatures*, 78 MD L. REV. 604, 616-17 (2019) (providing state legislatures could regulate sports wagering consistent with their economic necessities).

91. *See* *Murphy*, 138 S. Ct. at 1481 (providing Court's decision to leave each state to determine legalization of sports gambling).

92. *See* Will Yakowicz, *Where is Sports Betting Legal? A Guide To All 50 States*, FORBES (2022) (June 6, 2022, 12:48 PM), <https://www.forbes.com/sites/willyakowicz/2022/01/07/where-is-sports-betting-legal-america-2022/?sh=585074d2342c> [<https://perma.cc/8Y9V-HZ7L>] (providing 100 million Americans live in locations where they can participate in sports gambling).

93. *See* Jill R. Dorson, *Which States Will Legalize Sports Betting in 2022?*, SPORTS HANDLE (Dec. 30, 2021), <https://sportshandle.com/which-states-will-legalize-sports-betting-2022/> [<https://perma.cc/R8LG-7J2D>] (stating Utah likely will not legalize sports betting because of its Mormon leanings).

94. *See* Farnum, *supra* note 7, at 510 (rationalizing NCAA's anti-gambling stance, despite states' willingness to legalize). "While we certainly respect the Supreme Court's decision, our position on sports wagering remains." *See NCAA Examines Impact of Sports Wagering*, NCAA (July 19, 2018, 2:01 PM), <https://www.ncaa.org/news/2018/7/19/ncaa-examining-impact-of-sports-wagering.aspx> [<https://perma.cc/2B8Q-SDMF>] (quoting former chief legal officer, Donald Remy).

bling promotes corrupt conduct and threatens the ability to maintain the competitive equity of the game.⁹⁵ Additionally, the NCAA fears that collegiate athletes' participation in sports betting will diminish the bedrock amateurism principle.⁹⁶ It rationalizes that the student is first and the athlete second.⁹⁷ Furthermore, some commentators conceive sports gambling will make college athletics susceptible to scandals, such as point-shaving and other conduct that impact the outcome of the game.⁹⁸ As such, to preserve the welfare of student-athlete ideologies, the NCAA strictly prohibits athletes from participating in any form of gambling.⁹⁹

3. *NCAA's Governance Structure: Understanding the Scope of the NCAA's Power to Regulate*

Athletes and staff whose schools are members of the NCAA must abide by the NCAA's constitution and bylaws.¹⁰⁰ According to its rulemaking and enforcement power, NCAA Bylaw 10.3 states: "The following individuals *shall not knowingly participate in sports wagering activities* or provide information to individuals involved in or associated with any type of sports wagering activities concerning intercollegiate, amateur or professional athletics competition: . . . and (d) *Student-athletes.*"¹⁰¹

Consequentially, student-athletes who violate the gambling prohibition could face harsh punishments.¹⁰² Specifically, an athlete could be suspended or indefinitely ineligible for participating in wagering activities.¹⁰³ Despite the NCAA's concerns, *NCAA v. Al-*

95. *See id.* (providing NCAA's primary concerns with athletes participating in sports wagering activities).

96. *See id.* (noting potential diminishment of student-athlete principles if gambling is introduced into intercollegiate athletics).

97. *See id.* (rationalizing NCAA takes a strong traditional, amateur athlete stance that focuses primarily on the student aspect).

98. *See* Farnum, *supra* note 7, at 513 (explaining NCAA's anticipated challenges from amending its constitution and allowing student athletes to participate in sports betting activities).

99. *See id.* at 513–14 (providing NCAA's current stance which strictly prohibits student-athletes from gambling).

100. *See id.* at 512–13 (discussing NCAA's rulemaking authority).

101. *See* 2022-23 *NCAA Division 1 Manual*, § 10.3 (emphasis added), available at <https://www.ncaapublications.com/productdownloads/D123.pdf> [<https://perma.cc/5BTU-M2KR>] (last visited Jan. 26, 2023) (citing NCAA's prohibition of sports wagering activities for student-athletes and other team employees).

102. *See id.* (outlining potential disciplinary actions for violating Bylaw 10.3).

103. *See id.* (identifying specific punishments for violating Bylaws under the NCAA Manual).

ston¹⁰⁴ presumably invites college athletes to challenge the organization's ban on gambling rights.¹⁰⁵

E. A Slam Dunk: Unanimous Supreme Court Sympathizes with Student-Athletes

In 2021, the Supreme Court determined the NCAA's restraint on student-athlete's ability to earn educational benefits violated antitrust laws.¹⁰⁶ In *Alston*, former West Virginia football player Shawne Alston and other Division I athletes alleged that the NCAA's restrictions on compensation and eligibility violated federal antitrust laws by prohibiting athletes from receiving compensation for their labor.¹⁰⁷ The case concerned benefits related to education, such as computers, tutoring services, books, and study abroad fees.¹⁰⁸ The Supreme Court held that the NCAA violated federal antitrust laws by capping how much each of the member schools could provide student-athletes for education-related costs.¹⁰⁹

104. *N.C.A.A. v. Alston*, 141 S. Ct. 2141 (2021).

105. See Bill Speros, *Will Ruling on NCAA Student-Athlete Payments Impact Betting?*, BOOKIES.COM (June 21, 2021, 6:55 PM), <https://bookies.com/college-football/picks/will-ruling-on-ncaa-student-athlete-payments-impact-betting> [<https://perma.cc/9JRB-9ZKS>] (analyzing outcomes of *Alston*).

106. See *Alston*, 141 S. Ct. at 2164–65 (holding NCAA's policy unconstitutional). The Court's ruling indicates the NCAA's willingness to work with student-athletes. See *Speros*, supra note 105 (identifying Court hinted towards hearing future student-athlete cases brought against NCAA).

107. See *Alston*, 141 S. Ct. at 2151–53 (providing student-athletes filed antitrust complaints against NCAA and conferences); see also *Alston v. N.C.A.A. (In re N.C.A.A. Grant-in-Aid Cap Antitrust Litigation)*, 768 Fed App'x 651, 653 (9th Cir. 2019) (articulating Shawne Alston and FBS football and men's and women's basketball composed of the class action).

108. See *Alston*, 141 S. Ct. at 2164 (agreeing education-related benefits should not be confused with professional athlete's salary).

109. See *id.* at 2164–65 (affirming right to education-related benefits). Additionally, Gorsuch hinted at student rights by stating, “[s]ome will think the district court did not go far enough. By permitting colleges and universities to offer enhanced education-related benefits, its decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools. Still, some will see this as a poor substitute for fuller relief. At the same time, others will think the district court went too far by undervaluing the social benefits associated with amateur athletics. For our part, though, we can only agree with the Ninth Circuit: ‘The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law.’” See *id.* at 2164 (quoting *Alston v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.)*, 958 F.3d 1239, 1265 (2020)) (providing court ready to recognize student-athletes rights against NCAA); see also *The Differences Between NCAA Divisions*, NCSA SPORTS, <https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions> [<https://perma.cc/S9TQ-48TR>] (last visited Jan. 29, 2023) (stating “According to the

Justice Kavanaugh composed a strong concurrence, highlighting the uncertainty of other NCAA compensation rules.¹¹⁰ Notably, he brought attention to the majority's narrow opinion and explained that the NCAA's power to violate antitrust laws was still intact.¹¹¹ His opinion linguistically hit the NCAA with a hammer as he fired attacks on the illegality of its deeply-rooted amateurism model.¹¹² He stated, "[t]he NCAA's remaining compensation rules also raise serious questions under the antitrust laws."¹¹³ Most NCAA rules restraining compensation aggregate serious concerns under antitrust laws and would be "flatly illegal in almost any other industry in America."¹¹⁴ After tearing apart the NCAA and addressing the majority's narrow opinion, Justice Kavanaugh affirmatively took a pro-athlete stance and famously concluded, "[t]he NCAA is *not* above the law."¹¹⁵

NCAA, there are 363 Division 1 schools, 313 Division 2 schools, and 442 Division 3 schools.").

110. *See Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring) (providing Justice Kavanaugh concurred with the majority; however, he thought the Court should have gone further and analyzed non-academic compensation).

111. *See id.* (explaining Court's narrow opinion in analyzing restraints on academic compensation). Notably, the majority constrained its analysis to the academic-related restraints because only the NCAA appealed the District Court's finding that these restrictions violated antitrust laws. *See id.* at 2154–55 (explaining Supreme Court's limited review).

112. *See id.* at 2166–69 ("The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that 'customers prefer' to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a 'love of the law.' Hospitals cannot agree to cap nurses' income in order to create a 'purer' form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a 'tradition' of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a 'spirit of amateurism' in Hollywood.").

113. *See id.* at 2166–67 (providing NCAA's rules restraining student-athletes from receiving compensation raises antitrust issues).

114. *See id.* (portraying NCAA rules violate antitrust laws and cannot be disguised simply behind the amateurism model). Justice Kavanaugh wrote, "[t]he NCAA couches its arguments for not paying student athletes in innocuous labels." *See id.* at 2167 (indicating future claims against NCAA to pay student-athletes).

115. *See id.* at 2169 (emphasis added) (recapping Kavanaugh's concurrence that NCAA is not exempt from antitrust laws); *see also* Jada Allender, *The NIL Era Has Arrived: What the Coming of July 1 Means for the NCAA*, HARV. J. SPORTS & ENT. L. (July 1, 2021), <https://harvardjsel.com/2021/07/the-nil-era-has-arrived-what-the-coming-of-july-1-means-for-the-ncaa/#:~:text=In%20fact%2C%20NIL%20laws%20in,into%20effect%20on%20July%201> [<https://perma.cc/VH6R-3E6V>] (highlighting impact of Justice Kavanaugh's concurrence).

III. THE GAMBLER: BETTING ON COLLEGIATE ATHLETES' RIGHT TO SPORTS WAGERING

Athletes have been deprived of numerous rights since the foundation of college sports.¹¹⁶ Preceding *Alston*, the NCAA prohibited schools from providing athletes with financial aid beyond the “cost of attendance.”¹¹⁷ The effects following the opinion pressured the NCAA to recognize college athletes’ name, image, and likeness rights.¹¹⁸ Athletes will continue to pressure the NCAA, and the organization’s failure to act will predictably result in strenuous litigation that ultimately finds Bylaw 10.3 in violation of the Rule of Reason Test.¹¹⁹

The NCAA should amend Bylaw 10.3 and adopt a narrower regulatory scheme to comply with antitrust laws.¹²⁰ This regulation should prohibit athletes only from wagering on their particular sport.¹²¹ Doing so would concurrently uphold the NCAA’s traditional goals while allowing athletes to earn compensation from wagering activities.¹²²

A. The Game Changer: “The NCAA is not Above the Law”

In *Alston*, the Supreme Court unanimously struck down the NCAA’s cap on student-athlete academic benefits based on antitrust grounds.¹²³ The opinion forces the NCAA into a new reality where athletes resist regulations that infringe on their rights.¹²⁴ Per Jus-

116. For further discussion of the athletes’ loss of rights, see *supra* notes 4 and accompanying text.

117. For further discussion of *Alston*, see *supra* notes 106–115 and accompanying text.

118. See Gregory Marino, *NCAA v. Alston: The Beginning of the End or the End of the Beginning*, JD SUPRA (Aug. 5, 2021), <https://www.jdsupra.com/legalnews/ncaa-v-alston-the-beginning-of-the-end-9351737/> [<https://perma.cc/8MPA-LKVJ>] (discussing rise in athlete activism following the Supreme Court’s recent opinion). Shortly after the opinion was released, the NCAA lifted its restraint on NIL deals. See *Id.* (providing NCAA recognized NIL rights a few days after *Alston*).

119. See *id.* (analyzing *Alston* Court’s deference towards athletes).

120. For further discussion of the proposed bylaw amendment, see *infra* notes 147–173 and accompanying text.

121. For further discussion of minimizing the scope of Bylaw 10.3, see *infra* notes 166–173 and accompanying text.

122. For further discussion of the proposed bylaw’s justification, see *infra* notes 169–173 and accompanying text.

123. See *NCAA v. Alston*, 141 S. Ct. 2141, 2147–66 (2021) (articulating athletes may receive compensation for education benefits, such as tutoring, study abroad, and internships).

124. See Marino, *supra* note 118 (providing insight on apparent athlete activism based on recent litigation themes).

tice Kavanaugh's sharply worded concurrence, the Court's opinion merely slapped the NCAA on the wrist – at least for now.¹²⁵

Hypothetically, a court would apply the Rule of Reason test because the NCAA's anti-gambling Bylaw prohibits athletes from earning a form of compensation.¹²⁶ Justice Kavanaugh's expansive concurrence foreshadows a hopeful future to student-athlete litigants as he indicated uncertainty in the NCAA's remaining compensation rules under this test.¹²⁷ Notably, he stated to pass constitutional muster, "the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification."¹²⁸

125. *See id.* (analyzing Justice Kavanaugh's negative sentiment towards NCAA). Justice Kavanaugh wrote, "I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws." *Alston*, 141 S. Ct. at 2166–67 (Kavanaugh, J., concurring) (predicting challenges against NCAA's enumerated compensation rules). *See also* Marc Edelman, *Supreme Court's Ruling Against NCAA in College Athlete Pay Case Rests on Decades of Legal Precedent*, FORBES (June 21, 2021, 10:54 AM), <https://www.forbes.com/sites/marcedelman/2021/06/21/as-earlier-predicted-us-supreme-court-rules-against-ncaa-9-0/?sh=202d0c73824b> [<https://perma.cc/B72G-D5G8>] ("Kavanaugh . . . took the time to write a concurring opinion that put the writing on the wall that many other NCAA rules—beyond just limits on educational-related, in-kind benefits—might also one day be found to violate Section 1 of the Sherman Act.") (analyzing Justice Kavanaugh's expansive concurrence).

126. For further discussion of Bylaw 10.3, *see supra* note 101 and accompanying text; *see also Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring) (hypothesizing NCAA's remaining compensation rules should be analyzed under Rule of Reason).

127. *See Alston*, 141 S. Ct. at 2166–67 (Kavanaugh, J., concurring) (noting NCAA's guidelines raise constitutional issues for intercollegiate athletics); *see also* Mark Schofield, *What the Supreme Court's Decision Could Mean for the Future of College Sports*, TOUCHDOWN WIRE (June 21, 2021, 11:41 AM), <https://touchdownwire.usatoday.com/2021/06/21/ncaa-alston-supreme-court-justice-kavanaugh/> [<https://perma.cc/T732-S67B>] (noting Justice Kavanaugh's concurrence opened door for student-athletes). *See* Schofield, *supra* note 127 (analyzing Justice Kavanaugh's text to explain effects of his concurrence); *see also Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring) ("After today's decision, the NCAA's remaining compensation rules should receive ordinary 'rule of reason' scrutiny under the antitrust laws.").

128. *See Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring) (providing NCAA compensation rules likely pass Rule of Reason). Justice Kavanaugh stated, "[t]he NCAA acknowledges that it controls the market for college athletes. The NCAA concedes that its compensation rules set the price of student athlete labor at a below-market rate. And the NCAA recognizes that student athletes currently have no meaningful ability to negotiate with the NCAA over the compensation rules. The NCAA nonetheless asserts that its compensation rules are procompetitive because those rules help define the product of college sports. Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid. In my view, that argument is circular and unpersuasive." *See id.* (hinting NCAA impermissibly benefits off student-athletes).

Bylaw 10.3 currently does not meet the Rule of Reason's requirements.¹²⁹ To pass the test, the NCAA must assert a legally valid procompetitive justification for its remaining compensation rules.¹³⁰ Hypothetically, the NCAA would assert its traditional sports integrity and amateurism arguments.¹³¹ These interests are legitimate; however, standing alone, they are flawed in two respects.¹³² First, the Rule of Reason requires the NCAA to show an objective procompetitive justification.¹³³ In this scenario, the amateurism argument fulfills this requisite, but the integrity of the game is a subjective justification.¹³⁴ Second, the means for achieving this prohibition far exceed its goal of maintaining an amateur environment.¹³⁵ In the absence of other justifications, pro-athlete courts will find these assertions as overbearing, "circular[,] and unpersuasive" because they hinge on protecting the NCAA's financial interests and impose an unreasonable restraint on competition.¹³⁶

129. *See id.* (analyzing Justice Kavanaugh's concurrence with NCAA failing to pass constitutional muster).

130. *See id.* at 2167 (Kavanaugh, J., concurring) (restating Rule of Reason test). "When describing the rule of reason, this Court has sometimes spoken of 'a three-step, burden-shifting framework' as a means for 'distinguish[ing] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.' As we have described it, 'the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect.' Should the plaintiff carry that burden, the burden then 'shifts to the defendant to show a procompetitive rationale for the restraint.' If the defendant can make that showing, 'the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.' These three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. As we have seen, what is required to assess whether a challenged restraint harms competition can vary depending on the circumstances." *See id.* at 2160 (quoting *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2283-84) (providing rule of reason mechanics).

131. For further discussion of the NCAA's anti-gambling stance, see *supra* notes 94-99 and accompanying text.

132. *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, BONA LAW ANTITRUST & COMPETITION <https://www.bonalaw.com/insights/legal-resources/antitrust-standards-of-review-the-per-se-rule-of-reason-and-quick-look-tests> [<https://perma.cc/FJ6J-SLMF>] (last visited Nov. 11, 2022) (analyzing NCAA's justifications under Rule of Reason).

133. *See id.* (discussing first step in finding objective justification).

134. *See id.* (applying NCAA's asserted amateurism justification to objective standard).

135. *See Alston*, 141 S. Ct. at 2167-68 (providing antitrust violation is found when less infringing regulations can be implemented to achieve the same procompetitive effect as challenged rule).

136. *See id.* 141 S. Ct. at 2167-68 (Kavanaugh, J., concurring) (indicating NCAA's traditional justifications do not pass Rule of Reason test). "[T]o be sure, the NCAA and its member colleges maintain important traditions that have become part of the fabric of America . . . But those traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of stu-

Therefore, a court would theoretically strike down Bylaw 10.3 for violating antitrust law.¹³⁷

B. Dealers Choice: Amending NCAA Bylaw 10.3

Bylaw 10.3 reveals serious implications under antitrust laws.¹³⁸ The NCAA has the opportunity to exercise leadership and remedy the volitive restraint in three appropriate ways.¹³⁹ It could do one of the following (1) ask the legislature to carve out an antitrust exemption, (2) allow student-athletes to participate in collective bargaining agreements, or (3) amend Bylaw 10.3 to comply with the Rule of Reason standard.¹⁴⁰ In the NCAA's view, the latter is the best option because it would honor athletes' concerns, protect the amateurism model, and avoid further judicial scrutiny.¹⁴¹

To comply with antitrust laws, the NCAA cannot unreasonably restrain an athlete's ability to participate in constitutionally protected wagering rights.¹⁴² As aforementioned, amateurism and

dent athletes who are not fairly compensated." *See id.* (providing NCAA must find other procompetitive justifications to surpass Rule of Reason Test).

137. *See id.* at 2168 ("[I]t is not clear how the NCAA can legally defend its remaining compensation rules.").

138. *See id.* at 2167 (hinting NCAA's other bylaws potentially overstrain athletes).

139. *See id.* (outlining measures NCAA can take to remedy noncompliant compensation rules). Ultimately, the NCAA must be proactive to minimize further litigation. *See id.* (predicting athletes will challenge NCAA in courts until it reforms its over-restrictive restraints).

140. *See id.* (recommending athletes turn towards legislature). "Or colleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues." *See id.* (providing solutions alternative to NCAA's governance structure).

141. *See* Paul Myerberg, *Supreme Court Justice Brett Kavanaugh Rips NCAA in Antitrust Ruling, Says it 'is Not Above the Law'*, USA TODAY (June 21, 2021, 1:30 PM), <https://www.usatoday.com/story/sports/college/2021/06/21/justice-brett-kavanaugh-rips-ncaa-in-shawne-alston-opinion/7771281002/> [<https://perma.cc/QN4B-P35S>] (providing NCAA should collaborate with student-athletes to come up with ideal remedy). Employment status is not the best option for the NCAA because it could implicate the overall amateurism model that the organization intends to protect. *See* Tyrone P. Thomas, *Student Athletes Face Hurdles to Becoming Employees*, BLOOMBERG LAW (Nov. 4, 2021, 4:00 AM), <https://news.bloomberglaw.com/daily-labor-report/student-athletes-face-hurdles-to-becoming-employees> [<https://perma.cc/TML2-N4J8>] (providing employment status to college athletes risks many complexities).

142. *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 132 (describing the rule of reason test); *see generally* Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales After Brady v. NFL and Anthony v. NBA*, 45 U.C. DAVIS L. REV. 1221 (2012) (interpreting Rule of Reason in sports realm). The Rule of Reason is a balancing test that requires courts to "balance the procompetitive benefits and anticompetitive effects of the

sports integrity arguments alone are not legitimate justifications to meet the stringent test.¹⁴³ If properly amended, the noncompliant Bylaw can effectively meet the Rule of Reason test.¹⁴⁴ Specifically, the NCAA can limit the extent of Bylaw 10.3's blanket prohibition to meet its asserted goals.¹⁴⁵ Of course, this requires the NCAA to give up its traditional stance and restructure its model in a manner that does not entirely suppress athletes' right to gamble.¹⁴⁶

C. If You're Gonna Play the Game, You Gotta Learn to Play it Right: Limiting Student-Athletes from Betting on Their Own Sport

1. *You've Got to Know When to Walk Away: Abandoning Bylaw 10.3*

The NCAA's integrity of the game justification undeniably recognizes an important reason to limit athletes from engaging in certain sports wagering activities.¹⁴⁷ However, prohibiting athletes from participating in *all* gambling ventures overreaches its targeted goal.¹⁴⁸ Currently, the restraint on gambling fails to meet the net procompetitive standard because the student-athlete market would be better off without the restraint.¹⁴⁹ This is undoubtedly illegal under the Sherman Act and would not pass the Rule of Reason standard of review.¹⁵⁰ Accordingly, the NCAA must abandon Bylaw 10.3 or narrowly tailor it.¹⁵¹

restraint at issue to determine the restraint's net competitive effect." *See id.* at 1279 (describing judicially applied antitrust test). Ultimately, the inquiry balancing test asks whether the restraint benefits outweigh the anticompetitive effect. *See id.* (explaining rule of reasons goal of minimizing overbearing restraints).

143. For further discussion of integrity and amateurism arguments, see *supra* notes 131–137 and accompanying text.

144. *See NCAA v. Alston*, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring) (providing NCAA may adjust its bylaws as remedial measure).

145. *See id.* (finding limiting extent of Bylaw 10.3 would not violate antitrust laws).

146. *See Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring) ("Of course, those difficult questions could be resolved in ways other than litigation.").

147. For further discussion of the anti-gambling stance, see *supra* notes 94–99 and accompanying text.

148. For further discussion of the limitations of the rule of reason, see *supra* note 129 and accompanying text; see also Feldman, *supra* note 142 (applying Rule of Reason balancing test).

149. *See id.* (synthesizing Rule of Reason as applied to student wagering).

150. For further discussion of the limitations of the Rule of Reason, see *supra* note 129 and accompanying text.

151. For further discussion on the illegality of Bylaw 10.3, see *supra* notes 129–137 and accompanying text.

2. *You've Got to Know When to Hold 'Em: Balancing the Scales*

The NCAA fears that athletes who participate in sports wagering will be pressured to rig the outcome of a game in exchange for monetary benefits.¹⁵² Although negative conduct certainly would corrupt college sports, these concerns historically have not presented a continuous issue.¹⁵³ Thus, the NCAA's argument is speculative and a powerless reason to keep Bylaw 10.3 fully intact.¹⁵⁴

Additionally, Congress enacted federal provisions that prohibit this type of conduct.¹⁵⁵ An athlete who intentionally interferes with the outcome of a game for monetary gain is guilty of a federal crime under 18 U.S.C. Section 371.¹⁵⁶ The penalties for engaging in illegal conduct could result in a five year sentence in federal prison and a fine of \$250,000.¹⁵⁷ Federal law, accompanied by its sentencing regime, is an adequate mechanism to deter athletes from engaging in illegal activities.¹⁵⁸ Together, the threat of im-

152. For further discussion on bad historical sports betting practices, see *supra* notes 25–33 and accompanying text.

153. See Robb, *supra* note 25, at 377 (assuming sports betting correlates with fans losing faith in college sports integrity). Many argue that sports betting correlates directly with star athletes intentionally rigging the game's outcome. See *id.* (raising argument against NCAA allowing student-athletes to gamble). Additionally, Tom McMillen, former Congressman, former NBA player, and CEO of an association of NCAA Division I athletic directors, hypothesized that legalizing sports betting in states would lead to corrupt activities. See Farnum, *supra* note 7, at 513 (providing McMillen stated, "I'll give you something that I'll put 100% odds on. If gambling on colleges is [legal] in 20 or 30 states there is probably a 100% chance of a point-shaving scandal at some school.").

154. See Farnum, *supra* note 7, at 513 (noting minimum scandals over past twenty-five years within intercollegiate athletics); see also Jodi S. Balsam, *Criminalizing Match-Fixing as America Legalizes Sports Gambling*, 31 MARQ. SPORTS L. REV. 1 (2020) ("To be fair, the risk of gambling-related corruption is present whether sports wagering is legal or not.").

155. For further discussion on federal law that deters point shaving and other illegal activities, see *infra* notes 156–160 and accompanying text.

156. See 18 U.S.C. § 371 (providing statutory measure that prohibits conspiracy to defraud United States); see also Alex Kay, *Former Auburn Player Varez Ward Indicted in Point-Shaving Scandal*, BLEACHER REPORT (June 4, 2013), <https://bleacherreport.com/articles/1661262> [<https://perma.cc/72SA-777S>] (providing Auburn player indicted under federal law for point-shaving). Varez Ward allegedly intentionally shaved points to change the outcome of games in accordance with sports bettor requests. See *id.* (describing incident where sports gambling impacted game outcome).

157. See 18 U.S.C. § 286 (outlining federal imprisonment sanctions for conspiring to defraud the United States); see also Charles Doyle, CONG. RSCH. SERV., R41223, *Federal Conspiracy Law: A Brief Overview* 11 (2020) (discussing potential violation fines).

158. See Farnum, *supra* note 7, at 513 (providing minimum number of athletes engaging in illegal activities).

prisonment and high fines likely explains why the NCAA has not recently dealt with a major scandal over the past decades.¹⁵⁹ Accordingly, the NCAA does not have to maintain Bylaw 10.3 to deter potential fraudulent conduct.¹⁶⁰

Notably, some forms of athlete conduct do not rise to the level of a federal offense and the NCAA's desire to protect the integrity of intercollegiate athletics is certainly valid.¹⁶¹ However, Bylaw 10.3 is unreasonably restrictive without a solid procompetitive justification.¹⁶² As such, the Bylaw must be narrowed in a manner that only reaches the NCAA's interest.¹⁶³ The NCAA should take the initiative and amend the Bylaw if it wants to maintain its traditional interest.¹⁶⁴ It is recognizably true that athletes betting on their sport could incentivize them to adjust their plays.¹⁶⁵ As such, the most effective way to protect the game is to prohibit collegiate athletes from gambling on their particular sport.¹⁶⁶ For example, the NCAA should prohibit a college basketball player from gambling on any high school, college, or professional basketball team.¹⁶⁷ However, the NCAA must permit the basketball player to participate in betting outside the basketball court.¹⁶⁸

A bylaw drafted in the aforementioned respect would be less restrictive and comply with antitrust judicial review.¹⁶⁹ Specifically,

159. *See id.* (noting NCAA's minimal engagement in sports scandals); *see also* 18 U.S.C. § 286 (portraying imprisonment and high fines for conspiring to defraud United States).

160. *See* Robb, *supra* note 25, at 376 (identifying last major NCAA scandal occurred in 1995).

161. *See* 18 U.S.C. § 371 (criminalizing two or more persons who conspire to commit any offense against United States). Admittedly, there currently is not a United States Code that directly criminalizes illegal sports bribery. *See generally*, Balsam, *supra* note 154 (providing U.S.C. § 371 targets conspiracy offenses).

162. For further discussion of Bylaw 10.3's infringement on player rights, *see supra* notes 129–137 and accompanying text.

163. For further discussion of the illegalities of Bylaw 10.3, *see supra* notes 129–137 and accompanying text.

164. *See* NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring) (providing the NCAA should amend its Bylaws to avoid judicial review).

165. *See* Lindsay Keiser, *Gamble And You're Gone: Why the NCAA Should Allow Their Athletes to Bet on Sports*, THE MICHIGAN REVIEW (March 5, 2020), <http://www.michiganreview.com/gamble-and-youre-gone-why-the-ncaa-should-allow-their-athletes-to-bet-on-sports/> [<https://perma.cc/6E2X-7Z22>] (indicating risks of athletes manipulate the outcome of their games).

166. *See* *Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 132 (describing permissible scope of Bylaw 10.3 to pass constitutional scrutiny).

167. *See id.* (applying Rule of Reason to limit scope of Bylaw 10.3).

168. *See id.* (noting Rule of Reason analyzes whether restraints are unreasonable).

169. *See id.* (rationalizing balance of factors to provide reasonable restraint).

the restraint on gambling would achieve net-procompetitive results because the collegiate market would be better with the less restrictive restraint.¹⁷⁰ College athletes could receive compensation for gambling activities in a way that would not interfere with the integrity of their particular sport.¹⁷¹ Additionally, this is a sensible solution because athletes understand sports better than the average American and are in the best position to compensate from wagering activities.¹⁷² Overall, athletes can benefit from their knowledge without disrupting the integrity of the game.¹⁷³

IV. CONCLUSION: SHAME ON YOU NCAA – NO MORE SIGNING AWAY ALL RIGHTS ON THE RECRUITMENT TRIP

Bylaw 10.3 infringes on athletes' right to participate in sports-wagering activities, including sports in which an athlete does not participate.¹⁷⁴ Athlete advocacy, accompanied by the articulated blessings prescribed by Justice Kavanaugh, make it almost certain that courts will address Bylaw 10.3, which strips more rights than necessary to achieve its asserted interest.¹⁷⁵ The NCAA continues to support its historic anti-gambling stance.¹⁷⁶ It asserts that Bylaw 10.3 protects the integrity and amateurism of collegiate athletics.¹⁷⁷ Under the Rule of Reason test, however, an antitrust violation will be found if a trade practice is an unreasonable restraint of trade based on economic factors.¹⁷⁸ As applied, precluding athletes from engaging in any form of wagering activity presents an unreasonable

170. *See id.* (noting defendant bears burden to show objective procompetitive justification).

171. *See* Keiser, *supra* note 165 (providing “a reasonable restriction is prohibiting teams from betting on their specific sport, at the collegiate level only.”). College athletes are in the best position to profit from sports gambling because they understand the mechanics of sports. *See id.* (justifying NCAA’s prohibition on sports wagering precludes athletes from earning compensation).

172. *See id.* (indicating student-athletes understand sports rules more than the average layperson).

173. *See id.* (noting solution would adhere to NCAA’s traditional interest in amateurism and protecting the integrity of the game).

174. For further discussion of Bylaw 10.3’s infringement on player rights, see *supra* notes 129–137 and accompanying text.

175. For further discussion of Justice Kavanaugh’s concurrence and its impacts on Bylaw 10.3, see *supra* notes 138–146 and accompanying text.

176. For further discussion of the NCAA’s anti-gambling stance, see *supra* notes 164–168 and accompanying text.

177. For further discussion of the NCAA’s asserted interests, see *supra* notes 94–99 and accompanying text.

178. For further discussion of the Rule of Reason, see *supra* note 128 and accompanying text.

restraint of trade.¹⁷⁹ For example, an athlete betting on which contestant will win the Bachelor does not affect the integrity of the game or amateurism.¹⁸⁰ Thus, the Bylaw is too invasive in light of the facts peculiar to the business which the restraint is applied.¹⁸¹

Prohibiting athletes from betting on their particular sport would be a reasonable limitation.¹⁸² For instance, a football player should not be able to gamble on any football team, regardless of the league.¹⁸³ This prohibition would meet the Rule of Reason test because it is tailored to promote its overall concerns.¹⁸⁴

The NCAA should address Bylaw 10.3 and restructure its overall policies in accordance with antitrust protections.¹⁸⁵ Athletes have shown their willingness to speak against the NCAA.¹⁸⁶ Rightfully, they should not have to shed the majority of their rights at the college door.¹⁸⁷ Thus, the NCAA should protect its athletes by granting the exercise of necessary rights.¹⁸⁸ Failure to suitably re-

179. For further discussion of Bylaw 10.3 failing the Rule of Reason, see *supra* notes 164–168 and accompanying text.

180. For further discussion of Bylaw 10.3's restraints, see *supra* notes 129–137 and accompanying text.

181. For further discussion of Bylaw 10.3's overbreadth, see *supra* notes 129–137 and accompanying text.

182. For further discussion of reasonable restraints, see *supra* notes 164–173 and accompanying text.

183. For further discussion of an example of reasonable restraint, see *supra* notes 164–168 and accompanying text.

184. For further discussion of narrowing Bylaw 10.3 to be reasonable, see *supra* note 164–168 and accompanying text.

185. See *id.* (providing athlete advocates will likely seek judicial review of Bylaw 10.3 as it currently stands); see also Branch, *supra* note 4 (“But the real scandal is the very structure of college sports, wherein student-athletes generate billions of dollars for universities and private companies while earning nothing for themselves.”).

186. See Marino, *supra* note 118 (anticipating athletes will take strong stance against NCAA to obtain their constitutional rights).

187. See *id.* (providing athletes should be able engage in all American freedoms).

188. See *N.C.A.A. v. Alston*, 141 S. Ct. at 2141, 2168 (2018) (Kavanaugh, J., concurring) (providing remedial measure).

form is a promise for future litigation – and the NCAA will not win.¹⁸⁹

*Amanda Daoud**

189. *See id.* at 2169 (“[T]he NCAA is not above the law.”); *see also* Braden Anderson and Michael Schmidtberger, *Compensating College Athletes: Moving the Ball Forward*, Bloomberg Law (Aug. 12, 2021, 4:01 AM) <https://news.bloomberglaw.com/us-law-week/compensating-college-athletes-moving-the-ball-forward> [<https://perma.cc/CJT3-2Q58>] (predicting *Alston* invited future litigation in favor of student-athletes).

* J.D. Candidate, May 2023, Villanova University Charles Widger School of Law; B.S., Commerce & Business Administration and Sports Communications, *summa cum laude*, University of Alabama, 2020. I dedicate this Comment to my parents, Akram and Christina Daoud, and sisters, Jennifer and Mikaela Daoud. Dad, your journey to the United States has instilled in me that I can do anything I set my mind to, and no dream is ever too big to achieve. Mom, your unconditional love and support inspires me to work hard, do my best, and laugh often. Thank you also to my former gymnastics coach, Kim Nichols, for supporting my career since 2003. Finally, I would like to honor Kenny Rodgers, or “the Gambler,” for inspiring the theme of this Comment.

