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National Protection of Student-Athlete Mental Health: The Case for Federal Regulation over the National Collegiate Athletic Association

JAYCE BORN*

“On Instagram, Madison Holleran’s life looked ideal: Star athlete, bright student, beloved friend. But the photos hid the reality of someone struggling to go on.”¹ On January 17, 2014, Madison Holleran’s dad called her and asked if she had found a therapist on campus. She said, “No, but don’t worry, Daddy, I’ll find one.”² That night, she jumped off the ninth level of a parking garage to her death.³ Everyone knew she was unhappy, but nobody knew exactly how deep her torment went. Holleran’s track coach knew that the nineteen-year-old University of Pennsylvania track runner was struggling to figure out whether track was making her unhappy, or just Penn.⁴ But she was left on her own to find help on campus, a task she could not complete.⁵

The story of Madison Holleran is just one story of the devastating effects of mental illness on student-athletes. There are others. For example, just before the tragic death of Madison Holleran, the National Collegiate Athletic Association (NCAA) community lost another life, and the combination of these two high-profile suicides set the stage for this Note author, as well as many others, to push the conversation of what must be done. In December 2014, Kosta Karageorge, a football player at The Ohio State University, committed suicide.⁶ Karageorge went missing in early December and was later found with a self-inflicted gunshot wound to the head in a dumpster on Ohio State’s campus.⁷ Just before his death, Karageorge sent a text message to his mother indicating that he was “an embarrassment” and that his “concussions have [his] head all f—ed up.”⁸

In the brief aftermath of Holleran’s and Karageorge’s deaths, the mental health of college athletes became a topic of conversation. For example, the National Athletic

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1. Kate Fagan, *Split Image*, ESPN (May 7, 2015), http://www.espn.com/espn/feature/story/_/id/12833146/instagram-account-university-pennsylvania-runner-showed-only-part-story [<https://perma.cc/3XYH-8JBZ>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Terrence McCoy, *The Violent Death of Ohio State’s Kosta Karageorge—and the Troubling Link Between Suicide and Concussions*, WASH. POST (Dec. 1, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/12/01/the-violent-death-of-ohio-state-football-player-kosta-karageorge-and-concussions-suicidal-impact/> [<https://perma.cc/4PFZ-GHA3>].

7. *Id.*

8. *Id.*

Trainers Association (NATA) urged colleges to start treating the mental health of college athletes just as seriously as their physical well-being.⁹ Additionally, ESPN discussed the treatment disparity between mental and physical health issues for college athletes: “Physical injuries such as concussions and knee injuries draw routine and widespread study by doctors and researchers, yet a dearth of information about athletes and mental illnesses exists.”¹⁰

In the wake of athlete deaths, litigation, research, and social awareness, the NCAA recently instituted a series of concussion protocols to reduce dangerous hits during games and provide better diagnosis and treatment for traumatic head injuries.¹¹ NATA urged the NCAA to tackle mental health with the same fervor it exhibited when addressing concussions.¹² However, when asked if the NCAA should take responsibility for the mental health of student-athletes, Associate Director for the NCAA Sport Science Institute Mary Wilfert said that “intervention cannot come out of the national office” because the NCAA is “not a medical organization.”¹³ To explain the NCAA intervention into concussions, despite the fact the NCAA is not a medical organization, she stated: “Concussions get more attention [than mental health issues] because of the media, the NFL, lawsuits, and Congress”¹⁴ However, it took years for concussions to gain the traction needed to make a change in the NCAA, and dozens of athletes were permanently injured in the meantime.¹⁵ Wilfert’s statement further ignores the realities of the long-term effects of concussions, which often include various mental illnesses such as depression.¹⁶ However, the lives of student-athletes should not depend on lawsuits and media attention. Instead, mental illness is a prevalent and life-crippling issue for student-

9. *NATA Calls On NCAA To Address Issue*, ESPN (Sept. 26, 2013), http://espn.go.com/ncaa/story/_id/9720732/ncaa-trainers-make-mental-health-recommendations [<https://perma.cc/7VXJ-RCH4>] (“The organization outlined a set of broad guidelines Wednesday that it believes should be adopted in an effort to help athletes cope with everything from depression to suicidal thoughts. The recommendations include using athletic trainers and team physicians to help with early detection of potential mental illnesses, provide advice and make treatment referrals while maintaining patient confidentiality.”).

10. Nicole Noren, *Taking Notice of the Hidden Injury*, ESPN (Jan. 26, 2014), http://espn.go.com/espn/otl/story/_id/10335925/awareness-better-treatment-college-athletes-mental-health-begins-take-shape [<https://perma.cc/YZS4-J8Q3>].

11. Ashley J. Adams, Comment, *Intercollegiate Concussions: What the NCAA Can Do to Ease the Pain from an Inevitable Headache*, 87 TEMP. L. REV. 179, 193, 193–94 (2014); *NATA Calls on NCAA To Address Issue*, *supra* note 9.

12. *NATA Calls on NCAA To Address Issue*, *supra* note 9.

13. Justin Ching, *Mental Health Issues a Huge Challenge for NCAA in Regard to Student-Athletes*, FOX SPORTS (Mar. 25, 2015, 9:00 AM), <http://www.foxsports.com/other/story/madison-holleran-ncaa-student-athletes-mental-health-issues-032515> [<https://perma.cc/NTD5-8TLZ>].

14. *Id.*

15. See generally Daniel S. Goldberg, *Concussions, Professional Sports, and Conflicts of Interest: Why the National Football League’s Current Policies Are Bad for Its (Players’) Health*, 20 HEC F. 337 (2008).

16. See Sharon Terlep, *The Mental Health of the College Athlete*, WALL ST. J. (Dec. 1, 2014, 6:42 PM), <http://www.wsj.com/articles/the-mental-health-of-the-college-athlete-1417469413> [<https://perma.cc/56TM-EHZZ>].

athletes and must be tackled proactively. If intervention cannot, or will not, come out of the NCAA office, the mental health of NCAA student-athletes must be addressed another way.

FOX Sports interviewed female student-athletes, NCAA officials, and mental health experts to identify how prevalent mental health issues are and why the sports community has struggled to address mental health.¹⁷ Female athletes indicated they were not aware of any tangible NCAA resources, despite the American Psychiatric Association's finding that women are "'nearly twice as likely' as men to develop depression, anxiety and eating disorders."¹⁸ When the stress of athletics is added to the equation, female student-athletes are highly at risk for mental health issues.¹⁹ The majority of women interviewed by FOX Sports identified eating disorders related to their sport as their top health issue.²⁰

Moreover, aside from gender-specific mental health issues, studies have shown that student-athletes may be at a greater risk for mental illnesses than the general population of college-aged students.²¹ Suicide was the third-leading cause of death of student-athletes from 2004 to 2008, after accidents and heart problems.²² "[A]ccording to survey data by suicide experts, about 10 percent of the country's college students [have suicidal ideations] at some point in their college careers," and "[a]lmost one percent make an attempt."²³ Using the University of Pennsylvania as a case study, these statistics would indicate that, of its approximately 24,000 students, 2400 would have suicidal thoughts and 240 would attempt suicide.²⁴ If the baseline statistic of ten percent is applied to the entire NCAA student-athlete population of approximately 460,000,²⁵ the results are startling: an estimated 40,600 student-athletes have suicidal ideations each year. Research has shown, though, that student-athletes may experience higher rates of depression (up to twenty percent) and suicidal ideation, among other mental illnesses, than nonathletes.²⁶ Additionally, a study of NCAA athletes found that between ten and fifteen percent of student-athletes "experience psychological issues severe enough to warrant counselling,"—two percent higher than non-student-athletes.²⁷ Student-athletes are also less likely to

17. Ching, *supra* note 13.

18. *Id.*

19. *See id.*

20. *Id.*

21. *See, e.g.*, Steve Volk, *The Tragedy of Madison Holleran and Suicides at Penn*, PHILADELPHIA (May 23, 2014), <http://www.phillymag.com/articles/penn-suicides-madison-holleran/> [<https://perma.cc/RX53-VLYB>].

22. Ching, *supra* note 13; Noren, *supra* note 10.

23. Volk, *supra* note 21.

24. *Id.*

25. *Student-Athletes*, NCAA, <http://www.ncaa.org/student-athletes> [<https://perma.cc/BJU7-FMUG>].

26. Emma Vickers, *Mental Health in the Student Athlete*, BELIEVEPERFORM (2015), <http://believeperform.com/wellbeing/mental-health-in-the-student-athlete/> [<https://perma.cc/8XUR-UBWS>].

27. *Id.*; accord Joshua C. Watson & Daniel B. Kissinger, *Athletic Participation and Wellness: Implications for Counseling College Student-Athletes*, 10 J. C. COUNSELING 153, 153 (2007).

seek professional help.²⁸ According to this research, the estimated 4600 student-athletes that attempt suicide each year and 40,600 that have suicidal ideations is very likely too low.

Student-athletes deserve an aggressive approach to providing greater mental health resources. This Note argues that the mental health of student-athletes cannot wait for intervening litigation against the NCAA, which was required in order for the NCAA to take action on concussions. Instead, the NCAA must be forced, through federal regulation, to move to the forefront of guaranteeing student-athlete safety, including protecting student-athletes from themselves. In fact, the NCAA has admitted that it was “founded to protect young people from the dangerous and exploitative athletic practices of the time,”²⁹ and its bylaws additionally “lay out a commitment to assist all participating institutions in protecting student-athletes and providing a safe environment for them.”³⁰ Despite these goals, it has refused to ensure the mental wellness of student-athletes by helping them tackle the unique rigors of being student-athletes. Part I of this Note details the traditional governance scheme underlying the NCAA, where the NCAA acts largely as an absolute sovereign over its member institutions. However, there is also some government and regulatory oversight in certain realms such as Title IX. Then, Part II discusses the options, in light of Part I, that are available to increase mental health resources for NCAA student-athletes with immediacy. Part III concludes by arguing that the most appropriate and necessary option is federal regulation. It does so by explaining why other options—including allowing the NCAA to develop regulations organically—will not work, revisiting why mental health is so important, addressing federalism concerns, and proposing a model regulatory scheme to be implemented.

I. THE NCAA IS AN ABSOLUTE SOVEREIGN, EXCEPT WHEN IT’S NOT

In 1905, President Theodore Roosevelt called two White House conferences to address the rising number of deaths in college athletics, particularly football.³¹ Those meetings resulted in reforms to improve safety, and the NCAA grew out of this agreement.³² Its goal? “[T]o protect young people from the dangerous and

28. Jordan D. Barnard, *Student-Athletes’ Perceptions of Mental Illness and Attitudes Towards Help-Seeking* 1 (2013) (unpublished Psy.D dissertation, University of Hartford) (available through ProQuest Dissertations Publishing) (citing Watson & Kissinger, *supra* note 27).

29. Nathan Fenno, *In Court Filing, NCAA Denies Legal Duty To Protect Athletes*, WASH. TIMES (Dec. 18, 2013), <http://www.washingtontimes.com/news/2013/dec/18/court-filing-ncaa-denies-legal-duty-protect-athlet/> [https://perma.cc/ATY2-RR5P].

30. Katherine Mason, Note, *Informed Consent in the NCAA: A Solution to the Injured Athlete Epidemic*, 36 WHITTIER L. REV. 511, 518 (2015) (citing NAT’L COLL. ATHLETIC ASS’N, 2013–14 NCAA DIVISION I MANUAL xiv, 3 (2013)). The history and founding of the NCAA is discussed further in Part II.

31. Dan Treadway, *Why Does the NCAA Exist?*, HUFFINGTON POST: BLOG (Oct. 6, 2013, 5:12 AM), http://www.huffingtonpost.com/daniel-treadway/johnny-manziel-ncaa-eligibility_b_3020985.html [https://perma.cc/D24U-SGDV].

32. *Id.*

exploitative athletic practices of the time.”³³ In short, the origins of the NCAA grew from federal intervention in intercollegiate athletics for health and safety reasons.³⁴ Despite its government origins, the NCAA is a private organization that, “[w]ithin its realm, . . . is the absolute sovereign. Armed with a rule book as large as a small house, the Association enforces its edicts without much challenge.”³⁵ The NCAA consists of legislative bodies made up of volunteer representatives from NCAA member schools that govern each division—I, II, and III.³⁶ Additionally, a group of committees make and set policy for the NCAA and its member institutions, including policy on “sports rules, championships, health and safety, matters impacting women in athletics and opportunities for minorities.”³⁷ The highest governing body is the NCAA Board of Governors, which includes presidents and chancellors from universities in each division.³⁸ All governing bodies must uphold and advance the NCAA’s core values: “fairness, safety and equality opportunity for all student-athletes.”³⁹ The NCAA has the power to penalize a member school for not admitting to violations of NCAA rules.⁴⁰

The courts, generally, do not interfere with the NCAA’s authority.⁴¹ Only when the NCAA conflicts with the sovereign laws of the United States does its power get usurped.⁴² The following subparts briefly explore the development of differing governance schemes for various issues: student-athlete unionization, Title IX,⁴³ the American with Disabilities Act (ADA),⁴⁴ and concussions. Student-athlete unionization demonstrates one instance in which student-athletes attempted to subject the NCAA to an existing law. Title IX and the ADA are two examples of direct federal regulation of the NCAA and its member institutions. The newly developed concussion regulations within the NCAA demonstrate an instance in which the organization was left to its own development. All of these schemes are discussed here

33. Fenno, *supra* note 29.

34. Michael Aguirre, Comment, *From Locker Rooms to Legislatures: Student-Athletes Turn Outside the Game To Improve the Score*, 36 ARIZ. ST. L.J. 1441, 1442 (2004).

35. Roger I. Abrams, *The NCAA and the Law*, HUFFINGTON POST: THE BLOG (May 28, 2014), http://www.huffingtonpost.com/roger-i-abrams/the-ncaa-and-the-law_b_5051049.html [<https://perma.cc/MU5Q-F6LM>].

36. *Governance*, NCAA, <http://www.ncaa.org/governance> [<https://perma.cc/6ACN-XWAWJ>].

37. *Id.*

38. *Id.*

39. *Id.*

40. Abrams, *supra* note 35.

41. *Id.*

42. For example, the federal government, in setting antitrust laws, restrains NCAA trade. *Id.* Broadening its mission from athlete safety, the NCAA has made “maintaining a distinctive brand for college athletics” one of its purposes. *Id.* However, when the NCAA limited the number of football games any one college could sell to a television network, it unreasonably restrained trade and violated antitrust laws. *Id.*

43. 20 U.S.C. §§ 1681–88 (2012). The statute, in practice, prevents sex discrimination in federally funded educational programs. *See infra* note 62 and accompanying text.

44. 42 U.S.C. §§ 12101–213 (2012). Titles II and III of the ADA prevent both public entities and certain private individuals from discriminating on the basis of disability. *See infra* note 67 and accompanying text.

to provide a setup for Parts II and III, which discuss the plausibility of various options for the creation of greater mental health support for student-athletes.

A. The Recent Push To Unionize Student-Athletes as Laborers

The College Athletes Players Association (CAPA), created in January 2014, comprises former college athletes that advocate for players' rights.⁴⁵ In March 2014, CAPA petitioned the National Labor Relations Board (NLRB) in an attempt to establish the labor and unionization rights of Northwestern University football players.⁴⁶ The National Labor Relations Act (NLRA)⁴⁷ guarantees employees of private universities the right to form a union, but CAPA had to show that football players were private employees.⁴⁸ The players argued that they qualified as employees under the NLRA⁴⁹ because "they practiced up to 60 hours a week during a month-long training camp before the college semester began" and because "[d]uring the season, players prepared for games up to 50 hours a week."⁵⁰ The NLRB agreed, granted Northwestern University players the right to unionize, and set a precedent for private collegiate athletes across the country.⁵¹ However, Northwestern appealed the NLRB's regional decision to the full NLRB and secured a stay on the unionization vote.⁵²

In mid-August 2015, the full NLRB unanimously declined to accept jurisdiction over the football players' petition to unionize and did not explicitly rule on whether the players are Northwestern University employees.⁵³ The NLRB declined to accept jurisdiction because of the unique composition of NCAA member institutions—a mix of public and private colleges and universities.⁵⁴ Northwestern is the only private school in its NCAA conference, the Big Ten, and the NLRB could not issue a decision that would exercise jurisdiction over public institutions.⁵⁵ If the Northwestern players unionized, "they could bargain over NCAA policies that are

45. Anthony R. Caruso, *Collegiate Collisions on the Field and in the Courtroom: Will Labor Peace Save Student-Athletes from Further Injury?*, 10 J. BUS. & TECH. L. 15, 25 (2015).

46. *Id.* at 26.

47. 29 U.S.C. §§ 151–69 (2012).

48. Caruso, *supra* note 45, at 26.

49. The NLRA incorporates the common law definition of *employee*: "a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment." *Id.* (quoting Nw. Univ., 362 N.L.R.B. No. 167 (2015)).

50. *Id.*

51. *Id.*

52. *Id.* at 27.

53. Kevin Trahan, *NLRB Rules Northwestern Players Can't Unionize*, USA TODAY (Aug. 17, 2015, 5:44 PM), <http://www.usatoday.com/story/sports/college/2015/08/17/northwestern-union-vote-nlrb-football/31647545/> [<https://perma.cc/XDL4-JY8F>].

54. Nw. Univ., 362 N.L.R.B. No. 167 (2015).

55. Alejandra Cancino, *Northwestern Football Union Petition Dismissed by Labor Board*, CHI. TRIB. (Aug. 17, 2015, 5:24 PM), <http://www.chicagotribune.com/business/ct-northwestern-football-union-decision-0818-biz-20150817-story.html> [<https://perma.cc/4FFS-DCTX>].

meant to ensure competitive balance among the teams, potentially giving Northwestern football players an advantage.”⁵⁶

The unionization attempt was spurred by student-athletes’ concerns for their health and safety in the wake of increased concussion awareness.⁵⁷ When the Big Ten reformed concussion protocols in 2014, it partially adopted one of the union’s demands and now requires an athletic trainer to be present in the replay booth with the ability to contact officials on the field.⁵⁸ The unionization campaign may not have been successful legally, but, in terms of policy, it made an impact on at least the Big Ten Conference. The legal failure serves as a guide for future attempts to impact NCAA policies.⁵⁹ The policy change must impact all NCAA member institutions. Only then, for example, will the NLRB exercise jurisdiction over a unionization claim. The NLRB has power only over private institutions, and the unique makeup of the NCAA prevented the NLRB from exercising its jurisdiction over just those private institutions. Successful unionization could have also raised Title IX concerns because national law requires gender equality among the sports of NCAA member institutions; unionization of only men’s football and basketball would improve wages and hours of those sports while ignoring women’s sports.⁶⁰ Ironically, the NCAA opposed Title IX when it was before Congress but hoisted it in defense of the NCAA’s position against unionization.⁶¹ Part I.B further discusses the nature of Title IX federal regulation over member institutions, along with the mandates of the ADA.

B. Federal Legislation Forces Title IX and ADA Compliance on Member Institutions

The mandates of Title IX and the ADA take similar approaches to NCAA regulation by exercising control over member institutions through federal regulation. Title IX was implemented as part of the Educational Amendment of 1972 with the ultimate purpose of preventing sex discrimination in programs receiving federal funding.⁶² Title IX applies to almost all NCAA member institutions because both

56. *Id.*

57. See Dave Zirin, ‘Right Now the NCAA is Like a Dictatorship’: Why the Northwestern Football Team Formed a Union, NATION: BLOG (Jan. 29, 2014), <http://www.thenation.com/blog/178142/right-now-ncaa-dictatorship-why-northwestern-football-team-formed-union> [<https://perma.cc/8YJ4-L39Q>].

58. Cancino, *supra* note 55.

59. Caruso notes that private unionization under the NLRB would force public institutions to turn to state law to unionize, an attempt that would fail as most state laws limit or completely deny public university employees the right to unionize. Caruso, *supra* note 45, at 28.

60. *Id.* at 27; Abrams, *supra* note 35.

61. Abrams, *supra* note 35.

62. *Overview of Title IX of the Education Amendments of 1972*, 20 U.S.C.A. § 1681 *et. seq.*, U.S. DEP’T OF JUSTICE (last updated Aug. 7, 2015), <https://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq> [<https://perma.cc/H6EP-8FUL>]. The statute states “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal Financial Assistance.” 20 U.S.C. § 1681(a) (2012).

private and public universities overwhelmingly receive federal funding.⁶³ In *NCAA v. Smith*, the Supreme Court rejected the plaintiff's argument that the NCAA was subject to Title IX.⁶⁴ However, Smith did not allege that the NCAA itself directly received federal funding; instead she argued that it operates an educational program, benefits from financial assistance received by student-athletes, and receives federal assistance indirectly via membership dues and fees from membership institutions.⁶⁵ The Court rejected that reasoning, but its limited holding preserved the possibility of a plaintiff successfully applying Title IX to the NCAA if the plaintiff can prove the NCAA receives federal funding.⁶⁶

On the other hand, the ADA was implemented in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."⁶⁷ Title II of the ADA prohibits public entities, including public colleges and universities, from discriminating on the basis of disability, while Title III prohibits discrimination by a private individual who owns, leases, or operates a place of public accommodation, including private universities.⁶⁸ Unlike in Title IX, however, courts have held that the NCAA is a private entity that operates a place of public accommodation and is thus subject to the ADA's mandates.⁶⁹ Congress enacted the ADA as an extension of civil rights legislation⁷⁰ and with power from the enforcement provision of the Fourteenth Amendment.⁷¹

Both of these legislative actions demonstrate the broad federal ability to impact the well-being of NCAA student-athletes in response to identified issues of concern, such as discrimination. Whether using its spending power under Article I, Section 8, its enforcement power under the Fourteenth Amendment, or another of its enumerated yet broadly construed powers, Congress has the ability to directly regulate the NCAA and its member institutions.⁷² Despite the need to increase physical protection for student-athletes, Congress declined to legislate changes to NCAA concussion protocol. The result of that inaction is discussed below.

63. *Title IX Frequently Asked Questions*, NCAA, <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions> [<https://perma.cc/D8PF-5XN4>].

64. *Nat'l Coll. Athletic Ass'n v. Smith*, 525 U.S. 459, 462 (1999).

65. Isaac Ruiz, Comment, *National Collegiate Athletic Association v. Smith: Must the NCAA Play by the Rules?*, 26 J.C. & U.L. 119, 123 (1999).

66. *Id.* at 121.

67. 42 U.S.C. § 12101(b)(1) (2012); *see also* Yuri Nicholas Walker, Comment, *Playing the Game of Academic Integrity vs. Athletic Success: The Americans with Disabilities Act (ADA) and Intercollegiate Student-Athletes with Learning Disabilities*, 15 MARQ. SPORTS L. REV. 601, 614 (2005).

68. Walker, *supra* note 67, at 619.

69. *Id.* at 619–20.

70. *See id.* at 614.

71. *See Tennessee v. Lane*, 541 U.S. 509 (2004).

72. *See infra* Part IV.B (discussing the various congressional powers available to regulate mental health support for student-athletes).

C. The NCAA Takes on Concussion Regulation After Public Pushback

In July and August 2011, former NFL players began filing actions against the NFL seeking relief for injuries sustained from concussions during the players' football careers, and the suits were eventually consolidated into a multidistrict litigation case on January 31, 2012.⁷³ The lawsuit accused the NFL of "hiding information that linked football-related head trauma to permanent brain injuries."⁷⁴ In 2015, the parties reached a settlement, with the NFL admitting no wrongdoing but agreeing to pay "\$765 million for injury settlements, medical monitoring, and care for former players who suffered concussions and other brain injuries."⁷⁵ However, the lawsuit and settlement brought concussion issues to the forefront of the American mind, and several key changes were spurred by the litigation.⁷⁶

The litigation prompted the public to pay attention to the medical evidence that demonstrated a strong correlation between the hits sustained during football and long-term brain damage.⁷⁷ It also raised questions about the doctor at the center of the NFL's concussion stance, Dr. Elliot Pellman.⁷⁸ Pellman's credibility was undermined by his relationship with then-NFL Commissioner Paul Tagliabue, and the New York Times eventually revealed he had embellished his credentials and failed to disclose to the NFL that he attended medical school in Mexico.⁷⁹ He shaped concussion policy, allowing concussed athletes back into games, and served as the lead author in numerous studies that concluded concussions were not a problem in the

73. See Memorandum of Law of Defendants National Football League and NFL Properties LLC in Support of Motion to Dismiss the Amended Master Administrative Long-Form Complaint on Preemption Grounds at 11, *In re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB (E.D. Penn. Feb. 13, 2015) [hereinafter Memorandum of Law].

74. Barry Wilner, *Mega-Lawsuit Says NFL Hid Brain Injury Links*, SAN DIEGO UNION-TRIB. (June 7, 2012, 6:22 AM), <http://www.sandiegouniontribune.com/sdut-mega-lawsuit-says-nfl-hid-brain-injury-links-2012jun07-story.html> [<https://perma.cc/TU3T-LY42>].

75. George White, *Health Care Issues Could Mean Collapse of NCAA as We Know It*, HUFFINGTON POST: THE BLOG (Jan. 23, 2014), http://www.huffingtonpost.com/george-white/ncaa-concussions_b_4298490.html [<https://perma.cc/EV5R-9YW4>].

76. Concussions in sports persists as a widely discussed topic. For example, Sony released the film "Concussion" on December 25, 2015. *Concussion*, IMDB, <http://www.imdb.com/title/tt3322364/> [<https://perma.cc/SVK3-BXHS>]. The film tells the story of the doctor who first diagnosed the long-term impact of concussions on NFL football players' brains: the disease chronic traumatic encephalopathy. *Id.*

77. Charles (Oli) Barwald, Note, *Practicing Concussion Prevention: Enacting State Legislation Regulating Contact in High School Football Practices*, 37 T. JEFFERSON L. REV. 337, 346 (2015).

78. "Pellman led efforts to discredit independent scientists and presided over studies that portrayed concussions as minor injuries. His name appears 26 times in a lawsuit that contends the NFL concealed a link between football and brain damage." Steve Fainaru & John Barr, *New Questions About NFL Doctor*, ESPN (Aug. 18, 2013), http://espn.go.com/espn/otl/story/_/id/9561661/central-figure-nfl-concussion-crisis-appointed-years-ago-league-position-commissioner-paul-tagliabue-patient [<https://perma.cc/A5SH-MZ6P>].

79. *Id.*

NFL.⁸⁰ Eventually, the NFL distanced itself from Pellman and reversed its stance on concussions, implementing rule changes contradicting the league's earlier findings.⁸¹

As concussion research developed and deaths and long-term injuries became more prevalent in professional football, athletes began bringing litigation against the NCAA for its negligence.⁸² These lawsuits, coupled with increased research, raised public awareness. Many articles echoed public opinion by asking for rule changes from the NFL and, eventually, other organizations including the NCAA.⁸³ Faced with the change in public opinion and looming litigation,⁸⁴ the NCAA adopted a new concussion protocol and recommended best practices for its member institutions.⁸⁵ However, the member institutions are not bound by these protocols and practices because there is no NCAA structure through which to review, enforce, or punish violations.⁸⁶ The NCAA has indicated that it does not need to enforce or punish schools for violations of concussion protocol because "each school is responsible for the welfare of athletes and that risk can't be completely removed from sports."⁸⁷ Additionally, in its court filing, the NCAA maintained that it has no legal duty to protect college athletes, despite admitting that it was "founded to protect young people from the dangerous and exploitative athletic practices" present at the time of its founding.⁸⁸

Undoubtedly, the NCAA's implementation of guidelines is a step in the right direction, but it's a small step. The NCAA acknowledges that student-athletes underreport concussions, but the organization leaves student-athletes to self-report

80. *Id.* "In 2005, a Pellman-led NFL study concluded 'many NFL players can be safely allowed to return to play on the day of injury after sustaining an MTBI.'" *Id.* One player even indicated that "Pellman allowed him to return after [he] was knocked unconscious while reaching for a pass." *Id.*

81. *Id.* For example, concussed players are no longer allowed to return to play in the same game in which they suffer the head injury. *Id.*

82. In July 2014, the NCAA agreed to pay out \$75 million in a class-action settlement, provide concussion testing and diagnosis for all current and former NCAA athletes, "requir[e] that all member schools adhere to more strict return-to-play requirements," and create a mandatory concussion protocol. Barwald, *supra* note 77, at 347.

83. See, e.g., Dennis Dodd, *Concussions and College Football: The Game Must Change—or Perish*, CBS SPORTS (Aug. 22, 2013), <http://www.cbssports.com/collegefootball/writer/dennis-dodd/23264024/concussions-and-college-football-the-game-must-change-or-perish> [<https://perma.cc/R96B-Q9MF>].

84. See *supra* note 82.

85. Jon Solomon, *NCAA Releases Football Hitting and Concussion Safety Guidelines*, CBS SPORTS (July 7, 2014), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24610143/ncaa-releases-football-hitting-and-concussion-safety-guidelines> [<https://perma.cc/4CLD-NU49>].

86. Jack Moore, *Is the NCAA Doing Enough To Protect College Football Players from Concussion?*, GUARDIAN (Nov. 19, 2015, 6:00 AM), <http://www.theguardian.com/sport/2015/nov/19/college-football-ncaa-concussion> [<https://perma.cc/59ER-WSBW>]; see also *Concussion*, NCAA, <http://www.ncaa.org/health-and-safety/medical-conditions/concussion> [<https://perma.cc/2U25-A9T9>].

87. Solomon, *supra* note 85.

88. Fenno, *supra* note 29 (noting that "the NCAA grew out of two White House conferences in 1905 following a spate of football-related deaths").

any concussion-like symptoms not visible to the athletic team's medical personnel.⁸⁹ Additionally, research demonstrates that many college football trainers have felt pressure from the team's coaches to clear players prematurely.⁹⁰ The current gaps and flaws in NCAA regulation demonstrate the slow and hesitant pace by which change moves within the NCAA. Whether it is a matter of money, a matter of getting its member institutions on board to make swift changes, or something else, the NCAA's hesitation to institute change leaves student-athletes, whom it was founded to protect, vulnerable.

The problems plaguing the internal development of concussion regulation in the NCAA indicate that the mental health resources for student-athletes cannot be left up to organic development within the NCAA but must be spurred by faster acting changes. The NCAA grew from the health and safety concerns of the federal government. However, it seems that its mission to protect student-athletes has been forgotten, as its ineffective concussion regulations and denial of any legal duty to protect student-athletes demonstrate. Slow changes may reflect the NCAA's hesitancy to open itself to litigation when an athlete is injured or a refusal to increase costs to protect athletes. Whatever the reason, the development of NCAA concussion regulations serves as a shining example of why the NCAA is incapable of acting on its own in the best interests of student-athlete well-being. The following Part addresses the various options available to increase resources for student-athlete mental health, including revisiting the problems plaguing NCAA sovereignty over mental health. As a result of this Part's analysis, this Note concludes that federal regulation is the most appropriate avenue for change.

II. THE OPTIONS TO INCREASE SUPPORT FOR STUDENT-ATHLETE MENTAL HEALTH

Part I gave a brief overview of several different regulatory schemes affecting the NCAA, its member institutions, or both. The fastest-acting and most impactful changes have come from direct federal regulation of the NCAA or its member institutions through Title IX and the ADA. The NCAA only implemented concussion protocol when it was forced to accommodate public opinion to avoid litigation, and even then the protocol lacked any bite because of the absence of an enforcement mechanism against the member institutions. This Part explains the applicability and feasibility of similar schemes to the three discussed above but does so in the realm of mental health. It also explains the applicability and feasibility of other schemes that fall along the spectrum from zero regulation (allowing the organic development of regulations within the NCAA and its member institutions) to complete federal regulation. In doing so, this Part demonstrates how some degree of federal regulation serves as the most appropriate means of increasing mental health support to student-athletes.

89. Adams, *supra* note 11, at 191.

90. *Id.* at 192.

A. Leaving It to the NCAA

First, as with concussion protocol,⁹¹ the decision to create greater mental health support and resources for student-athletes could be left to the NCAA. One could easily argue that this is the appropriate approach because the NCAA has already taken charge of ensuring the wellness of athletes both through its founding mission⁹² as well as through its Sport Science Institute, which conducts health research, gives member institutions recommendations, and mandates medical examinations.⁹³ However, the NCAA's actions to implement concussion protocol have moved slowly, and it has failed to enforce its protocol against violating member institutions.⁹⁴ Student-athlete mental health requires a fast-acting solution.

A review of the earlier quote⁹⁵ from Mary Wilfert, Associate Director for the NCAA Sport Science Institute, is informative about the speed by which mental health changes would likely be implemented. Wilfert bluntly said that mental health intervention "cannot come out of the national office" because the NCAA is "not a medical organization."⁹⁶ She also noted that concussion intervention has come out of the national office because they "get more attention [than mental health issues] because of the media, the NFL, lawsuits, and Congress."⁹⁷ Wilfert's interviewer accurately summarized this statement: mental health intervention will not come out of the national office any time soon because of the cost of such a program, the bureaucracy, and the lack of litigation.⁹⁸ Surely, the deaths of student-athletes like Madison Holleran⁹⁹ and the startling rates of mental health issues among student-athletes cannot be ignored until the NCAA feels their bureaucratic and financial impacts.

Indeed, the NCAA dedicates a page of its website to addressing mental health.¹⁰⁰ Additionally, NCAA Chief Medical Officer Brian Hainline has begun distributing a mental health manual to athletic directors of member institutions.¹⁰¹ However, these efforts to educate coaches are not efforts to provide tangible resources to student-athletes, nor are they efforts to create an environment where student-athletes feel comfortable seeking help without feeling repercussions on their playing time. One hopes that continuing suicides and high rates of other mental illnesses, such as eating disorders among female athletes, would lead the NCAA to develop more than just a pamphlet. But the NCAA has not been prompted by the public to do so, and the

91. *See supra* Part I.C.

92. *See supra* notes 29–31 and accompanying text.

93. *Cardiac Health*, NCAA, <http://www.ncaa.org/health-and-safety/medical-conditions/cardiac-health> [https://perma.cc/XS9F-N8PS].

94. *See supra* note 86 and accompanying text.

95. *See supra* text accompanying notes 13–14.

96. Ching, *supra* note 13.

97. *Id.*

98. *Id.*

99. Another student-athlete suicide, that of Kosta Karageorge, is discussed in Part III.

100. *Mental Health*, NCAA, <http://www.ncaa.org/health-and-safety/medical-conditions/mental-health> [https://perma.cc/ZVC6-TEGC].

101. Terlep, *supra* note 16.

organization moves slowly even when it is prompted (e.g., implementing a concussion protocol without an enforcement scheme).

Without outside intervention, the NCAA is not likely to take any, let alone aggressive, steps to increase mental health resources at its member institutions. The lesson learned from concussion regulation is that the NCAA is resistant to change unless prompted by an outcry of public opinion or the threat of litigation, and even then it is only marginally effective. It is unlikely student-athletes would be able to find a valid cause of action by which to bring suit for the failure to provide mental health resources.¹⁰² Further, the stigma associated with mental illness and the disparity between public support for physical injuries and mental illness make it unlikely that public opinion will sway the NCAA in the same way the Association was swayed by the public's opinion of concussions. Finally, even if the NCAA is prompted to make a change, that change is not likely to come with immediate or long-lasting impacts. The development of the NCAA concussion protocol shows us that the NCAA is hesitant to include enforcement mechanisms with its regulations. Enforcement is needed to implement change across all member institutions. Student-athletes must get mental health support another way, and the next sections address why the only appropriate option is federal regulation by demonstrating the fatal problems that would plague any other approach.

B. Leaving It to Existing Laws

Existing state or federal laws could be used to force change, as student-athletes attempted to do when they petitioned the NLRB for the ability to unionize.¹⁰³ Indeed, if unionization were ever to occur, it would give student-athletes the bargaining power to ask their private colleges and universities for greater mental health support and resources. In order for this result to reach all NCAA student-athletes, however, the NLRA would need to be amended to cover both public and private institutions, not just private colleges.¹⁰⁴ Additionally, a Title IX concern may arise if high-revenue men's sports were able to unionize but women's sports were not.¹⁰⁵ That potential issue would need to be resolved. These problems make the resolution of the mental health issue through existing labor law extremely unlikely.¹⁰⁶ Furthermore, it

102. For example, it is unclear whether NFL football players would have succeeded in their negligence and failure to warn claims because the case was settled before its merits were decided. *See* Memorandum of Law, *supra* note 73 (arguing that the lawsuit should be dismissed against the NFL defendants because they had no legal liability). Additionally, the most recent concussion case brought against the NCAA was settled, but not before it denied any duty to protect student-athletes, a requirement of any successful negligence action. Fenno, *supra* note 29.

103. *See supra* Part I.A.

104. *See supra* Part I.A.

105. *See supra* note 66 and accompanying text.

106. I have considered the possible applicability of the Affordable Care Act (ACA) to mental health regulation, but an analysis proves it would not be helpful. The ACA requires most individual and small employer health insurance plans, including those plans offered through the Health Insurance Marketplace, to cover mental health and substance abuse services. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). However, the

is difficult to think of another existing law or regulation that student-athletes could use to compel the NCAA to grant student-athletes greater mental health resources and support. Consequently, student-athletes must turn to a new federal regulation compelling NCAA support for mental health.

C. Leaving It to the States or to Individual Institutions

Each state could pass legislation requiring all institutions of higher education to implement more stringent mental health resources for its student-athletes. Alternatively, each institution could adopt its own mental health requirements for its athletic programs.

The state-by-state legislative approach has already occurred in the concussion realm—specifically, for youth sports.¹⁰⁷ All fifty states and the District of Columbia currently have youth concussion laws, spurred by an NFL lobbying campaign in the wake of its own criticism.¹⁰⁸ Washington passed the first of these laws in 2009 and subsequently became the benchmark for other legislation.¹⁰⁹ However, the Associated Press conducted an analysis of these laws and found significant deficiencies in over half of the state laws.¹¹⁰ In that analysis, significant deficiencies meant that fewer than half of all state laws contain *all* of the key principles of the Washington bill.¹¹¹ For example, “[a]bout a third of the laws make no specific reference to which ages or grades are covered,” and even fewer explicitly apply to both

responsibility for deciding to offer student insurance plans falls to member institutions, and not all student-athletes participate in school-sponsored insurance programs. *See generally* NCAA, INFORMATION GUIDE FOR NCAA MEMBER INSTITUTIONS: THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (PPACA), <http://www.ncaa.org/sites/default/files/PPACA%2Binfo%2BGuide%2B2.13.pdf> [https://perma.cc/LKL8-TNQF]; *Insurance*, NCAA, <http://www.ncaa.org/about/resources/insurance> [https://perma.cc/K8WX-N6AD]. Additionally, the ACA and insurance plans provide financial support if and when any college student seeks mental health services. *See Insurance, supra*. It does not individually address the tendency of student-athletes to decline seeking treatment in the first place, despite their higher rates of mental illness over their nonathlete counterparts.

107. Howard Fendrich & Eddie Pells, *AP Analysis: Youth Concussion Laws Pushed by NFL Lack Bite*, ASSOCIATED PRESS: PRO32 (Jan. 28, 2015, 12:22 PM), <http://pro32.ap.org/article/ap-analysis-youth-concussion-laws-pushed-nfl-lack-bite-0> [https://perma.cc/MLK8-AX9L]

108. *Id.*

109. *Id.* The Washington statute, also known as the Zackery Lystedt law, sets forth four key requirements:

- (1) development of uniform concussion guidelines and distribution of educational materials regarding brain injuries;
- (2) mandatory consent from parents for participation in youth athletics;
- (3) immediate removal of the youth athlete from competition after suffering an apparent brain injury; and
- (4) mandatory compliance with return-to-play protocol before allowing the youth athlete to return to athletic competition.

Andrew W. Breck, *Keeping Your Head on Straight: Protecting Indiana Youth Athletes from Traumatic Brain Injuries Through “Return-to-Play” Legislation*, 9 IND. HEALTH L. REV. 215, 216 (2012) (citing Wash. Rev. Code Ann. §§ 28A.600.190(2)–(4) (West 2011)).

110. Fendrich & Pells, *supra* note 107.

111. *Id.*

school leagues and recreation leagues like Pop Warner.¹¹² Nearly all of the laws lack enforcement or consequences for noncompliance.¹¹³ The Republican who sponsored Washington's initial bill, Jay Rodne, said that an enforcement mechanism would be costly and would have caused many state laws to fail.¹¹⁴ The ability for state legislatures to vary their bills from the benchmark for a variety of considerations, including cost, has led to weaknesses in a majority of the laws and has failed to adequately protect the youth in the states. The welfare of athletes, including the treatment of their mental health issues, should not vary from state to state or institution to institution.

The variation problem that would plague a state-by-state approach would undoubtedly plague an institution-by-institution approach. When institutions have differing budgets, their policies will certainly vary. An institution-by-institution approach would likely suffer from another problem, especially in Division I and Division II programs: the conflict of interest between revenue generation and student-athlete welfare.¹¹⁵ W. Burlette Carter argues that, traditionally, colleges and universities acted “‘*in loco parentis*,’ or, in the position of parents vis-a-vis their students.”¹¹⁶ The doctrine crumbled in the larger institutional context but has persisted to exist in a “perverse” form in modern intercollegiate athletics.¹¹⁷ Institutions have continued to exercise broad control over their student-athletes, but they are “unable to fulfill [their] responsibilities in protecting the welfare of the alleged child because the parent has an overwhelming financial interest in exploiting the child’s talents.”¹¹⁸ When this conflict of interest exists, it would be unquestionably difficult for an institution to implement policies that may limit incoming revenue from athletics. And if more student-athletes are reporting, seeking, or receiving mental health treatment, there will very likely be some athletes that need to take time off from the stress and demands of their sport in order to recover. For these reasons, an institution-by-institution approach, like a state-by-state approach, will very likely fail to provide student-athletes the mental health support they need.

The foundational idea behind federalism is that some issues are best addressed on a local level, whether that is by state, by town, or by institution. Other issues are best addressed nationally. The most relevant benefit of a local approach, in this instance, is the idea of the states as “laboratories of democracy.”¹¹⁹ The phrase implies that states have the ability to experiment with solutions to different issues locally, in order to find the best solution for that state’s needs or a universal solution that would subsequently spread to all states.¹²⁰ Although allowing innovation in the states (or

112. *Id.*

113. *Id.*

114. *Id.*

115. See W. Burlette Carter, *Responding to the Perversion of In Loco Parentis: Using a Nonprofit Organization To Support Student-Athletes*, 35 IND. L. REV. 851, 853 (2002).

116. *Id.* at 852–53 (italics in original).

117. *Id.* at 853.

118. *Id.*

119. Fernando R. Liguada, Note, *Federalism Myth: States as Laboratories of Health Care Reform*, 82 GEO. L.J. 159, 159 (1993) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

120. MARK CARL ROM & PATRICK CARR, LABORATORIES OF DEMOCRACY? STATE

their individual institutions) is important for many issues, the mental health of student-athletes is not one of these issues. We should learn from state concussion laws where one state, Washington, passed a regulation widely recognized as the benchmark for other laws to follow. Over half of all state laws were found to have significant deficiencies.¹²¹ The idea that the best solution prevails was not the reality for concussions, likely because the budgeting preferences of each state and interest-group influences caused significant variations. Additionally, the conflict of interest that exists between the university's revenue interest and the student-athletes' interests in remaining physically and mentally healthy will prevent the "laboratory experiment" from succeeding among institutions.

Instead, federal regulation will provide the unity and uniformity needed to tackle mental health in NCAA athletics. Part III details exactly why federal legislation is the best option not only by addressing available enumerated powers and federalism concerns but also by providing a possible regulation scheme that would result in the most impactful changes at the lowest cost.

III. FEDERAL REGULATION

Federal regulation overcomes the deficiencies of the three schemes addressed in Part II, as the successes of Title IX and ADA regulation over the NCAA and its member institutions demonstrate.¹²² These deficiencies include the NCAA's reluctance to change, the inability of existing law to compel change, the possibility of large variations between state laws and institutional policies, and the conflict of interest present at the institutional level.¹²³ New federal regulation can force institutional or organizational compliance almost immediately. It would provide a uniform and unified approach to change. And, at the federal level, as opposed to the institutional level, the value of beneficial institutional revenue from athletics can be separated from the value of student-athlete well-being. Before moving into the practical considerations of implementing federal regulation—that is, how federal regulation can overcome federalism concerns, what enumerated powers Congress can and should use, and what an effective and cost-efficient plan can look like—this Part briefly notes what the NCAA has already said on mental health reform for student-athletes.

Karageorge's and Holleran's deaths brought brief national attention to mental illness among student-athletes. In response, the NCAA's Chief Medical Officer Brian Hainline indicated that college athletes might need better services and support for mental health issues.¹²⁴ He hoped that Karageorge's death would "send the red-

ELECTORAL PROCESSES 1 (2008) (paper prepared for ASPA Annual Conference, Boston, MA), https://apw.polisci.wisc.edu/archives/Labs_of_Dem_St_Electora_Proc_APSA.pdf [<https://perma.cc/Z7R3-KTPQ>].

121. See *supra* note 110 and accompanying text.

122. See *supra* Part I.B. It is true that, as of now, the NCAA is not directly affected by Title IX, see *NCAA v. Smith*, 525 U.S. 459 (1999), but it will be applied to the NCAA if a plaintiff can demonstrate that the organization receives federal financial assistance, Ruiz, *supra* note 65, at 121.

123. See *supra* Part II.

124. Terlep, *supra* note 16.

alert button to take all of this stuff very seriously” and acknowledged that physical injuries often lead to mental health issues.¹²⁵ Hainline indicated that, aside from the educational manual already being distributed, he would eventually recommend “athletic directors implement mental-health screening[s], assist players in managing their medications and equip campus counseling centers to handle student athletes.”¹²⁶ But Hainline’s recommendations are not mandates.¹²⁷ Karageorge’s and Holleran’s deaths, for a short time, increased the public discussion about student-athlete mental health, but that discussion has yet to result in any notable long-term change.

The NCAA cannot wait for another student-athlete to commit or attempt suicide to make a change.¹²⁸ Instead, the mental health of student-athletes deserves a uniform and unified approach that can be accomplished by allowing the federal government, over state governments, to legislate change. Congress can utilize its spending power or invoke its broad authority under the Interstate Commerce Clause, to pass swift-acting legislation in the public interest.¹²⁹ An effective and cost-efficient change can be made under either of these powers and would cause minimal disruption to the existing structure at the NCAA and its member institutions.¹³⁰

A. Federalism Allows Federal Action

Federalism represents the idea that political power must be balanced and divided between the state governments and the federal government.¹³¹ Because the Constitution indicates that the federal government is a government of limited, enumerated powers, federalism has often been equated with the idea of “states’ rights.”¹³² Constitutional scholars often focus on federalism, with some arguing that federalism

125. *Id.* This article, without a source cited, indicates: “[S]tudent athletes suffer lower-than-average rates of depression and most other mental-health diseases, compared with other students.” *Id.* This statement conflicts with the research discussed earlier in this Note but, even if true, would not indicate there is no need for mental health resources. As noted above, student-athletes are unaware of any tangible NCAA mental health resources and are less likely to seek professional help. See *supra* text accompanying notes 18, 28.

126. Terlep, *supra* note 16.

127. *Id.*

128. Sadly, as this Note was being written, another high-profile NCAA athlete committed suicide: Demetri Allison, an Elon University football player. *Teammates and Friends Gather To Remember Elon University Wide Receiver*, WBTV.COM (Dec. 12, 2015), <http://www.wbvtv.com/story/30503221/teammates-and-friends-gather-to-remember-elon-university-wide-receiver> [https://perma.cc/LM44-FF6K]. And, as this Law Journal prepared this Note for publication, Jordan Hankins, a Northwestern University women’s basketball player, committed suicide. Kyle Neddenriep, *Northwestern Women’s Basketball Player Jordan Hankins’ Death Ruled Suicide*, USA TODAY (Jan. 10, 2017, 8:30 PM), <http://www.usatoday.com/story/sports/ncaaw/2017/01/09/northwestern-basketball-player-jordan-hankins-found-dead/96376536/> [https://perma.cc/8LW5-RV42].

129. See Joshua A. Sussberg, Note, *Shattered Dreams: Hazing in College Athletics*, 24 CARDOZO L. REV. 1421, 1449, 1459 (2003).

130. See *infra* Part III.C.

131. James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH 309, 314 (1998).

132. Sussberg, *supra* note 129, at 1447.

is dead because the federal government can now exercise any power it desires,¹³³ while others argue that federalism exists on a pendulum, with state power and federal power reigning at different points in the history of our jurisprudence.¹³⁴ Whether federalism is dead or very much alive, some of federalism's consistent principles are especially pertinent to this discussion. That is, federalism stands for the proposition that some questions require uniform national resolution, while others are best left to local legislative decisions.¹³⁵ Local legislatures are valued as "[l]aboratories of [d]emocracy," where ideas are tested at the local level, improved, and diffused throughout the country.¹³⁶ Additionally, by respecting the power of local legislation, federalism also values the idea that a "diversity of preferences" exists in different areas of the country.¹³⁷

In the realm of public health, which includes mental health,¹³⁸ governmental regulation develops at both the local and national level.¹³⁹ It is true that, traditionally, public health laws were implemented under a state's police power, but as time went on, federal legislative intervention in matters of public health was upheld.¹⁴⁰ For example, in *Jacobson v. Massachusetts*,¹⁴¹ the Court limited state power over public health by requiring the means of enforcement to have a "real or substantial relation to the protection of public health."¹⁴² Then, during the New Deal, the Court upheld the use of Congress's commerce, tax, and spending powers to pass public health laws, using "national interests" as justification for the expansion of federal power over a traditionally state issue.¹⁴³ The result was "a more nationalized system of public health regulation" aided by the federal powers at Congress's disposal.¹⁴⁴ In

133. See, e.g., Joseph Lesser, *The Course of Federalism in America—An Historical Overview*, in *FEDERALISM: THE SHIFTING BALANCE* 11 (Janice C. Griffith ed., 1987).

134. See, e.g., Ronald J. Bacigal, *The Federalism Pendulum*, 98 W. VA. L. REV. 771 (1996).

135. Vikram David Amar, *The NCAA As Regulator, Litigant, and State Actor*, 52 B.C. L. REV. 415, 425 (2011).

136. Alexander T. Tabrok, *Arguments for Federalism*, INDEP. INST. (Sept. 20, 2001), <http://www.independent.org/issues/article.asp?id=485> [<https://perma.cc/5ZQB-6M2L>].

137. *Id.*

138. S. Marshall Williams, D. Chapman & J. Lando, *The Role of Public Health in Mental Health Promotion*, 54 MORBIDITY & MORTALITY WKLY. REP. 841, 841 (2005), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5434a1.htm> [<https://perma.cc/KD2K-HNSU>].

139. Hodge, *supra* note 131, at 311.

140. *Id.* at 311–12.

141. 197 U.S. 11 (1905).

142. Hodge, *supra* note 131, at 311–12.

143. *Id.* at 311–12. A sampling of New Deal era cases expanding federal power includes *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), and *United States v. Darby*, 312 U.S. 100 (1941). See Hodge, *supra* note 131, at 333–35. Congressional legislation post–New Deal demonstrating the power to federally regulate public health includes the Social Security Act of 1966 (establishing Medicare and Medicaid programs), the Chamberlain-Kahn Act of 1914 (providing "federal funds to the states for investigation and control of venereal diseases"), and the National Mental Health Act of 1966 ("establishing the National Institute of Mental Health and financing training programs for mental health professionals and the development of local community health services"). See *id.* at 335–36.

144. *Id.* at 312.

other words, public health became a realm in which uniformity was critical for the public welfare. When it comes to the mental health of student-athletes, the discussion in Part II.C suggests that relying on local legislatures as “laboratories of democracy” is inappropriate.¹⁴⁵ Increasing support and resources for student-athlete mental health instead requires a uniform approach.

Traditionally, the validity of public health laws at the state or federal level depended on whether the governmental entity was vested with the constitutional power to implement public health regulations and, if so, whether the regulation violated or exceeded any constitutional or individual rights.¹⁴⁶ The first inquiry turns on federalism considerations.¹⁴⁷ Under original federalist conceptions, the answer to this question for state public health laws would almost always be “yes.” The courts “rarely struck down state public health regulations” because “states and their local subsidiaries had virtually exclusive responsibility” for public health matters under their police power.¹⁴⁸ However, as time went on, “federal judicial and legislative intervention in public health became more pronounced,” resulting in a more nationalized public health system.¹⁴⁹ Congress only needed to point to an enumerated federal power in order to take on the traditional state police power of regulating mental health. The recent revival of *new federalism*, though, has reemphasized the importance of leaving exercises of police powers to the states.¹⁵⁰ It “tells us that the means through which we pursue our national public health agenda must comport with the federalist system of government through which our nation exists.”¹⁵¹ In other words, federalist jurisprudence is moving away from accepting broad exercises of federal powers and requiring national intervention in traditionally state-regulated arenas to have stronger connections to an enumerated federal power.

To satisfy the two-part analysis for the regulation of student-athlete mental health, Congress must be able to point to the existence of an appropriate enumerated power. The most appropriate powers are discussed below.

B. The Powers Available to Congress To Pass NCAA Mental Health Legislation

Congress’s spending power, as well as its broad authority under the Interstate Commerce Clause, could both be invoked to incite NCAA change.

1. The Spending Power

The U.S. Constitution provides that “Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”¹⁵² This clause allows the

145. *See supra* note 136 and accompanying text.

146. Hodge, *supra* note 131, at 311.

147. *Id.*

148. *Id.*

149. *Id.* at 311–12.

150. *Id.* at 312–13.

151. *Id.* at 313.

152. U.S. CONST. art. I, § 8, cl. 1.

federal government to tax and spend for the furtherance of the general welfare.¹⁵³ In *United States v. Butler*,¹⁵⁴ the Supreme Court declared that Congress's spending power is not limited by the powers specifically enumerated in Article I.¹⁵⁵ Congress has the power "to authorize expenditure of public moneys for public purposes."¹⁵⁶ Next, in *South Dakota v. Dole*,¹⁵⁷ the Court affirmed Congress's ability to place conditions on federal funds in order to compel state or organizational action.¹⁵⁸ But this ability came with four restrictions:

- (1) Congress must be acting in pursuit of the "general welfare";
- (2) if Congress places conditions on state receipt of federal funds, it must clearly set forth what those conditions are;
- (3) there can be no constitutional bar to the conditions; and
- (4) the conditions must be related to the federal interest in the particular program.¹⁵⁹

When states have the power to reject the federal funding, the spending power does not violate any Tenth Amendment considerations.¹⁶⁰ However, the federal funding must not reach the level of coercion.¹⁶¹ In *Dole*, Congress did not coerce the states by cutting a small percentage of federal funding to states who did not maintain a minimum legal drinking age of twenty-one.¹⁶² The Court stated that when a financial inducement offered by Congress is "so coercive as to pass the point at which 'pressure turns into compulsion,'" the legislation will likely be unconstitutional.¹⁶³ Autonomy must be retained.

Title IX is perhaps the best example of Congress utilizing its spending power to reach NCAA student-athletes. Title IX was implemented to reduce gender discrimination within educational programs and applies to any educational program or activity receiving federal financial assistance.¹⁶⁴ Because nearly all universities now accept federal funding, university athletic departments are subject to Title IX after the passage of the Civil Rights Restoration Act of 1987 (CRRA).¹⁶⁵ Title IX comes complete with an enforcement arm, which punishes violations by withholding Department of Education funding.¹⁶⁶

Title IX was a successful and appropriate congressional foray into the traditional

153. Sussberg, *supra* note 129, at 1459.

154. 297 U.S. 1 (1936).

155. *Id.* at 66; Sussberg, *supra* note 129, at 1460.

156. *Butler*, 297 U.S. at 66.

157. 483 U.S. 203 (1987).

158. *Id.* at 207–09; Sussberg, *supra* note 129, at 1462.

159. Sussberg, *supra* note 129, at 1463–64 (footnotes omitted) (citing *Dole*, 483 U.S. at 207–08).

160. *Id.* at 1465.

161. *Id.*

162. *Dole*, 483 U.S. at 206.

163. *Id.* at 211 (citing *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

164. Sussberg, *supra* note 129, at 1473–74.

165. 20 U.S.C. § 1687 (2012); Sussberg, *supra* note 129, at 1476–77. The CRRA established that Title IX applies institution-wide when a university receives federal funding, instead of a department-by-department application. *Id.*

166. Sussberg, *supra* note 129, at 1478.

state realm of education. Title IX, and its jurisprudential predecessors, could easily be used to justify congressional interference into mental health. Congress could condition the receipt of institutional federal funding on the implementation of mental health resources within athletic departments. One caveat is that this scheme, as it currently stands with Title IX, does not apply to the NCAA—just to its member institutions. There is room after *NCAA v. Smith* for the NCAA to be considered an entity receiving federal financial assistance,¹⁶⁷ but a more straightforward approach to directly reaching the NCAA can likely be accomplished through Congress's regulatory authority under the Interstate Commerce Clause.

2. The Interstate Commerce Clause

Article I, Section 8, Clause 3 of the U.S. Constitution grants Congress the authority “[t]o regulate Commerce . . . among the several States.”¹⁶⁸ Throughout the course of Commerce Clause jurisprudence, and most significantly during the New Deal period, the Court gradually accepted expanding congressional regulation through the commerce power.¹⁶⁹ The Court has routinely accepted congressional intervention into traditional state activities through the use of the Commerce Clause.¹⁷⁰ As jurisprudence stands today, Congress can (1) regulate the “channels of interstate commerce”; (2) “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities”; and (3) regulate economic or commercial activities that “substantially affect interstate commerce.”¹⁷¹ The rapid and constantly changing development of “tests” related to the Interstate Commerce Clause makes it difficult to definitively say whether regulating NCAA resources dedicated to mental health would fit under the Commerce Clause. However, because of the nature of the modern NCAA and its student-athletes, the Commerce Clause analysis becomes clearer.

The NCAA is often said to be running its own business,¹⁷² and universities certainly benefit from the revenue gains of its large sports, such as men's football and basketball.¹⁷³ For example, USA Today reported that “[t]he NCAA recorded a nearly \$61 million surplus for its 2013 fiscal year This increased the NCAA's

167. See Ruiz, *supra* note 65, at 121–22 (“Under the Civil Rights Restoration Act of 1987, each of the NCAA's education programs or activities would be covered by Title IX if a future litigant could show that the NCAA somehow *receives* (as opposed to merely *benefits from*) federal financial assistance; and the Supreme Court's *Smith* decision is an indication that this showing may not be an impossible feat.” (emphasis in original)).

168. U.S. CONST. art. 1, § 8, cl. 3.

169. See Sussberg, *supra* note 129, at 1449–50.

170. *Id.* at 1450.

171. *United States v. Lopez*, 514 U.S. 549, 558–59 (1994).

172. Sussberg, *supra* note 129, at 1468–70 (citing James V. Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L.J. 9, 11 (1985); Daniel Nestel, Note, *Athletic Scholarships: An Imbalance of Power Between the University and the Student-Athlete*, 53 OHIO ST. L.J. 1401, 1401 & n.1 (1992)).

173. See *supra* note 153 and accompanying text.

year-end net assets to more than \$627 million.”¹⁷⁴ Additionally, a simple web search for “revenues from college sports” reveals numerous articles showing the immense amounts of money flowing into universities from college athletics.¹⁷⁵ Regulating the support and resources provided to the athletes who bring in floods of revenue to a university and to the NCAA, and who cross state lines in order to compete, would certainly fall under the Commerce Clause. The regulation would fit under the Commerce Clause because the NCAA and university athletic departments are instruments of interstate commerce or because the athletes are in interstate commerce. If not, then the regulation almost certainly would fall under the Clause because college sports are a commercial activity that substantially affects interstate commerce.¹⁷⁶

Whether Congress uses its spending power or regulatory authority under the Interstate Commerce Clause, it will not violate federalism principles or constitutional limits by imposing federal regulations on the NCAA or its member institutions in order to provide greater mental health support and better resources for student-athletes.

C. Recommended Changes

This Note recognizes that congressional interference with the activities of the NCAA or its member institutions will face backlash from the organizations, especially if it comes at a high cost. In order to overcome any organizational resistance, the goal is to create minimal changes that have a big impact at the lowest cost. For student-athlete mental health, there are three changes that any proposed legislation should aim to compel. First, education and training should be increased at all levels of intercollegiate athletics. Second, mental health professionals should be made more available to student-athletes. Third, preseason screenings should be conducted each year and should incorporate mental health screenings into the existing predominantly physical screenings.

In its current state, the NCAA acknowledges the existence of mental health issues among its student-athletes while denying that the organization needs to take any aggressive or forceful action.¹⁷⁷ Chief Medical Officer Brian Hainline indicated that there is a manual, *Mind, Body and Sport: Understanding and Supporting Student-*

174. Steve Berkowitz, *NCAA Has Net Assets of \$627 Million, Say Records*, USA TODAY (Mar. 20, 2014, 2:36 PM), <http://www.usatoday.com/story/sports/college/2014/03/20/ncaa-expenses-revenue-money-mark-emmert/6651133/> [<https://perma.cc/EX48-JAFW>].

175. For example, one article indicates that the University of Texas Longhorns had the highest-revenue athletic department in college sports in 2013, generating \$165.7 million in 2013. Cork Gaines, *The 20 Colleges That Make the Most Money on Sports*, BUSINESS INSIDER (Sept. 11, 2014, 1:28 PM), <http://www.businessinsider.com/texas-revenue-college-sports-2014-9> [<https://perma.cc/JJ9W-3PPU>].

176. *But cf.* Sussberg, *supra* note 129, at 1455 (arguing that applying the *Lopez* test to an antihazing regulation would fail because the regulation of hazing would be neither commercial nor economic and because Congress could not find that hazing of student-athletes substantially affected interstate commerce).

177. *See supra* note 9 and accompanying text.

Athlete Mental Wellness,¹⁷⁸ currently distributed to athletic directors at its member institutions.¹⁷⁹ Education, no doubt, is a critical aspect of addressing mental health problems.¹⁸⁰ But with education, there is usually a need for training. The manual includes an excerpt by Rachel Sharpe, an athletic trainer at an NCAA school.¹⁸¹ She describes mental health in intercollegiate athletics as “a large and complicated puzzle.”¹⁸² She also writes that athletic trainers are not just primary medical professionals but that they also become “confidants, motivators, encouragers and even friends” to the student-athletes they treat.¹⁸³ An important part of that role can and should be catching mental health issues as they arise in student-athletes.¹⁸⁴ Hainline also indicated that he may eventually make recommendations for institutions to implement mental health screenings, medication management, and better training for on-campus counseling centers to assist student-athletes.¹⁸⁵ But there is no timeline on when these recommendations will come forth, and there is no enforcement arm attached to the recommendations to propel change.

Federal legislation should first focus on increasing education and training for athletic trainers, coaches, and athletes. The preexisting manual distributed by the NCAA should continue to be distributed and utilized. There are two options regulation could take: (1) require the NCAA to provide certified classes to member institutions, with or without a fee to the institution; or (2) delegate power to the NCAA, requiring them to force member institutions to find and provide educational and training classes on mental health for their staff. Mental health training for athletic trainers and coaches is important for several reasons. First, as Sharpe said, athletic trainers develop uniquely close relationships with student-athletes.¹⁸⁶ Second, when surveyed, “certified athletic trainers felt their educational background did very little to prepare them to recognize and refer mental health issues in their student-athletes.”¹⁸⁷ It is essential that athletes know of the resources available to them and for trainers and coaches to help change the culture of stigma surrounding mental illness. Sharpe wrote that “[t]he very culture of athletics tends to discourage athletes from expressing any kind of mental health issue, since it is often construed as a

178. MIND, BODY AND SPORT: UNDERSTANDING AND SUPPORTING STUDENT-ATHLETE MENTAL WELLNESS (Gary T. Brown, ed. 2014), www.ncaapublications.com/product/downloads/MindBodySport.pdf [<https://perma.cc/K62E-YXW2>] [hereinafter MIND, BODY AND SPORT].

179. Terlep, *supra* note 16.

180. *See id.*

181. Rachel Sharpe, *Solving the Mental Health Puzzle*, in MIND, BODY AND SPORT, *supra* note 178, at 14.

182. *Id.* at 14.

183. *Id.*

184. *See also* Mary Jean LaRue, The Role of Certified Athletic Trainers in the Recognition and Referral of Mental Health Issues in Intercollegiate Student-Athletes 4 (Dec. 2010) (unpublished Ph.D. dissertation, University of Minnesota), <http://purl.umn.edu/100230> [<https://perma.cc/VYV9-HGQX>], (“[C]ertified athletic trainers may be in the best position to notice when student-athletes are experiencing . . . psychological problems.”).

185. Terlep, *supra* note 16.

186. Sharpe, *supra* note 181, at 14.

187. LaRue, *supra* note 184, at 112. For greater detail on the appropriate role of the athletic trainer in addressing student-athlete mental health, see *id.* at 127–32.

weakness.”¹⁸⁸ Athletes need to know that only in the direst of circumstances will their playing time suffer from a mental health issue and that their teammates and athletic departments will support them as they seek treatment. A critical part of this education is regulation that forces the NCAA to codify the culture—to keep institutions from sitting an athlete for a mental health issue simply because it is a mental health issue, rather than because it would threaten the student-athlete’s well-being if he or she played. The culture needs to create a welcoming atmosphere for student-athlete healing.

Next, there are three options to increase the availability of mental health professionals for student-athletes. Each option will work as part of federal legislation, but one may be more cost-effective. First, the lower-cost option: the legislation can adapt Hainline’s recommendation to better equip current campus counseling centers to treat student-athletes into a requirement. At least one member of the current campus counseling center¹⁸⁹ should have preexisting experience working with student-athlete populations, or they should attend a continuing education session or similar training in order to gain expertise in the area.¹⁹⁰ The second option is to equip the athletic training department itself with a mental health specialist, or perhaps multiple specialists for larger athletic programs. Sharpe indicated that athletic trainers develop very close relationships with athletes, so it would make sense for departments to bring mental health professionals to the athletes.¹⁹¹ The final option is to increase the education of athletic trainers to equip them to make educated referrals to outside mental health professionals, but require the NCAA or member institutions to develop preexisting, strong relationships with professionals in the community.¹⁹²

The final change should be to incorporate mental health screenings into the pre-existing structure of preperformance physicals. This is one of Hainline’s forthcoming recommendations, but the NCAA and its member institutions should be required to comply with it. “Preparticipation physical examinations have been used routinely for nearly 40 years.”¹⁹³ It would be an easy change to include a mental health screening along with the physical exam each year, and such a policy would be a great first line of defense to identify mental health issues in student-athletes who do not routinely

188. Sharpe, *supra* note 181, at 14.

189. “Nearly one in every 10 students is getting mental health counseling on campus. . . . [Counseling services are] often offered free or at a nominal price. . . . [M]ental health counseling is just one more service that students and families are demanding.” Cliff Peale, *Students Flood College Counseling Offices*, USA TODAY (Apr. 7, 2014, 7:40 AM), <http://www.usatoday.com/story/news/nation/2014/04/07/college-students-flood-counseling-offices/7411333/> [<https://perma.cc/84D9-EQJS>].

190. LaRue suggests student-athletes be provided with a list of three mental health professionals equipped to serve them, “which strengthens the student-athletes [*sic*] feelings of control in the situation.” LaRue, *supra* note 184, at 128.

191. Sharpe, *supra* note 181, at 14.

192. LaRue, *supra* note 184, at 127.

193. Kevin M. Conley, Delmas J. Bolin, Peter J. Carek, Jeff G. Konin, Timothy L. Neal & Danielle Violette, *National Athletic Trainers’ Association Position Statement: Preparticipation Physical Examinations and Disqualifying Conditions*, 49 J. ATHLETIC TRAINING 102, 102 (2014).

confide in other members of the athletic department. Such a change would likely require congressional testimony and subsequent findings in order to identify the most effective mental health questions to ask or tests to administer.¹⁹⁴ However, after these findings are made, the NCAA and its member institutions should be required to administer the standardized screening.

With these three simple changes, the mental health support and resources provided to NCAA student-athletes will be dramatically increased with little change in the day-to-day operations of either the NCAA or its member institutions. Any change that can be made to ensure student-athlete well-being certainly outweighs the comparably small increase in costs associated with making a change.

CONCLUSION

Madison Holleran's life seemed ideal from the outside looking in, and in fact, it was: a student-athlete at a Division I Ivy League university and a beloved daughter and friend. But mental illness does not consider how perfect someone's life is before it decides who its next opponent is. Madison's coach knew she was struggling with the unique pressures of being a student-athlete but was not able to assist her in getting help before depression took another victim. The prevalence of mental illness among student-athletes demonstrates the unique pressures of college athletics that deserve support. The NCAA is moving slowly to protect student-athletes while moving quickly away from its founding principle of protecting student-athletes' health and safety. Similarly, leaving it up to the laboratories of democracy, that is, the NCAA's member institutions or the states, to implement change is ineffective and inappropriate when it comes to mental health. Instead, a federal regulation passed under Congress's interstate commerce power can expediently force high-impact changes at a minimal cost on the NCAA and its member institutions. Such an approach will provide the unity and uniformity needed to address mental health among student-athletes by increasing support and resources and thereby show student-athletes that mental illness is no longer an opponent that they must face alone.

194. An analysis of the most effective tests or screenings is outside the scope of this Note.