Conference-Employees and Student-Athletes: A Proposal for Rescuing College Sports from Antitrust Law

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Antitrust law has won. The National College Athletic Association (NCAA) has lost. Or so it seems with the settlement in the House *case, which provides for revenue sharing for college athletes.*

The current settlement is problematic in three ways. It completely abandons the old student-athlete model, with its virtues and vices, but also adopts a model that seems to violate antitrust law and, at the very least, ensures continued litigation. Specifically, the settlement does not alleviate the ongoing antitrust problem of capping the revenue that the NCAA and its member institutions share with the athletes. In addition, it creates serious questions as to whether athletes are university employees while failing to address the question of unionization in light of states that do not protect the right of public sector employees to collectively bargain. Finally, it also does not address the Title IX problem of a federal law that requires educational institutions to provide equal opportunity to each gender without specifying whether those rules apply to revenue sharing.

This Article proposes a model that addresses all three of these problems while also preserving the salvageable parts of the former student-athlete model. Specifically, this Article advocates for a conference-employee, student-athlete model, where athletes would have an employment relationship with their athletic conference but retain their student-athlete relationship with their university.

Part I of the Article outlines the three interrelated issues—antitrust law, labor & employment law, and gender discrimination law—and the obstacles that remain after the House *settlement. In Part II, the Article articulates its central proposal—a conference-employee, student-athlete model that allows the current athlete-university relationship to persist. Part III then explains how the proposed model solves each of the three problems—eliminating antitrust concerns through the non-statutory labor exemption, allowing for the adoption of labor unions through conference employment instead of university employment, and avoiding Title IX limitations on revenue sharing by having conferences, not federally funded universities, paying the athletes.*

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Introduction

Antitrust law has won.[1] The National College Athletic Association (NCAA)[2] has lost.[3] Or so it seems with the settlement in the *House*[4] case, which provides for revenue sharing between college athletes and their institutions.[5]

The NCAA's long held ideal of the student-athlete is disappearing.[6] For several generations, the NCAA has fought at every turn to protect its

1. *See In re* College Athlete NIL Litigation, No. 20-cv-03919, 2025 WL 1675820, at *1 (N.D. Cal. June 6, 2025) (approving the nearly $3 billion antitrust settlement between college athletes and the NCAA); Alston v. NCAA, 141 S. Ct. 2141, 2153, 2166 (2021) (finding that NCAA limits on education-related costs violate the Sherman Act); O'Bannon v. NCAA, 802 F.3d 1049, 1052–53 (9th Cir. 2015) (finding that NCAA limits on cost of attendance payments violate the Sherman Act).

2. It is worth noting that the NCAA is merely the sum of its member institutions and the product of the collective decision-making of college and university administrators.

3. Even after the settlement, the NCAA seems to be placing its hope in Congress. *See* Charlie Baker, *A Letter from NCAA President Charlie Baker*, NCAA: MEDIA CTR. (June 6, 2025, 10:00 PM), https://www.ncaa.org/news/2025/6/6/media-center-a-letter-from-ncaa-president-charlie-baker.aspx [https://perma.cc/LCS6-7SXB] ("The NCAA and college sports leaders have made tremendous, positive change in recent years, but only Congress can address these issues. In the weeks ahead, we will work to show Congress why the settlement is both a massive win for student-athletes and a road map to legislative reform.").

4. *In re* College Athlete NIL Litigation, No. 20-cv-03919, 2025 WL 1675820 (N.D. Cal. June 6, 2025).

5. *Id.* at *1.

6. Former NCAA president Walter Byers coined this phrase, in part to avoid paying athletes disability payments in light of a 1955 lawsuit filed by Ray Dennison's widow against the NCAA. Taylor Branch, *The Shame of College Sports*, THE ATL. (Oct. 2011), https://www.theatlantic.com/

amateurism model.[7] The idea was that the NCAA limited athlete compensation to tuition, room, board, books (and later, cost of attendance), because the main purpose of athletes playing college sports was to receive an education, of which college athletics constituted merely a part.[8] This amateurism approach barred anyone, whether institution or third party, from providing any benefits outside of the grant-in-aid, particularly economic benefits, to college athletes.[9] At its heart was a prohibition against the dreaded "pay-for-play,"[10] offering compensation to athletes merely for playing the game.[11] The NCAA and its member institutions also "protected"

magazine/archive/2011/10/the-shame-of-college-sports/308643 [https://perma.cc/A4QF-P4MQ]. Byers explained, "[w]e crafted the term student-athlete, . . . and soon it became embedded in all NCAA rules and interpretations." *Id.* Byers later regretted crafting the term. *Id.*

7. *See, e.g.*, WILLIAM W. BERRY III & DANIEL LUST, COLLEGE SPORTS LAW IN A NUTSHELL (2024) (describing NCAA restrictions that "ensure[d] that college athletes remained unpaid, thus maintaining their amateur standing); Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992); Bloom v. NCAA, 93 P.3d 621 (2004); Lasege v. NCAA, 53 S.W.3d 77 (Ky. 2001); McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990); Agnew v. NCAA, 683 F.3d 328 (7th Cir. 2012); Deppe v. NCAA, 893 F.3d 498 (7th Cir. 2018); White v. NCAA, No. CV 06-999-RGK, 2006 U.S. Dist. LEXIS 101366 (C.D. Cal. Sep. 21, 2006).

8. The NCAA's historical statement of amateurism explains:

> Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student athletes should be protected from exploitation by professional and commercial enterprises.

NCAA, 2020–21 NCAA DIVISION I MANUAL 3 (August 2020) [hereinafter 2020–21 DI MANUAL], https://www.ncaapublications.com/productdownloads/D121.pdf [https://perma.cc/AT97-3UT9].

9. *Id*. Indeed, part of the stated role of the NCAA and its member institutions was to "protect[]" athletes from commercial exploitation. *Id.*

10. Some have advocated for avoiding pay-for-play at all costs. *See, e.g.*, Horace Mitchell, *Students Are Not Professional Athletes*, U.S. NEWS (Jan. 6, 2014, 8:00 AM), https://www.usnews.com/opinion/articles/2014/01/06/ncaa-athletes-should-not-be-paid [https://perma.cc/Y8T9-KVH6] (arguing that college athletes should not receive salaries); Ekow N. Yankah, *Why N.C.A.A. Athletes Shouldn't Be Paid*, THE NEW YORKER (Oct. 14, 2015), https://www.newyorker.com/news/sporting-scene/why-ncaa-athletes-shouldnt-be-paid [https://perma.cc/62AS-WQNV] (same); Dan Duggan, *Charles Barkley: Paying College Athletes Is 'Ridiculous*,*'* NJ.COM (Mar. 10, 2015, 6:58 PM), https://www.nj.com/rutgersfootball/index.ssf/2015/03/charles_barkley_paying_college_athletes_is_ridicul.html [https://perma.cc/JE2Y-C5F7] (same); Victor Lipman, *Why Considering College Athletes Pro Athletes Is a Really Bad Idea*, FORBES (July 29, 2015, 9:22 PM), https://www.forbes.com/sites/victorlipman/2014/04/01/why-considering-college-athletes-pro-athletes-is-a-really-bad-idea/#7c361a664b31 [https://perma.cc/LFB2-MUD5] (same).

11. As the commercialization of college sports grew in the 2010s with the development of conference television networks, a cacophony of calls for pay-for-play regularly occurred. *See, e.g*., Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES MAG. (Dec. 30, 2011), https://nyti.ms/2kgO9w9 [https://perma.cc/WG9T-T3BE] (arguing that the NCAA should allow college athletes to receive remuneration); Taylor Branch, *The Shame of College Sports*, THE ATL. (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643 [https://perma.cc/JVT2-YZDD] (same); Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W.

athletes from commercialization by maintaining their amateurism ideal.[12] Even the recent Supreme Court decision in *Alston*[13] only allowed universities to pay their athletes' costs "related to education."[14]

The adoption of state laws in 2021 enabling athletes to receive payment for use of their "name, image, and likeness" (NIL) marked a major upheaval in the student-athlete model.[15] Third-party payments, previously grounds for NCAA infractions and even federal crimes, now became not only legal,[16] but critical to assembling a competitive roster.[17]

The NCAA imposed interim rules to try to distinguish NIL payments from pure pay-for-play,[18] but both of the imposed regulations had almost no practical effect. First, the NCAA barred the use of NIL payments as a recruiting tool.[19] Institutions largely ignored this unenforceable rule, and a

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RSRV. L. REV. 61, 77, 88–89 (2013) (explaining that the amateurism model violates the Sherman Act because college athletic departments are a business and college athletes are akin to workers).

12. 2020–21 DI MANUAL, *supra* note 8, at 3. The costs of violating this ideal were significant: loss of scholarships, loss of postseason revenue, loss of athlete eligibility, disassociation from athletic programs, show cause orders for coaches, and in the most severe case, a one-year ban on playing the sport. *See, e.g.*, BERRY & LUST, *supra* note 7, at 35–39 (explaining the NCAA compliance system); 30 FOR 30: *Pony Excess* (ESPN television broadcast Dec. 11, 2020) (detailing the NCAA's one-year ban of SMU's football program).

13. NCAA, 141 S. Ct. 2141 (2021).

14. *Id.* at 2165–66.

15. *See, e.g.*, Eric Prisbell, *As College Sports Transform Thanks to NIL, Here Is the State of Play*, ON3.COM (June 19, 2023), https://www.on3.com/nil/news/as-college-sports-transform-here-is-the-state-of-play-nil-title-ix-ncaa/ [https://perma.cc/WUF7-EUZX] (highlighting the changes to amateurism NIL brings); Jada Allender, Note, *The NIL Era Has Arrived: What the Coming of July 1 Means for the NCAA*, HARV. J. SPORTS & ENT. L. (July 1, 2021), https://journals.law.harvard.edu/jsel/2021/07/the-nil-era-has-arrived-what-the-coming-of-july-1-means-for-the-ncaa/ [https://perma.cc/DG93-K35B] (same); Richard Johnson, *Year 1 of NIL Brought Curveballs, Collectives, and Chaos. Now What?*, SPORTS ILLUSTRATED (July 12, 2022), https://www.si.com/college/2022/07/12/nil-name-image-likeness-collectives-one-year [https://perma.cc/M38G-WAX6] (same).

16. *Cf.* U.S. v. Gatto, 986 F.3d 104, 114–16 (2d Cir. 2021) (imposing criminal sentences for defendants' inducement of athletes to attend particular schools with cash payments); William W. Berry III, *The Crime of Amateurism*, 61 SANTA CLARA L. REV. 219, 228–35 (2020) (explaining the *Gatto* case and the federal criminality of paying players under the NCAA's historical amateurism model).

17. *See, e.g.*, David A. Fahrenthold & Billy Witz, *How Rich Donors and Loose Rules Are Transforming College Athletics*, N.Y. TIMES (Oct. 22, 2023), https://www.nytimes.com/2023/10/21/us/college-athletes-donor-collectives.html [https://perma.cc/DJG3-5ZUH] (describing how donor collectives facilitate athlete recruiting inducements); Cameron Salerno, *Ohio State Players Received 'Around $20 Million' in NIL, Believed to be Largest Amount in College Football*, CBS SPORTS (July 24, 2024, 4:01 PM), https://www.cbssports.com/college-football/news/ohio-state-players-received-around-20-million-in-nil-believed-to-be-largest-amount-in-college-football/ [https://perma.cc/RB48-U5TH] (documenting the amount of money Ohio State's collective paid to its football players).

18. NCAA, *Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement* (July 1, 2021) [hereinafter NCAA *Interim NIL Policy*], https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf [https://perma.cc/32VJ-GQLE].

19. *Id*.

federal court has recently barred enforcement of this rule because it likely violates antitrust law.[20] The second guardrail required athletes to perform work to merit the amount paid for use of their NIL.[21] But cleverly drafted NIL deals require limited activity on behalf of the athletes—social media posts, public appearances—and it is difficult to determine the relative market value of college athlete NILs.[22] The formation of collectives—groups of boosters—as opposed to the more traditional endorsement deals modeled by professional athletes and entertainers, has substantiated the perception that NIL compensation of athletes is merely a form of third-party pay-for-play.[23]

The NCAA's application of the *House* settlement to NIL deals has attempted to limit deals beginning in 2025–2026.[24] The College Sports Commission must approve all NIL deals valued over $600.[25] Deloitte reviews these contracts to make sure that the amount of the NIL payment accurately reflects the value of the use of the athlete's NIL and is not simply an alternate form of pay-for-play.[26] The application of the settlement also differentiates between "associated" boosters and "non-associated" boosters.[27] Contributions from associated boosters count toward the $20.5 million revenue cap; payments from non-associated boosters do not.[28] Again, the idea here is to distinguish between compensation for use of an athlete's NIL and compensation for simply playing the sport.[29]

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20. *Id.*; Tennessee v. NCAA, 718 F.Supp.3d 756, 759 (E.D. Tenn. 2024).

21. NCAA *Interim NIL Policy*, *supra* note 18.

22. *See, e.g.*, Meg Penrose, *The NCAA's Challenge in Determining NIL Market Value*, 76 OKLA. L. REV. 203, 211 (2023) (explaining how collectives distort market value).

23. *See, e.g.*, BERRY & LUST, *supra* note 7, at 146–48 (describing how collectives use NIL deals as "inducements" in recruiting); Pete Nakos, *On3's Top 15 NIL Collectives in College Sports*, ON3 (Aug. 29, 2024), https://www.on3.com/nil/news/on3s-top-15-nil-collectives-in-college-sports/ [https://perma.cc/6APE-KD8Q] (explaining how collectives pay to retain top college players); Brad Crawford, *College football NIL Collective Leaders for 2025: NCAA Estimates Nation's Top-25 Spenders*, 247SPORTS (Dec. 12, 2024, 9:13 AM), https://247sports.com/longformarticle/college-football-nil-collective-leaders-for-2025-ncaa-estimates-nations-top-25-spenders-241949240/ [https://perma.cc/VMD9-TZU7] (listing and describing the top spending collectives).

24. NCAA, *Question and Answer: Implementation of the* House *settlement* (June 13, 2025), https://ncaaorg.s3.amazonaws.com/governance/d1/legislation/2024-25/June2025D1Gov_PhaseThreeInstSetQuestionandAnswer.pdf [https://perma.cc/6FJQ-XVZM].

25. *Id.*

26. *Id.* The irony here is a bit rich given that the settlement itself enables pay-for-play.

27. *Id.*

28. *Id.*

29. It seems clear that this model violates the Sherman Act. But the hope of the NCAA is that it is part of a settlement and therefore something athletes cannot challenge. For those in the settlement this might make sense, but it seems like an overreach to bind future college athletes going forward for a decade. The settlement is currently pending before the Ninth Circuit. House v. NCAA, 545 F. Supp. 3d 804 (9th Cir. 2021), *appeal docketed*, No. 4:20-cv-03919-CW (9th Cir. June 12, 2025).

If state NIL laws upended the student-athlete amateurism model, the *House* settlement will effectively end it.[30] The antitrust settlement not only compensates athletes for use of their NIL in the five years prior to the adoption of the state NIL laws in 2021 but also establishes a revenue sharing model in which athletes will enjoy pay-for-play, receiving a share of the television money that funds college athletics.[31] University athletic departments can share up to 22% of the average annual revenues of the schools in the Power conferences (the Southeastern Conference (SEC), the Big Ten Conference (Big 10), the Big Twelve Conference (Big 12), and the Atlantic Coast Conference (ACC)).[32]

For some, the collapse of the student-athlete model is a form of economic justice, with the football players, and to a lesser degree, the women's and men's basketball players, able to receive remuneration beyond the traditional educational costs of tuition, room, board, and books.[33] This means that less of the income that these athletes arguably generate will be available to fund non-revenue sports, coach and administrator salaries, and new facilities.[34]

For others, the collapse of the student-athlete model eliminates much of what made college sports unique and worthwhile.[35] Before the 1980s, when

30. *In re* College Athlete NIL Litigation, No. 20-cv-03919, 2025 WL 1675820, at *1 (N.D. Cal. June 6, 2025).

31. *Id.* at *6–7. It is worth noting that part of the settlement limits the NIL payments of boosters, requiring them to be part of the 22% cap of $20.5 million, a subtle attempt to differentiate between pay-for-pay and legitimate (in the sense that the athlete "earns" the money for appearances or other NIL uses) NIL payments. *Id.* at *7.

32. *Id.* at *7.

33. *See* sources cited *supra* note 11; *see also* Ryan Young, *The Case for Paying College Athletes*, THE DAILY ECON. (Apr. 9, 2022), https://thedailyeconomy.org/article/the-case-for-paying-college-athletes/ [https://perma.cc/H33L-RL83] (arguing for pay-for-play); Keely Grey Fresh, *Blood, Sweat, Tears: A Re-Examination of the Exploitation of College Athletes*, 28 WASH. & LEE J. CIV. RTS. & SOC. JUST. 163, 202–05 (2022) (same); Ellen Stauvowsky, *How Colleges Exploit Student-Athletes*, THE ATL. (Sep. 14, 2011), https://www.theatlantic.com/entertainment/archive/2011/09/how-colleges-exploit-student-athletes/244945/ [https://perma.cc/B8Z8-Z96Z] (arguing that the traditional student-athlete model replicates patterns of colonialism).

34. *See, e.g.*, William W. Berry III, *Saving Camelot*, 50 BYU L. REV. 197, 217–18 (2024) (explaining that paying football athletes will affect the ability of universities to redistribute football profits to cover the cost of other sports); Craig Garthwaite, Jordan Keener, Matthew J. Notowidigdo & Nicole F. Ozminkowski, *Who Profits from Amateurism? Rent-Sharing in Modern College Sports* 2–6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27734, 2020), https://www.nber.org/papers/w27734 [https://perma.cc/9T6G-8BV3] (explaining how non-revenue sports benefit from revenue sports); Steve Maas, *Revenue Redistribution in Big-Time College Sports*, THE NBER DIGEST (Nov. 2020), https://live-nber.pantheonsite.io/sites/default/files/2020-10/nov20.pdf [https://perma.cc/6KXQ-KFJS] (exploring the revenue redistribution from football to other sports).

35. *See, e.g.*, Cody J. McDavis, *The Value of Amateurism*, 29 MARQ. SPORTS L. REV. 275, 326–27 (2018) (arguing for judicial deference under the Sherman Act to the NCAA); Linda Wray Black, *The Day the Fight Song Died: The* Alston *Concurrence that Became the Playbook*, 53 U. MEM. L. REV. 1009, 1012, 1037–38 (2023) (arguing for a return to principles of amateurism and a rejection of Justice Kavanaugh's concurrence in *Alston*).

college sports were not a billion-dollar industry, education really was the primary focus, and athletics served as a way to provide college degrees to athletes who otherwise did not have the resources or inclination to pursue higher education.[36] The NCAA conception of student-athletes as amateurs focused on education, with college sports being merely an avocation that was part of that education, has in many ways been a success story, particularly for athletes in non-revenue sports.[37]

The current settlement is problematic in three ways. First, it completely abandons the old model, with its virtues and vices, but also adopts a model that seems to violate antitrust law and, at the very least, ensures continued litigation. Specifically, the settlement does not alleviate the ongoing antitrust problem of capping the revenue that the NCAA and its member institutions share with the athletes.[38] In addition, it creates serious questions as to whether athletes are university employees while failing to address the question of unionization—especially in states that do not protect the right of public sector employees to collectively bargain.[39] Finally, it also does not address the Title IX problem of a federal law that requires educational institutions to provide equal opportunity to each gender but does not specify whether those rules apply to revenue sharing.[40]

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36. *See* Kay Hawes, *Debate on Amateurism Has Evolved Over Time*, NCAA NEWS (Jan. 3, 2000, 4:07 PM), https://ncaanewsarchive.s3.amazonaws.com/2000/association-wide/debate-on-amateurism-has-evolved-over-time---1-3-00.html [https://perma.cc/PYT2-5325] (describing how professional athletes were unable to compete as amateurs in other sports before 1974); Michael Weinreb, *An Era of Excess: In the 1980s, College Football Outgrew NCAA Rules*, N.Y. TIMES: THE ATHLETIC (July 1, 2019), https://www.nytimes.com/athletic/1050606/2019/07/01/college-football-1980s-ncaa-scandals-money/ [https://perma.cc/NP8F-Z5BQ] (describing the commercial enterprise that college sports had developed by the 1980s).

37. *See* Carly Lyvers, *Celebrating Student-Athlete Successes*, NCAA MEDIA CTR. (Apr. 6, 2023, 11:00 AM), https://www.ncaa.org/news/2023/4/6/media-center-celebrating-student-athlete-successes.aspx [https://perma.cc/U5ZE-AZL4] ("[F]ormer NCAA athletes are more likely than other college graduates to be thriving in areas such as community, social, physical and purpose."); Brenda L. Vogel, Jeff Kress & Daniel R. Jeske, *Student-Athletes vs. Athlete-Students*, 24 THE SPORT J. (2019), https://thesportjournal.org/article/student-athletes-vs-athlete-students-the-academic-success-campus-involvement-and-future-goals-of-division-i-student-athletes-who-were-university-bound-compared-to-those-who-would-not-have-attended/ [https://perma.cc/EAB9-QBV7] (conducting a study that supports the conclusion that: "athletics enhances the academic mission of universities"); Kasee Hildenbrand, James Sanders, Adrienne Leslie-Toogood & Stephen Benton, *Athletic Status and Academic Performance and Persistence at a NCAA Division I University*, 3 J. STUD. SPORTS & ATHLETES IN EDUCATION 41, 45 (2009) ("[F]emale athletes and other non-revenue generating sport athletes appear highly committed to academics."); Scott R. Stansbury, *Evaluating Academic Success in Student Athletes: A Literature Review*, 27 CONCEPT INTERDISC. J. GRADUATE STUD., Apr. 4, 2004, at 14 (explaining that "activities like intercollegiate athletics, intramurals, and other co-curricular activities allows students to enhance and expand their educational and social experiences in college").

38. *See* discussion *infra* subpart I(A).

39. *See* discussion *infra* subpart I(B).

40. *See* discussion *infra* subpart I(C).

This Article proposes a model that addresses all three of these problems while also preserving the salvageable parts of the former student-athlete model. Specifically, this Article advocates for a conference-employee, student-athlete model, where athletes would have an employment relationship with their athletic conference but retain their "amateur" student-athlete relationship with their university.[41]

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I. Three Problems Facing a Post-*House* NCAA

The NCAA and its member institutions are facing three existential issues that bear directly on the economics of intercollegiate athletics. The *House* settlement is at best a band-aid on these three interrelated problems. Instead of allowing litigation to drive the future of college sports, university presidents and athletic directors should consider adopting a new model that does not require institutions to sacrifice their core values while at the same time addressing the economic realities of a market-based industry.[42]

The claim in *House* related to the class of current NCAA athletes is that the existing NCAA amateurism model violates antitrust law by barring athletes from receiving pay-for-play.[43] The case also includes another class of plaintiffs claiming that such rights extend back to 2016, with these plaintiffs also citing the blocking of the ability to receive third-party

41. Amateurism here would mean limiting remuneration from the institution to educational costs, making that relationship amateur, while allowing compensation from third parties, both through NIL boosters and collectives, as well as through conferences. William W. Berry III, *Amending Amateurism*, 68 ALA. L. REV. 551, 573–76 (2016).

42. Others have proposed different economic models for college sports. *See, e.g.*, Andrew Zimbalist, *Whither the NCAA: Reforming the System*, 52 REV. INDUS. ORG. 337, 349–50 (2018) (exploring possible economic paths for college sports); David A. Grenardo, *Preparing for the Inevitable—Compensating College Athletes for Playing*, 53 U. MEM. L. REV. 963, 1000–04 (2023) (explaining a performance-based model of athlete compensation); Richard T. Karcher, *The NCAA as Joint Employer? Let's Be Real*, 53 U. MEM. L. REV. 893, 925–26 (2023) (arguing for conferences, not NCAA member institutions, as multi-employer bargaining units).

43. *In re* College Athlete NIL Litigation, No. 20-cv-03919, 2025 WL 1675820, at *1–3 (N.D. Cal. June 6, 2025).

compensation for use of their NIL.[44] They note that this is a benefit enjoyed by athletes since 2021 because of the widespread adoption of state laws in 2021 and claim damages dating back to 2016.[45]

The settlement includes a payment of $2.576 billion in backpay to current and former athletes, but also provides for revenue sharing beginning in 2025–2026.[46] The settlement caps the amount of money that universities can share with their athletes at 22% of the average annual revenue of the athletic programs in the Power 5 conferences, estimated to exceed $20 million per school in 2025–2026.[47] The settlement does not require schools to pay 22% of the average revenue amount, it just bars the NCAA from blocking schools from paying more than that number.[48] In addition, the settlement provides for changes in NCAA rules with respect to certain sports, like baseball and softball, that do not currently allocate full scholarships for all athletes.[49] The new model eliminates scholarship limits in equivalency sports and allows schools the ability to award scholarships to all team members, and not be forced to divvy up partial scholarships throughout the roster.[50]

The settlement also attempts to maintain this status quo for up to a decade.[51] While the settlement clearly can bar current athletes who opt-in to the settlement from bringing antitrust claims, it is not clear that the *House* settlement can bar individuals not yet in college from bringing antitrust claims in the future. As discussed below, the current model, even with revenue sharing, arguably violates the Sherman Act in several ways.

In addition, if the athletes do receive revenue sharing, essentially a salary from the university for playing their sport, it will be difficult for the NCAA and its member institutions to claim that athletes are not employees of their universities. So, the employment law question is a second problem beyond the antitrust issues that the *House* settlement will exacerbate rather

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44. *Id.* at *4–5.

45. Complaint at 9, 104 House v. NCAA, No. 4:20-CV-03919, 2020 WL 8820440 (N.D. Cal. July 26, 2021).

46. *In re* College Athlete NIL Litigation, 2025 WL 1675820, at *5, 7.

47. *Id.* at *7.

48. *Id.*

49. *Id.*

50. *Id.* at *7; Declaration of Daniel A. Rascher in Support of Final Approval of House Settlement at 26, 31, *In re* College Athlete NIL Litigation, No. 20-cv-03919, 2025 WL 1675820, at *1–3 (N.D. Cal. June 6, 2025). The settlement will also raise the cap of total scholarship team members of some sports like football, which will have 105 roster spots, up from 85. *In re* College Athlete NIL Litigation, 2025 WL 1675820, at * 7; *Roster Limits*, COLLEGE SPORTS COMMISSION, https://www.collegesportscommission.org/roster-limits [https://perma.cc/F2ZC-8ZUE].

51. *See In re* College Athlete NIL Litigation, 2025 WL 1675820, at *1 ("[The settlement] would . . . eliminate NCAA limits on scholarships. This is expected to open the door for Division I student athletes to receive . . . new compensation and benefits per year . . . over the next ten years.").

than solve. This issue is dually important in light of the recent attempts of college athletes to form labor unions.[52]

Finally, the settlement does not solve the gender equity question.[53] The settlement does not require the amount of revenue sharing to be equal between male and female athletes.[54] It appears that the NCAA and its member institutions might take the position that Title IX extends only to scholarships and not revenue sharing.[55] The initial position of the U.S. Office of Civil Rights (OCR) is that Title IX does require gender equity in revenue sharing, which makes future litigation on the topic likely regardless of what the settlement ultimately provides.[56] But that guidance came in the final weeks of the Biden administration, meaning that under a new administration the OCR could potentially take a different view.[57]

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52. *See* discussion *infra* subpart I(B).

53. In re *College Athlete NIL Litigation*, 2025 WL 1675820, at *9; Ralph D. Russo & Justin Williams, *DOE Memo Says NIL Payments Must Be Proportionate Between Male, Female Athletes, but Guidance Could Be Short-lived*, N.Y. TIMES: THE ATHLETIC (Jan. 17, 2025), https://www.nytimes.com/athletic/6068325/2025/01/16/department-of-education-title-ix-nil-memo/ [https://perma.cc/3XYS-PNLM]. Jeffrey Kessler, one of the lead attorneys of the plaintiffs in *House*, stated:

> This has no impact on the settlement at all . . . . The injunction does not require the schools to spend the new compensation and benefits that are permitted to any group of athletes and leaves Title IX issues up to the schools to determine what the law requires. We resolved antitrust claims — not Title IX claims.

Id.

54. In re *College Athlete NIL Litigation*, 2025 WL 1675820, at *6.

55. *See* Paula Lavigne, *Dept. of Education Revokes Guidance on Title IX and Athlete Pay*, ESPN (Feb. 12, 2025, 12:42 PM), https://www.espn.com/college-sports/story/_/id/43809645/dept-education-revokes-guidance-title-ix-athlete-pay [https://perma.cc/5ES3-VPK7] (noting that major athletic programs would resist revenue-sharing under a more sweeping Title IX regime that would mandate proportionality).

56. U.S. DEP'T OF EDUC., FACT SHEET: ENSURING EQUAL OPPORTUNITY BASED ON SEX IN SCHOOL ATHLETIC PROGRAMS IN THE CONTEXT OF NAME, IMAGE, AND LIKENESS (NIL) ACTIVITIES 8 (2025), https://www.ed.gov/media/document/ocr-factsheet-benefits-student-athletes [https://perma.cc/WG8U-ZRFA]; *see also* Daniel Libit, *NCAA Athlete NIL Pay Must Be Title IX Compliant, Dept. of Education Says*, SPORTICO (Jan. 16, 2025, 5:43 PM), https://www.sportico.com/leagues/college-sports/2025/department-of-education-title-ix-nil-guidance-1234824287/ [https://perma.cc/TG36-CRFT] (discussing OCR guidance that NIL revenue earned by student-athletes should be considered part of a school's athletic financial assistance and therefore subject to Title IX); Russo and Williams, *supra* note 53 (explaining how Title IX lawsuits are likely regardless of the OCR memo).

57. Russo and Williams, *supra* note 53. It is also not clear how the Court's decision in *Loper Bright v. Raimondo*, which abandoned the *Chevron* deference courts once accorded agency rulings, might affect a Court's application of Title IX to revenue sharing. 144 S. Ct. 2244, 2273 (2024); *see also* Michael McCann, *SCOTUS Chevron Rejection Could Upend NCAA, College Athlete Cases*, SPORTICO (June 28, 2024, 12:31 PM), https://www.sportico.com/law/analysis/2024/scotus-overrules-chevron-sports-ncaa-1234786034/ [https://perma.cc/U44L-GBGW] (intimating that this decision could affect the pending labor law NLRB cases).

A. The Antitrust Problem

The organization of intercollegiate athletics through the NCAA is, at its core, a model that implicates the Sherman Act, which bars unreasonable restraints on trade.[58] The NCAA is a democratic cartel[59] in that it establishes a set of uniform eligibility and compensation rules for its voting member institutions.[60] Specifically, this model has historically limited athletes to four years of eligibility[61] and remuneration of tuition, room, board, and books.[62] This means that, technically, there is no economic competition between institutions for athletes.[63] Instead, NCAA rules provide that athletes, as amateur student-athletes, will receive essentially the same remuneration from any of its member institutions competing for their services.[64] In practice, third-party payments have led to economic competition, but this competition

58. *See* Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (articulating the rule of reason, the applicable antitrust rule).

59. *See, e.g.*, Roger D. Blair & Wenche Wang, *The NCAA Cartel and Antitrust Policy*, 52 REV. INDUS. ORG. 351, 352–55 (2018) (arguing that the NCAA's collusive monopolistic restraints make it a cartel); Allen R. Sanderson & John J. Siegfried, *The National Collegiate Athletic Association Cartel: Why It Exists, How It Works, and What It Does*, 52 REV. INDUS. ORG. 185, 198–99, 202 (2018) (same).

60. The most recent iteration of the NCAA Constitution has allowed each division to establish its own separate set of rules. NCAA CONST. art. 2, § B(1), at 9–10, https://ncaaorg.s3.amazonaws.com/governance/ncaa/constitution/NCAAGov_Constitution121421.pdf [https://perma.cc/C72M-JE2B]; Corbin McGuire, *NCAA Members Approve New Constitution*, NCAA: MEDIA CENTER (Jan. 20, 2022, 6:12 PM), https://www.ncaa.org/news/2022/1/20/media-center-ncaa-members-approve-new-constitution.aspx [https://perma.cc/24J3-RNFY]; *see also* PAUL C. WEILER, STEPHEN F. ROSS, MICHAEL C. HARPER, JODI S. BALSAM & WILLIAM W. BERRY III, SPORTS AND THE LAW: TEXT, CASES, AND PROBLEMS 763 (2023) (describing some of the new changes).

61. NCAA, 2024–25 NCAA DIVISION I MANUAL 54 [hereinafter 2024–25 DI Manual]. The model allows athletes five years to complete four years of eligibility. *Id.*

62. NCAA, 2013–14 NCAA DIVISION I MANUAL 57–58; *id*. at 191–92. The current model allows payment of cost of attendance and other expenses related to education, known as Alston awards. 2024–25 DI MANUAL, *supra* note 61, at 174; *id.* at 205; Nicole Auerbach, *NCAA, Power 5 Face New Lawsuit Seeking Back Pay for 2 Years of Alston Payments*, N.Y. TIMES: THE ATHLETIC (Apr. 5, 2023), https://www.nytimes.com/athletic/4381880/2023/04/04/ncaa-power-5-lawsuit-alston-payments/ [https://perma.cc/3X76-WRS7]. After the *House* settlement, direct pay-for-play will occur in the form of revenue sharing beginning in fall 2025. In re *College Athlete NIL Litigation*, No. 20-cv-03919, 2025 WL 1675820, at *1 (N.D. Cal. June 6, 2025).

63. In the NIL era that began in the summer of 2021, this changed in that athletes can receive different levels of compensation from third party collectives between institutions. But under NCAA rules, third parties cannot use such payments to encourage athletes to attend a particular school, and institutions cannot facilitate such payments. NCAA *Interim NIL Policy*, *supra* note 18; Meghan Durham, *DI Board Approves Clarifications for Interim NIL Policy*, NCAA: MEDIA CENTER (Oct. 26, 2022, 1:21 PM), https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx [https://perma.cc/5Z6U-VH2J] (detailing guidelines for schools in the implementation of the new NIL policy). These rules, though, may also violate antitrust law. *See Tennessee v. NCAA*, 718 F. Supp. 3d 756, 766 (E.D. Tenn. 2024) (enjoining the NCAA's attempt to enforce the inducement rule).

64. *See, e.g.*, 2024–25 DI MANUAL, *supra* note 61, at 33 (A grant-in-aid administered by an educational institution is not considered to be pay or the promise of pay for athletics skill . . . .").

is between boosters, not universities, and therefore does not address the Sherman Act problem. And the amounts are not exactly the same, as tuition and cost of attendance amounts vary among institutions.

On its face, this kind of horizontal restraint of trade typically is a per se violation of the Sherman Act.[65] Because sports involve athletic competition, the Court has applied the rule of reason rather than the per se test in assessing the reasonableness of restraints involving athletics.[66] Under the rule of reason, the defendant can justify the restraint in cases where it is essential to promote competition in another market, and reasonable alternatives to achieve the same ends do not exist.[67]

The NCAA's approach has been to first claim that college sports are amateur, not commercial in nature, as student-athletes pursue education before athletics.[68] This argument seems as dubious as Justice Holmes' opinion in *Federal Baseball*[69] that baseball games do not constitute interstate commerce, particularly as college athletics (like baseball) has become a multi-billion-dollar industry.[70] Then, the NCAA has claimed that amateurism—limiting student compensation to the amount of the grant-in-aid (tuition, room, board, and books)—was essential to differentiate college sports as a product in the market for entertainment.[71]

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65. Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); United States v. Topco Assocs. Inc., 405 U.S. 596, 608 (1972); *see also* Jonathan B. Baker, *Per se Rules in the Antitrust Analysis of Horizontal Restraints*, ANTITRUST BULL. 733, 735–39 (1991) (describing the policy supporting per se rules for horizontal restraints).

66. NCAA v. Bd. of Regents, 468 U.S. 85, 100–03 (1984); Mackey v. Nat'l Football League, 543 F.2d 606, 618–22 (8th Cir. 1976).

67. *Chi. Bd. of Trade*, 246 U.S. at 238; *Bd. of Regents*, 468 U.S. at 101–03; *Mackey*, 543 F.2d at 620–21.

68. *See, e.g.*, Banks v. NCAA, 977 F.2d 1081, 1084, 1089–91, 1094 (7th Cir. 1992) (barring year of eligibility based on the no-draft and no-agent rules); Bloom v. NCAA, 93 P.3d 621, 626–28 (Colo. Ct. App. 2004) (upholding NCAA rules barring receipt of endorsement money); NCAA v. Lasege, 53 S.W.3d 77, 81, 85 (Ky. 2001) (denying eligibility because of prior receipt of renumeration); Gaines v. NCAA, 746 F. Supp. 738, 740, 744 (M.D. Tenn. 1990) (denying eligibility because of unsuccessful draft bid); Agnew v. NCAA, 683 F.3d 328, 342–44 (7th Cir. 2012) (upholding NCAA bar on multi-year scholarships); Deppe v. NCAA, 893 F.3d 498, 501–03 (7th Cir. 2018) (upholding NCAA rule that transfers must sit out for one year after transferring).

69. Fed. Baseball v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200 (1922).

70. *Id.* at 206; Assoc. Press, *NCAA Generates Nearly 1.3 Billion in Revenue for 2022–23*, ESPN (Feb. 1, 2024, 9:35 PM), https://www.espn.com/college-sports/story/_/id/39439274/ncaa-generates-nearly-13-billion-revenue-2022-23 [https://perma.cc/RGV9-RV63]; Serena Morones & Paul Heidt, *Opinion: Following the Money in College Sports and the Pac-12 Shakeup*, PORTLAND BUS. J. (Nov. 17, 2023), https://www.bizjournals.com/portland/news/2023/11/17/following-the-money-in-college-sports.html?ana=maz&b=1700246799^22331076 [https://perma.cc/MJH2-3EJM] (finding that college sports received $13.6 billion in revenue in 2022).

71. *See* cases cited *supra* note 68. The response of the public and the market to athletes receiving NIL money casts doubt on this argument, as revenue, attendance, and television viewership are increasing, not decreasing. *See, e.g.*, Alyssa Meyers, *Interest in College Sports is on*

Even so, it has been clear, at least since the Supreme Court's 1984 decision in *NCAA v. Board of Regents of Oklahoma*,[72] that the student-athlete model rested on uncertain antitrust grounds.[73] In *Board of Regents*, the Court held that the NCAA's restriction on Georgia and Oklahoma entering football television contracts violated the Sherman Act.[74]

Despite losing its share of football money since the *Board of Regents* decision, the NCAA nonetheless used dicta from the decision to argue that its student-athlete model enjoyed antitrust immunity.[75] Specifically, the Court's dicta stated,

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.[76]

Lower courts initially agreed with the NCAA's reading of this language, insulating the NCAA from antitrust challenges for over two decades.[77] The reasoning of these courts related to the idea that the NCAA was largely non-commercial in its activity and its distinct product was amateur and educational, not commercial.[78] This meant that limiting the amount of

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the Rise, Report Says, MARKETING BREW (Mar. 5, 2024), https://www.marketingbrew.com/stories/2024/03/05/interest-in-college-sports-is-on-the-rise [https://perma.cc/7GPY-B2LA] (finding that college sports fans are planning on engaging more with games in 2024 than the past).

72. 468 U.S. 85 (1984).

73. *Id.* at 100–04.

74. *Id.* at 88. This decision led to an explosion in television growth and expansion over several decades such that now, networks televise almost every major conference football game. BERRY & LUST, *supra* note 7, at 84–86.

75. BERRY & LUST, *supra* note 7, at 84–85.

76. *Bd. of Regents*, 468 U.S. at 120. In the final section of its opinion, the Court emphasized that:

> consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life.

Id.

77. Banks v. NCAA, 977 F.2d 1081, 1089 (7th Cir. 1992); Bloom v. NCAA, 93 P.3d 621, 626 (2004); NCAA v. Lasege, 53 S.W.3d 77, 85, n.17 (Ky. 2001).

78. *See* cases cited *supra* note 68. Justice Kavanaugh highlighted the circularity of this argument in his concurrence in *Alston*:

> [T]he NCAA says that colleges may decline to pay student athletes because the defining feature of college sports . . . is that the student athletes are not paid. In my view, that argument is circular and unpersuasive. The NCAA couches its

revenue received by athletes to tuition, room, board, and books was a market restraint justified by a largely non-commercial goal of educating amateur athletes and concurrent to the value of amateur athletic competitions in the market for entertainment.[79]

The applicable analysis comes from the Court's reading of the Sherman Act in applying its rule of reason test.[80] The restraint imposed by the NCAA is obvious and not disputed—it restricts the ability of college athletes to receive compensation in the market for their services.[81] The question under the Sherman Act is whether there is a pro-competitive justification for that restraint.[82] In other words, the question is whether the NCAA is able to promote competition in another market—here the market for entertainment—by limiting the ability of athletes to receive remuneration, preserving "amateur" college sports as an entertainment alternative.[83] If the NCAA's product will diminish in the market, i.e., fans will no longer watch and attend games if the athletes receive compensation, then it has a justification for its restraint.[84]

The NCAA's losing argument in *Board of Regents* was similar. It argued that televising the football games would result in the decline of in-person attendance at games.[85] Forty years later, this argument seems very

> arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America.

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

79. *See, e.g.*, Banks v. NCAA, 977 F.2d 1081, 1091 (7th Cir. 1992) (finding that NCAA no-draft and no-agent rules were essential to preventing intrusion on the "educational pursuits" of student-athletes); Bloom v. NCAA, 93 P.3d 621, 626 (2004) (stating that the NCAA remuneration rules maintain a "clear line of demarcation between intercollegiate athletics and professional sports"); NCAA v. Lasege, 53 S.W.3d 77, 85 (Ky. 2001) ("The NCAA unquestionably has an interest in . . . preserving the amateur nature of intercollegiate athletics."); Gaines v. NCAA, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) (describing the purpose of the NCAA rules to "preserve the unique atmosphere of competition between 'student-athletes'"); Deppe v. NCAA, 893 F.3d 498, 503 (7th Cir. 2018) (upholding the NCAA transfer rule as maintaining the "revered tradition of amateurism in college sports").

80. The Court has applied the rule of reason test, instead of its per se test, in cases involving sports partly because of the presence of athletic competition, which can create confusion in the assessment of the key factor of economic competition. *Bd. of Regents*, 468 U.S. at 117.

81. 2024–25 DI MANUAL, *supra* note 61, at 36.

82. *Alston*, 141 S. Ct. at 2162; O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015); *Bd. of Regents*, 468 U.S. at 117. Framing college sports as non-commercial can lead to the impression that there is no restraint at all.

83. *Alston*, 141 S. Ct. at 2162; *O'Bannon*, 802 F.3d at 1079; *Bd. of Regents*, 468 U.S. at 117–18.

84. *Alston*, 141 S. Ct. at 2152–53; *O'Bannon*, 802 F.3d at 1059; *Bd. of Regents*, 468 U.S. at 101–02.

85. *Bd. of Regents*, 468 U.S. at 115–17.

unpersuasive, as televising the games has led to increased attendance and wild growth in college football.[86]

The economic growth of college athletics, particularly after the turn of the century, increasingly undermined the NCAA's claim that amateurism justified restraining the remuneration of athletes by limiting it to tuition, room, board, and books.[87] In *O'Bannon v. NCAA*,[88] the Ninth Circuit held that the NCAA could not bar schools from including the cost of attendance in their compensation of athletes.[89] The Supreme Court subsequently held in *NCAA v. Alston* that the NCAA could not restrict the athletes from receiving costs related to education, including the costs of computers, graduate school tuition, and summer abroad programs.[90]

Recent litigation has suggested that the scope of the NCAA's liability does not end there.[91] A preliminary injunction in *Tennessee and Virginia v. NCAA*[92] has barred the NCAA from enforcing its rule that prohibits schools from using NIL contracts as inducements for signing with a school.[93] This rule does not promote competition in a way that likely justifies the restraint.[94] The market for college athletics viewership does not depend on barring booster collectives from using economic NIL inducements to attract players. If athletes choose schools based on the size of the NIL package instead of the other virtues of the school, fans will not care. They are excited that the athlete is on their team, no matter what methods of persuasion third parties used.[95]

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86. Andrew Zimbalist, *Analysis: Who Is Winning in The High Revenue World of College Sports?*, PBS NEWS (Mar. 18, 2023, 7:14 PM), https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports [https://perma.cc/64YD-386M]; *see College Sports Finances Database*, SPORTICO, https://www.sportico.com/business/commerce/2023/college-sports-finances-database-intercollegiate-1234646029/ [https://perma.cc/6WCV-NAAM] (highlighting the large revenues that football yields for various universities).

87. Zimbalist, *supra* note 86; Adam Hoffer, Brad R. Humphreys, Donald J. Lacombe & Jane E. Ruseski, *Trends in NCAA Athletic Spending: Arms Race or Rising Tide?*, 16 J. SPORTS ECON. 576, 577 (2015).

88. 802 F.3d 1049 (9th Cir. 2015).

89. *Id.* at 1075–76.

90. *Alston v. NCAA*, 141 S. Ct. 2141, 2165–66 (2021). The *Alston* case was a perhaps final attempt by the NCAA to seek an antitrust exemption from the Court, ironically by using a case in which the Court rejected that idea in another context. *See Bd. of Regents*, 468 U.S. at 119–120 (rejecting the NCAA's argument that its restrictions on television contracts did not violate the Sherman Act).

91. Justice Kavanaugh's concurrence in *Alston* made this point as well. *Alston*, 141 S. Ct. at 2166–67 (Kavanaugh, J., concurring) (noting that the Court has not addressed remaining NCAA compensation rules, which leave "serious questions whether [they] can pass muster under ordinary rule of reason scrutiny").

92. 718 F. Supp. 3d 756 (E.D. Tenn. 2024).

93. *Id.* at 766.

94. *Id.* at 762–63.

95. The knowledge that Nico Iamaneleva allegedly received a $10 million payment did not seem to affect the attendance at Tennessee football games, which remained one of the highest in the

Similarly, star Vanderbilt quarterback Diego Pavia received a preliminary injunction that will allow him to receive an additional year of eligibility.[96] The court in that case found that limiting athletes to four years of eligibility including years played in junior college programs likely violates the Sherman Act.[97] Again, there is no evidence that the length of eligibility rule is necessary to protect the product of college football in the market. Pavia playing another year is much more likely to increase attendance and viewership at Vanderbilt games than decrease them.[98]

Further, it seems likely that the same argument would apply to the NCAA's limit on eligibility as applied to all athletes, not just junior college transfers. Initially, some courts have deferred to the NCAA on this issue, again pretending that the question is not an economic one, while others have found that it seems to violate antitrust law because there is no pro-competitive economic justification for limiting the number of seasons an athlete can play.[99] In other words, there does not seem to exist a pro-competitive justification for capping eligibility at four years instead of five, six, or even ten years. It does not seem likely that fans will cease to watch their teams if their favorite athletes continue to play for their teams for

country. *2022 FBS Attendance Trends*, D1.TICKER (2024), https://www.d1ticker.com/2022-fbs-attendance-trends/ [https://perma.cc/5Z6U-VH2J]; Chris Low, *Sources: UCLA in Talks with QB Nico Iamaleava for Less Money*, ESPN (Apr. 16, 2025), https://www.espn.com/college-football/story/_/id/44703683/ucla-talks-qb-nico-iamaleava-less-money [https://perma.cc/UU7C-NBXH].

96. Pavia v. NCAA, 760 F.Supp.3d 527, 544–45 (M.D. Tenn. 2024); *see also* Pavia v. NCAA, No. 24-6153, 2025 U.S. App. LEXIS 25450, at *14 (6th Cir. 2025) (mooting the case based on the NCAA's grant of a waiver to Pavia and keeping the preliminary injunction in place).

97. *Pavia*, 760 F.Supp.3d at 540–41, 544. *See also* Teresa M. Walker, *Vandy QB Diego Pavia Wins Injunction Allowing Him to Play D-1 Football in 2025*, AP NEWS (Dec. 18, 2024, 7:15 PM), https://apnews.com/article/vanderbilt-diego-pavia-preliminary-injunction-2025-029ed63d2520a2930be197d31ccc0e5f [https://perma.cc/YP69-GQWS] (noting the court's affirmation of Pavia's likely success under the Sherman Act).

98. Vanderbilt sports appear to be in the middle of a sort of renaissance, with fans rushing the field and court after victories over #1 Alabama in football (Oct. 5, 2024), #6 Tennessee in basketball (Jan. 18, 2025), and #9 Kentucky in basketball (Jan. 25, 2025). *Vanderbilt Fined $500,000 by SEC for Allowing Fans to Storm Court After Victory Over Kentucky*, AP NEWS (Jan. 26, 2025, 5:42 PM), https://apnews.com/article/vanderbilt-sec-fine-fans-storm-court-crowd-97d2ded540f9e76f4598a4e8caf9eb7e [https://perma.cc/ETD8-4GRX]. It follows that fans would be excited to see the star quarterback return for another season.

99. *Compare Pavia*, 760 F.Supp.3d at 541–43 (M.D. Tenn. 2024) (enjoining rule counting time in junior college against eligibility), *and* Elad v. NCAA, No. 25-1981 (ZNQ) (JTQ), 2025 WL 1202014, at *7–11 (D.N.J. 2025) (same), *and* Fourqurean v. NCAA, 771 F. Supp. 3d 1043, 1052–55, 1057 (W.D. Wis. 2025) (enjoining Five-Year Rule), *with* Wade v. NCAA, No. 2:24-cv-196-TBM-RPM, 2024 WL 5212665, at *1–2 (S.D. Miss. 2024) (denying TRO preventing enforcement of rule counting time in junior college, but setting hearing for preliminary injunction), *and* Arbolida v. NCAA, No. 25-2019-JWB, 2025 WL 579830, at *1–2, *5 (D. Kan. 2025) (same), *and* Osuna v. NCAA, No. 3:25-cv-62, 2025 WL 684271, at *2–4 (E.D. Tenn. 2025) (denying motion for preliminary injunction challenging Five Year Rule), *and* Ciulla-Hall v. NCAA, No. 25-cv-10271-DJC, 2025 WL 438707, at *2–3 (D. Mass. 2025) (denying motion for temporary restraining order challenging Five Year Rule), *and* Goldstein v. NCAA, No. 3:35-cv-00027-TES, 2025 WL 662809, at *3–6 (M.D. Ga. 2025) (same).

additional years.[100] In addition, the NCAA withdrew its transfer rule restricting transfers for students who have already transferred once.[101] Again, the threat of antitrust liability reinforced the idea that all of the NCAA's rules might be subject to antitrust scrutiny.

It is not clear where this antitrust analysis stops. The *House* settlement provides revenue sharing to athletes, up to 22% of the average revenue of the Power conferences.[102] But why 22%? The cap in the settlement *still* violates the Sherman Act.[103] The settlement's limit on booster NIL (limiting it to contributions to the 22% cap) also is clearly an anti-competitive restraint.[104]

As are, arguably, many of the eligibility rules the NCAA imposes. The NCAA limits athletes to four years of eligibility in a five-year window,[105] but there is no evidence that its product of college football in the market would suffer if athletes could play six years (the timetable for graduation for many students), or even a decade.[106]

And the academic eligibility rules suffer from the same problem. It is doubtful that fans will cease watching college football and attending games if the athletes are no longer students of the university.[107] At some level, it

100. This certainly did not happen when athletes received additional eligibility after the COVID-19 pandemic. For example, Miami tight end Cam McCormick enjoyed a nine-year college football career as the result of the pandemic extension and several injuries. Angel Nakamura, *Miami Hurricanes Tight End Cam McCormick Cries After His 9-year College Football Career Comes to an End*, MARCA (Dec. 28, 2024, 10:46 PM), https://www.marca.com/en/ncaa/2024/12/29/6770d39346163f24238b45bc.html [https://perma.cc/33AT-9TVH]. Miami's average home-game attendance in 2024 was 21% higher than in 2023 and 14% higher than its five-year average attendance. *2024 FBS Attendance Trends*, D1.TICKER, https://www.d1ticker.com/2024-fbs-attendance-trends/ [https://perma.cc/6KD5-RFUS].

101. Ohio v. NCAA, 706 F. Supp.3d 583, 589 (N.D. W. Va. 2023); Ryan Young, *NCAA Officially Ratifies New Rules Allowing Athletes to Transfer Multiple Times and Still Be Immediately Eligible*, YAHOO! SPORTS (Apr. 22, 2024), https://sports.yahoo.com/ncaa-officially-ratifies-new-rules-allowing-athletes-to-transfer-multiple-times-and-still-be-immediately-eligible-225903569.html [https://perma.cc/U7XM-U5ZM].

102. *In re* College Athlete NIL Litigation, No. 20-cv-03919, 2025 WL 1675820, at *25 (N.D. Cal. June 6, 2025).

103. The settlement is attempting to bar current and future potential plaintiffs from raising such a claim, but an antitrust challenge to such a cap is inevitable. *See, e.g.*, Notice of Appeal from a Judgment or Order of a United States District Court at 2, *In re* College Athlete NIL Litigation No. 20-cv-03919 (9th Cir. filed June 11, 2025) (revealing an anticipated antitrust challenge on appeal).

104. In re *College Athlete NIL Litigation*, 2025 WL 1675820 at *25.

105. 2024–25 DI MANUAL, *supra* note 61, at 54. As discussed above, this issue has been the subject of considerable judicial debate. *See* cases cited *supra* note 99.

106. *See, e.g.*, *Selected cohort entry years, 1996 through 2017*, Digest of Education Statistics, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d24/tables/dt24_326.10.asp [https://perma.cc/7FMM-TSAA] (showing that in 2017, 49.1% of students graduated in four years, while 64.5% graduated in six years).

107. *See, e.g.*, Patrick J. Ferguson & Karim R. Lakhani, *Consuming Contests: The Effect of Outcome Uncertainty on Spectator Attendance in the Australian Football League*, 99 ECON. REC. 410, 428–29, 431 (2023) (demonstrating that the uncertainty in outcomes is a notable driver of sporting event attendance, irrespective of star power).

seems like fans are content to "cheer for the laundry," meaning that they will consume the product in the market as long as the teams play on behalf of their institutions and wear the university's logos and colors.[108] Without some way to limit antitrust liability, it is foreseeable, maybe even likely, that intercollegiate athletics will one day no longer have student-athletes because antitrust law prevents the NCAA from requiring the athletes to be students. Without a change in the current model to address the antitrust problem (which the *House* settlement will not do), a semi-pro version of college athletics—where college athletes are not students—seems like an inevitability.

B. The Labor Law / Employee Problem

An important adjacent question to the antitrust issue is whether college athletes are university employees.[109] Athletes have recently raised this issue in two different contexts: as a demand for minimum wage under the Fair Labor Standards Act (FLSA)[110] and as a demand to form a union under the National Labor Relations Act (NLRA).[111]

The increasing commercialization of intercollegiate athletics has made athletes seem more like employees in the same way that it casted doubt on the amateurism defense in antitrust law. When remuneration extends beyond educational costs to revenue sharing under the *House* settlement, institutions are paying athletes to play sports to the extent that they were not already paid through grant-in-aid.[112]

As with the Sherman Act cases, athletes had lost their FLSA claims, often at the early 12(b)(6) stage of litigation which allows courts to dismiss cases that "fail to state a claim."[113] These decisions held that athletes were

108. For a deeper assessment of the implications of cheering for the laundry without adopting this model (or another alternative model), see William W. Berry III, Cheering for the Laundry (unpublished manuscript) (on file with the author).

109. *See, e.g.*, Marc Edelman, Michael A. McCann & John T. Holden, *The Collegiate Employee-Athlete*, 2024 ILL. L. REV. 1, 33, 54 (2024) (exploring the consequences of athletes receiving employment status); William W. Berry III, *Employee-Athletes, Antitrust, and the Future of College Sports*, 28 STAN. L. & POL'Y REV. 245, 248 (2017) (same).

110. 29 U.S.C. § 206.

111. 29 U.S.C. § 157. In addition to the ongoing FLSA and NLRA claims, earlier cases unsuccessfully argued that athletes are university employees for workers' compensation purposes. *See* Waldrep v. Tex. Emps. Ins. Ass'n, 21 S.W.3d 692, 698, 701 (Tex. App.—Austin 2000, pet. denied) (denying relief to Waldrep for an injury he sustained playing football because he was not deemed an employee of Texas Christian University).

112. At private schools, tuition alone can exceed $270,000 for four years, and at public schools, out-of-state tuition for four years is typically over $100,000 for four years. And the cost of attendance adds roughly another $20,000 a year of costs and expenses. Melanie Hanson, *Average Cost of College & Tuition*, EDUC. DATA INITIATIVE (Aug. 29, 2025), https://educationdata.org/average-cost-of-college [https://perma.cc/8VT4-TDZS].

113. Berger v. NCAA, 843 F.3d 285, 294 (7th Cir. 2016); Dawson v. NCAA, 932 F.3d 905, 911 (9th Cir. 2019).

not university employees because intercollegiate athletics was not a commercial activity.[114] According to the courts, the compensation that athletes received related to education—covering the expenses of being a student-athlete, not paying the athletes to play their sport.[115] The Third Circuit, however, recently found that athletes could be employees for FLSA purposes in *Johnson v. NCAA*.[116] In affirming the district court's finding on interlocutory appeal, the relationship between athlete and university was not only a student-athlete one but also could be an employee-athlete one.[117]

The court's assessment of whether college athletes could be employees under the student-athlete model began with noting the broad, open-ended definition of employee, as "any individual employed by an employer."[118] As a result, the court looked to the "economic realities of the relationship" between athlete and university.[119]

Given this unique relationship, the court concluded that "[a]ny test to determine college athlete employee status under the FLSA must therefore be able to identify athletes whose play is *also* work."[120] The court found that common-law agency principles, derived from FLSA caselaw defining "work," provided the best tool to determine athlete employment status.[121]

The court thus held that college athletes may be employees under the FLSA "when they (a) perform services for another party, (b) necessarily and primarily for the [other party's] benefit, (c) under that party's control or right of control, and (d) in return for express or implied compensation or in-kind benefits."[122] As such, the Third Circuit allowed the case to proceed, and affirmed the district court's denial of the NCAA's motion to dismiss.[123] In choosing to find that college athletes may be university employees for FLSA purposes, the court rejected the reliance on the *Board of Regents* dicta by the Seventh Circuit in *Berger v. NCAA*[124] and the Ninth Circuit's analysis in

114. *Berger*, 843 F.3d at 293; *Dawson*, 932 F.3d at 909.

115. *Dawson*, 932 F.3d at 912; *see Berger*, 843 F.3d at 293 (reasoning that athletes spend a large amount of time playing for their school "without any real expectation of earning an income").

116. Johnson v. NCAA, 108 F.4th 163, 180 (3d Cir. 2024).

117. *Id.* at 167, 180.

118. *Id*. at 176 (quoting 29 U.S.C. § 203(e)(1)). This definition has been described as "the broadest . . . that has ever been included in any one act." United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657 (1937) (statement of Sen. Hugo Black)).

119. *Johnson*, 108 F.4th at 176 (quoting Martin v. Selker Bros. Inc., 949 F.2d 1286, 1293 (3d Cir. 1991)).

120. *Id*. at 178.

121. *Id.*; *see also* Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944) (applying a similar definition); IBP, Inc. v. Alvarez, 546 U.S. 21, 25 (2005) (same); De Asencio v. Tyson Foods, Inc., 500 F.3d 361, 371 (3d Cir. 2007) (illustrating how the cases collectively form this principle).

122. *Johnson*, 108 F.4th at 180 (internal citations omitted).

123. *Id.* at 167.

124. Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016).

Dawson v. NCAA,[125] which dismissed a similar case based on general principles from Supreme Court FLSA precedent.[126]

Under the agency test adopted in *Johnson*, it seems likely that athletes would be university employees for FLSA purposes, particularly in a post-*House* world of revenue sharing. Athletes would be performing services for the university of playing college sports in return for compensation.[127] The revenue sharing compensation would be pay-for-play, eliminating the ability of the university to hide behind the "education-related" costs idea that supports the argument that athletes are students, not employees.[128] Indeed, this is the basis for the Court's decision in *Alston.* It was Justice Kavanaugh's concurrence that suggested that the relationship was purely economic in nature, a position undermined by the model proposed here, where athletes are employees, just not of the universities.[129]

Certainly, the athletics department exercises control over the athlete, and perhaps will do so even more with direct payments. And the participation in sports would continue to benefit the institution, not just to generate television revenue and revenue from games, but also to serve as a marketing tool to attract the students who provide the tuition revenue upon which the institution's future depends.[130]

In the labor law context, a similar evolution is occurring. In 2014, Northwestern football players petitioned the National Labor Relations Board (NLRB) for the recognition as an entity that could hold a union election.[131] NLRB regional director Peter Ohr granted the athletes the right to form a

125. Dawson v. NCAA, 932 F.3d 905 (9th Cir. 2019).

126. *Berger*, 843 F.3d at 29; *Dawson*, 932 F.3d at 908–10; *Johnson*, 108 F.4th at 181–82. The court in *Johnson* of course had the benefit of the Court's 2021 decision in *Alston* which had rejected the *Board of Regents* dicta as providing antitrust immunity. Alston v. NCAA, 141 S. Ct. 2141, 2158 (2021). If, upon remand, the district court ultimately finds that college athletes are employees for FLSA purposes and awards remedies to the plaintiffs, and the Third Circuit affirms, the case will create a circuit split and perhaps end up in the Supreme Court.

127. *In re* College Athlete NIL Litigation, No. 20-cv-03919, 2025 WL 1675820, at *1–2 (N.D. Cal. June 6, 2025).

128. *Alston*, 141 S. Ct. at 2166–68 (Kavanaugh, J., concurring).

129. *Id.* at 2168 (Kavanaugh, J., concurring) (noting that student athletes generate billions of dollars in revenues for their universities and for the NCAA).

130. *See generally*, KRISTI DOSH, SATURDAY MILLIONAIRES: HOW WINNING FOOTBALL BUILDS WINNING COLLEGES (2013) (explicating the connection between athletic success and improving enrollment numbers); Jordan R. Bass, Claire C. Schaeperkoetter & Kyle S. Bunds, *The "Front Porch": Examining the Increasing Interconnection of University and Athletic Department Funding*, 41 ASHE HIGHER ED. REP., no. 5, 2015, at 46 (demonstrating the connection between athletic success and academic fundraising).

131. Decision & Direction of Election, Northwestern Univ., No. 13-RC-121359 NLRB 2 (Mar. 26, 2014). Interestingly, the motivation for unionizing did not focus on pay-for-play, but instead on continuing medical benefits beyond graduation for injuries suffered while playing football. Joe Nocera and Ben Strauss, *Fate of the Union: How Northwestern football union nearly came to be*, SPORTS ILLUSTRATED (Feb. 24, 2016), https://www.si.com/college/2016/02/24/northwestern-union-case-book-indentured [https://perma.cc/GV3F-AQL7].

union, largely for similar reasons to the court in *Johnson* and *Alston*—that the athletes participated for commercial reasons, not merely educational ones.[132] The NLRB subsequently vacated the decision on jurisdictional grounds.[133] Ohr's striking language pre-dated Kavanaugh's concurrence in *Alston* but shared the same sentiment—the focus of college football was economic more than academic.[134]

In 2021, NLRB general counsel Jennifer Abruzzo wrote a memorandum arguing that athletes had the right to unionize and that the NCAA and its member institutions referring to athletes as "student-athletes" violated their rights under the NLRA.[135] Dartmouth University's basketball team subsequently filed a case and successfully unionized in 2023.[136] Additional cases involving students at Notre Dame[137] and Southern California (USC)[138] were pending, but the plaintiffs have withdrawn them after the 2024 presidential election.[139]

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132. Decision & Direction of Election, Northwestern Univ., No. 13-RC-121359, at 14, 18, 23.

133. Northwestern Univ., 362 NLRB 1350, 1355–56 (Aug. 17, 2015).

134. Decision & Direction of Election, Northwestern Univ., No. 13-RC-121359, at 14. Specifically, Ohr asserted:

> Understandably, the goal of the football program is to field the most competitive team possible. To further this end, players on scholarship are initially sought out, recruited and ultimately granted scholarships because of their athletic prowess on the football field. Thus, it is clear that the scholarships the players receive is compensation for the athletic services they perform for the Employer throughout the calendar year, but especially during the regular season and postseason.

Id.

135. General Counsel Memorandum, Jennifer A. Abruzzo, NLRB, 1–2 (Sep. 29, 2021), https://www.nacua.org/docs/default-source/new-cases-and-developments/2021/statutory-rights-of-players-at-academic-institutions-_student_athletes_-under-the-national-labor-relations-act.pdf [https://perma.cc/V7AK-FDRF] (finding that college athletes are employees for purposes of the NLRA).

136. Decision and Direction of Election, Trustees of Dartmouth College, 01-RC-325633 NLRB (Feb. 5, 2024). The Dartmouth players have subsequently ceased to oppose the university's NLRB appeal. Ryan Golden, *Dartmouth Basketball Players Withdraw Labor Union Bid*, HIGHER ED DIVE (Jan. 7, 2025), https://www.highereddive.com/news/dartmouth-basketball-players-withdraw-labor-union-bid/736553/ [https://perma.cc/B48M-URN3].

137. Charge Against Employer, Univ. of Notre Dame, No. 25-CA-340413 NLRB (Apr. 18, 2024); Assoc. Press, *Unfair Labor Complaint Filed Against Notre Dame Over Athletes*, ESPN: (Apr. 18, 2024, 9:55 PM), https://www.espn.com/college-sports/story/_/id/39972209/unfair-labor-complaint-filed-notre-dame-athletes [https://perma.cc/8M2D-EX9E].

138. Order Granting the Charging Party's Motion to Withdraw Charges, Univ. of S. Cal., No. 31-CA-290326 NLRB (Jan. 8, 2025); Joe Reedy, *Testimony in USC Case Before Labor Relations Board Administrative Judge Could Be Wrapping Up*, AP NEWS (Apr. 15, 2024, 1:27 PM), https://apnews.com/article/usc-ncaa-nlrb-b261dd0164b4bd17e00e4c7da5ca3f98 [https://perma.cc/E67L-VRBV].

139. The plaintiffs subsequently dropped their cases in anticipation of a more conservative, labor-hostile NLRB. Michael McCann, *Notre Dame, Other NLRB Athlete Employment Charges Dropped*, SPORTICO (Jan. 15, 2025), https://www.sportico.com/law/analysis/2025/notre-dame-nlrb-charges-dropped-1234824102 [https://perma.cc/QU7D-LSRX].

There are two important challenges for universities related to the question of athlete employment. If and when college athletes receive legal confirmation that their relationship to the university is as employees and not just as athletes, universities will have to respond.

First, many legal rights and consequences flow from categorizing athletes as employees.[140] Athletes must pay taxes on non-exempt remuneration from universities[141]; universities must provide athletes minimum wage[142] and accord certain benefits including health care,[143] workers' compensation,[144] and provide for leave;[145] federal discrimination laws apply;[146] other benefits, responsibilities, and regulations may also apply.[147] One can imagine, for instance, an increase in Title VII discrimination suits related to playing time and decisions to offer athletes a position on the team, particularly with a salary attached to the revenue sharing provided by the *House* settlement.[148] This becomes even more likely if eligibility rules disappear, and athletes can stay for longer than four years.

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140. *See, e.g.*, Edelman, McCann & Holden, *supra* note 109, at 3–4 (exploring the many consequences of making athletes university employees).

141. Tim Shaw, *NCAA's Tax-Exempt Status Under Pressure as Student-Athletes Gameplan for New Revenue Sharing*, THOMSON REUTERS (Sep. 2, 2025), https://tax.thomsonreuters.com/news/ncaas-tax-exempt-status-under-pressure-as-student-athletes-gameplan-for-new-revenue-sharing/ [https://perma.cc/WQ5E-GXLY].

142. 29 U.S.C. § 206.

143. *See, e.g.*, 42 U.S.C. § 4980H (establishing requirements for employer-sponsored insurance). The Affordable Care Act would require providing health insurance to athletes just like other university employees, presuming the athletes continued to participate above the thirty-hour-a-week threshold. *See, e.g.*, Bobby Stroup, *The NCAA May Pay a Healthy Sum to Student Athletes*, PETRIE-FLOM CENTER: BILL OF HEALTH (Jan. 8, 2024), https://petrieflom.law.harvard.edu/2024/01/08/the-ncaa-may-pay-a-healthy-sum-to-student-athletes/ [https://perma.cc/2HXT-CGZC] (exploring the costs of providing health care benefits to athletes). The NCAA has increasingly tried to fill the gap, but that was before revenue-sharing. *See* Nicole Auerbach, *NCAA to Offer 2 Years of Post-Eligibility Injury Insurance Coverage to All Athletes*, N.Y. TIMES: THE ATHLETIC (Aug. 2, 2023), https://www.nytimes.com/athletic/4742796/2023/08/02/ncaa-injury-insurance-medical-coverage/ [https://perma.cc/LZ58-2ZYY] (describing a new NCAA health care benefit for athletes).

144. The NCAA has previously fought to deny workers' compensation benefits to athletes. *See* Waldrep v. Tex. Emps. Ins. Ass'n, 21 S.W.3d 692, 698, 701 (Tex. App.—Austin 2000, pet. denied) (finding that a student-athlete on scholarship is not considered an employee for purposes of Texas worker's compensation law).

145. 29 U.S.C. § 2612.

146. 42 U.S.C. § 2000e-2.

147. These might include requirements of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1003; Social Security requirements and benefits, 42 U.S.C. §§ 409–10; Medicare tax requirements and benefits, 26 U.S.C. § 3101; disability benefits and accommodations, 42 U.S.C. § 12102 et seq.; and other benefits and requirements part of the human resources package for university employees. *See, e.g.*, Edelman, McCann, & Holden, *supra* note 109109, at 53–54 (stating that classifying college athletes as student-athletes was intended to prevent requirements conferring employment benefits).

148. *See* sources cited *supra* notes 97 and 100 and accompanying text; *see, e.g.*, Cox v. Nat'l Football League, 29 F. Supp. 2d 463, 466–67 (N.D. Ill. 1998) (involving an NFL Title VII lawsuit challenging playing time decisions).

The labor law landscape adds a further complication. Many states, mostly in the South, do not afford public sector employees the right to collectively bargain, the practical effect of which is that public employees are unable to enter into collective bargaining agreements with state employers.[149] As a result, athletes at private schools can, in theory, form unions while athletes at many public schools (including those in some of the most prominent football programs) cannot.[150]

C. The Title IX Problem

A final challenge facing college sports relates to the application of Title IX to intercollegiate athletics.[151] Title IX requires gender equity, which to date has meant providing equal opportunity to male and female athletes.[152] This does not, however, require equal resources to be spent on the sports themselves.[153] The Office for Civil Rights (OCR), which promulgates and enforces Title IX regulations, has found that universities can comply with this equal opportunity requirement in one of three ways.[154]

First, the university can offer athletic scholarships in proportion to the gender divide of students enrolled at the university.[155] For instance, if fifty-five percent of enrolled students are women, then fifty-five percent of athletic scholarships should be for women.[156] A second safe harbor relates to the

149. *See, e.g.*, CJLE: LAB, *Building Worker Power in Cities & States: State Constitutions and Public Sector Collective Bargaining Rights*, CTR. FOR LAB. & JUST ECON. (Sep. 1, 2024), https://clje.law.harvard.edu/publication/building-worker-power-in-cities-states/state-constitutions-and-public-sector-collective-bargaining-rights [https://perma.cc/D6DJ-4RCX] (explaining that many states in the South do not protect or allow public sector workers to collectively bargain).

150. *See, e.g.*, Ryan Quinn, *Higher Ed Workers Seek to Coordinate Nationally*, INSIDE HIGHER ED (Mar. 26, 2024), https://www.insidehighered.com/news/faculty-issues/labor-unionization/2024/03/26/higher-ed-workers-seek-coordinate-nationally [https://perma.cc/8PGR-MYNL] ("About 20 states don't offer collective bargaining rights to any public college or university workers.").

151. 20 U.S.C. § 1681(a) (1972); *Equal Opportunity in Intercollegiate Athletics: Requirements Under Title IX of the Education Amendments of 1972*, U.S. DEP'T. EDUC. (Jan. 14, 2025), https://www.ed.gov/laws-and-policy/civil-rights-laws/sex-discrimination/equal-opportunity-in-intercollegiate-athletics-requirementsunder-title-ix-of-the-education-amendments-of-1972 [https://perma.cc/JL3H-QTSN].

152. U.S. DEP'T. EDUC., *supra* note 151151.

153. NCAA, TITLE IX 50TH ANNIVERSARY REPORT: THE STATE OF WOMEN IN COLLEGE SPORTS 27 (2022), https://s3.amazonaws.com/ncaaorg/inclusion/titleix/2022_State_of_Women_in_College_Sports_Report.pdf [https://perma.cc/LUU4-9MC5]; ESPN News Services, *NCAA's Title IX Report Shows Stark Gap in Funding for Women*, ESPN (June 23, 2022, 12:30 PM), https://www.espn.com/college-sports/story/_/id/34136495/ncaa-title-ix-report-shows-gap-funding-women [https://perma.cc/9MUV-PDQS].

154. 34 C.F.R. § 106.37(c) (2024).

155. *See id.* (mandating proportional athletic scholarship opportunities for each sex).

156. Courts have construed this percentage amount rigorously, meaning that being off even a small percentage would indicate non-compliance. *See* Biediger v. Quinnipiac Univ., 691 F.3d 85, 106 (2d Cir. 2012) (finding that a disparity of 3.62% was disproportionate); *see also* Wyatt Honse

recent movement of the athletic program toward proportionality.[157] If the institution has not reached proportionality, but in recent years has made progress toward proportionality by adding women's sports, has plans to increase the number of women's scholarships, or discontinues male sports, then the institution can satisfy Title IX, at least for the present.[158] Finally, a third safe harbor exists in situations where universities have sought to offer additional opportunities to women in an effort to move toward proportionality, but interest in participation does not currently exist.[159]

Title IX becomes increasingly important with the addition of revenue sharing for two reasons. First, the consequence of revenue sharing is that the amount of resources available to fund non-revenue sports will diminish.[160] This means that athletic departments may decide to move varsity sports to club status and eliminate scholarships.[161] Title IX requires that institutions who do this maintain proportionality in athletic scholarships.[162] With increasing percentages of women in the overall student body, the number of women's athletic scholarships required to achieve proportionality also increases. This, along with the continued size of football-program scholarships (eighty-five),[163] without women's sports of equivalent size, creates a situation where all men's scholarships are going to football players, leaving less scholarships available for other men's sports. Therefore, many men's non-revenue sports are in jeopardy and may not persist. Certainly, Title IX will remain critical to the preservation of women's sports.

& Jayma Meyer, *Title IX's "Substantial Proportionality" Test: Old Challenges and New Debates in Assessing Whether a School Provides Equal Opportunity to Participate in Athletics*, 33 MARQ. SPORTS L. REV. 83, 111–19 (2023) (discussing the proportionality standard more generally).

157. Title IX of the Education Amendments of 1972; a Policy Interpretation, 44 Fed. Reg. 71418 (1979); *see* Neal v. Bd. of Trs. of Cal. State Univs, 198 F.3d 763, 767 (9th Cir. 1999) (implementing the policy guidance).

158. Title IX of the Education Amendments of 1972, *supra* note 157; *Neal*, 198 F.3d at 767.

159. Title IX of the Education Amendments of 1972, *supra* note 157; Cohen v. Brown Univ., 101 F.3d 155, 165 (1st Cir. 1996) (discussing the equal athletic opportunity compliance test).

160. David Cobb, *House v. NCAA Settlement Winners and Losers*, CBS SPORTS (May 24, 2024, 8:56 AM), https://www.cbssports.com/college-football/news/house-v-ncaa-settlement-winners-and-losers-athletes-take-monumental-step-non-revenue-sports-at-risk/ [https://perma.cc/4Q2G-775C]; William W. Berry III, *Saving Camelot? NIL and the Future of Amateurism*, 50 BYU L. REV. 197, 217–18 (2024).

161. *See* Douglas DePeppe and Brandon Leopoldus, *Proposed NCAA Settlement Threatens Non-Revenue Sports: Roster Caps Jeopardize 25,000 D1 Roster Spots*, SPORTS ILLUSTRATED (May 6, 2025), https://www.si.com/high-school/news/proposed-ncaa-settlement-threatens-non-revenue-sports-roster-caps-jeopardize-25-000-d1-roster-spots-01jfrmymg4m6 [https://perma.cc/8JKE-KGBG] (explaining how non-revenue sports may no longer be funded).

162. 34 C.F.R. § 106.37(c).

163. David Cobb, *SEC Maintains 85-Scholarship Limit for 2025 Season Ahead of Transformative House v. NCAA Settlement*, CBS SPORTS (Nov. 7, 2024, 7:19 PM), https://www.cbssports.com/college-football/news/sec-maintains-85-scholarship-limit-for-2025-season-ahead-of-transformative-house-v-ncaa-settlement/ [https://perma.cc/EVL4-ZRNE]. The number will increase to 105 going forward. *Id.*

The second, more complicated issue is whether Title IX applies to revenue sharing. Under the *House* settlement, women will not receive an equal share of the revenue distribution.[164] With the majority of the revenue coming from college football, the NCAA and its member institutions argue that it does not violate Title IX to pay football players a greater share (if not all) of that revenue.[165] If the NCAA did allocate revenue equally based on gender, football players will likely challenge that distribution.

The Title IX question relates in part to the degree to which the payments in question relate to education. In the private sector, there is no legal requirement that companies pay men and women equally. At the same time, federal law does clearly prohibit gender discrimination in pay under both Title VII[166] and the Equal Pay Act.[167] On one level, the athlete-employees are doing the same job—participating in intercollegiate athletics. On another level, one could argue that football is fundamentally different from other sports in such a way that justifies pay differentials.

One wonders, however, if the revenue difference from men's and women's sports relates more to the history of promoting and televising men's sports more frequently than women's.[168] The viewership for the women's 2024 NCAA basketball tournament final exceeded the viewership from the men's tournament final for the first time.[169] The television networks seem to

164. *See In re* College Athlete NIL Litigation, No. 20-cv-03919, 2025 WL 1675820, at *6 (N.D. Cal. June 6, 2025) (explaining that 90% of the additional compensation claims settlement amount will go to men's sports).

165. *See* Lavigne, *supra* note 55 ("Many major college athletic departments plan to distribute the majority of [the settlement] money to athletes in sports that generate the most revenue . . .").

166. 42 U.S.C. § 2000e-4.

167. 29 U.S.C. § 206(d)(1).

168. *See* Cheryl Cooky, LaToya D. Council, Maria A. Mears & Michael A. Messner, *One and Done: The Long Eclipse of Women's Televised Sports, 1989-2019*, 9 COMMC'N & SPORT 347, 351–52, 355 (2021) (presenting comparative data of airtime received by men's and women's sports); Sarah Scire, *Most TV Completely Ignores Women's Sports*, *a 30-Year Study Finds*, NIEMAN JOURNALISM LAB (Mar. 24, 2021, 2:35 PM), https://www.niemanlab.org/2021/03/most-tv-completely-ignores-womens-sports-a-30-year-study-finds/ [https://perma.cc/CG6Y-9ZMU] (revealing that "80% of televised sports news . . . included *zero* stories on women's sports") (emphasis in original).

169. Molly Bohannon, *NCAA Women's Basketball Championship Beat Men's Game in Ratings for First Time Ever*, FORBES (Apr. 9, 2024, 6:11 PM), https://www.forbes.com/sites/mollybohannon/2024/04/09/ncaa-womens-basketball-championship-beat-mens-game-in-ratings-for-first-time-in-history/ [https://perma.cc/5WNM-6YGB]. Caitlyn Clark, the star guard for Iowa, deserves some of the credit for this increased popularity and had a similar impact on WNBA ratings. *See, e.g.*, Jack Baer, *Here's Every Way Caitlin Clark Made Ratings History this Year*, YAHOO! SPORTS (Sep. 20, 2024), https://sports.yahoo.com/heres-every-way-caitlin-clark-made-ratings-history-this-year-181048197.html [https://perma.cc/WG5Z-4C7E] (reporting on the ratings for women's basketball games since Clark entered the public eye); Alex Leeds Matthews, *How Women's NCAA Basketball and Caitlyn Clark Broke Viewership Records, in Three Charts*, CNN (Apr. 10, 2024, 1:23 PM), https://www.cnn.com/2024/04/10/us/ncaa-womens-basketball-ratings-dg/index.html [https://perma.cc/UM7K-B5SB] (presenting viewership data for the 2024 NCAA women's basketball championship).

be adjusting to the appetite for women's sports, with increased coverage of women's tennis during the most recent season.[170] Either way, one consequence of revenue sharing is likely to be litigation challenging the chosen approach in light of what Title IX might or might not require.

II. Conference-Employees and Student-Athletes

Over the past two decades, the NCAA and university presidents have elected to maintain the student-athlete model and fight for its continued existence. Its future has become increasingly dubious, not only from successful antitrust challenges, but also from the advent of state NIL laws which have enabled boosters to become increasingly involved in providing third party compensation to athletes through collectives.

One curious part of the increasing commercialization of intercollegiate athletics has related to the way in which universities have handled this increased revenue. Most institutions have not used the tens of millions of extra annual revenues to increase the quality of their academic programs or academic facilities. Rather, institutions have treated money generated by athletics as money for athletics to spend, meaning that the revenue funds additional sports, increases in coach salaries, and athletic facility improvements. With revenue-sharing part of the budget post-*House*, these monies will, at least in part, go to the athletes themselves.

University presidents have been content to allow athletics to keep the television revenue because they view athletics as the front porch of the institution, critical to attracting students and boosting enrollment. Failing to adequately fund an institution's football team, for instance, might result in a decline in competitiveness such that the university's athletic brand diminishes in a way that might affect enrollment. With the 2026 enrollment cliff fast approaching in which the percentage of high school seniors drops fifteen percent and stays that way for a decade, the focus on enrollment, particularly at large public institutions, seems likely to continue.[171]

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170. Women's professional tennis has drawn closer to men's tennis in viewership and on occasion surpassed it. BLOOMBERG, *Serena Williams Match Drew 50% More Viewers Than Men's Finals*, FORTUNE (Sep. 11, 2018, 3:34 PM), https://fortune.com/2018/09/11/serena-williams-carlos-ramos/ [https://perma.cc/LQP6-G6WE]; Chris Czermack, *Tennis Viewership Statistics*, TENNIS CREATIVE (Dec. 3, 2020), https://tenniscreative.com/tennis-viewership-statistics/ [https://perma.cc/VB8B-SYMR]; *see* Craig O'Shannessy, *Looking for Equality in Tennis? Check the Stat Sheet*, N.Y. TIMES (Aug. 26, 2018), https://www.nytimes.com/2018/08/26/sports/tennis-equality.html [https://perma.cc/L7TJ-AXY3] (highlighting physical and technical parity between men's and women's tennis).

171. Missy Kline, *The Looming Higher Ed Enrollment Cliff*, CUPAHR, Fall 2019, at 24, https://www.cupahr.org/issue/feature/higher-ed-enrollment-cliff [https://perma.cc/3XDP-V3LG]; Dan Bauman, *Colleges Were Already Bracing for an 'Enrollment Cliff.' Now There Might Be a Second One*, CHRON. HIGHER ED. (Feb. 7, 2024), https://www.chronicle.com/article/colleges-were-already-bracing-for-an-enrollment-cliff-now-there-might-be-a-second-one [https://perma.cc/AK3Y-FMSL].

But rather than let litigation and state law drive the model of intercollegiate athletics, institutions have a chance to preserve the valuable parts of the student-athlete model while also providing for revenue sharing consistent with both federal law and the exploding commercialism of intercollegiate athletics. Specifically, institutions should adopt a conference-employee model, while maintaining the university-student-athlete amateur relationship. As explained below, this approach solves the antitrust, labor law, and Title IX problems.

A. Conference-Employees

Under this model, athletes should become employees of the conference to which their institution belongs. Conferences would pay athletes a salary based on the share of the revenue they generate.[172] The pay allocation of the television money already works this way. The College Football Playoff and the NCAA pay conferences their share of the television revenue, then the conferences divide up that revenue among the universities.[173]

The terms and conditions of conference employment could regulate athlete participation in their relevant sports, creating a better balance between athletics and academics. And this approach would separate the business part of college sports from the academic part. Indeed, as discussed below, this model offers a way to *save* the concept of "amateur" student-athlete rather than abandon it as the *House* settlement will do.

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172. Many law firms operate a similar model. Megan Smith, *Law Firm Profit Sharing Formulas and Compensation Models*, CLIO BLOG, https://www.clio.com/blog/law-firm-profit-sharing-formulas/ [https://perma.cc/US5Z-7NT9]; Francis Mundin, *Law Firm Profit Sharing Formulas and Compensation Models*, L. CROSSING (Jan. 1, 2024), https://www.lawcrossing.com/employers/article/900055247/Law-Firm-Profit-Sharing-Formulas-and-Compensation-Models/ [https://perma.cc/2QSA-J4P2].

173. Traditionally, the revenue sharing in the Power conferences was equal among institutions, but in recent years, the Atlantic Coast Conference (ACC) has adopted an unequal revenue sharing model in attempt to placate Florida State and Clemson, both of whom have sued to attempt to get out of the conference agreement. Andrea Adelson, *ACC Endorses New Revenue Distribution Model to Reward Success*, ESPN (May 24, 2023, 1:09 PM), https://www.espn.com/college-football/story/_/id/37721321/acc-endorses-new-revenue-distribution-model-reward-success [https://perma.cc/4HEC-YUGM]; Amanda Christovich, *Florida State, Still Suing ACC, Claims It Never Wanted to Leave*, FRONT OFF. SPORTS (Dec. 12, 2024, 11:34 AM), https://frontofficesports.com/fsu-acc-lawsuit-grant-of-rights/ [https://perma.cc/JPG5-YATJ]; Andrea Adelson, *ACC Boss to Fight Clemson, FSU Lawsuits 'For as Long as it Takes*,' ESPN (July 22, 2024, 2:30 PM), https://www.espn.com/college-football/story/_/id/40617735/acc-boss-fight-clemson-fsu-lawsuits-long-takes [https://perma.cc/JJ3R-XLMT]. The ACC model gives new members Stanford and Cal only a 30% share, with Southern Methodist University foregoing revenue sharing for its first nine years in the league. David Hale & Andrea Adelson, *ESPN Exercises Option to Televise ACC Sports Through 2036*, ESPN (Jan. 30, 2025), https://abc7news.com/post/sources-espn-oks-option-televise-acc-sports-36/15848852 [https://perma.cc/NW35-4GDH]. The model also will reward post-season participants a higher revenue share, again in part to placate Clemson and Florida State. *Id*. All of this is happening in the context of a new media rights deal with ESPN that extends to 2036. *Id.*

Practically, the conference contract would be one that athletes enter when they enroll in a university. Historically, athletes have signed the National Letter of Intent (NLI) to declare the university they would attend and reserve their scholarship position on the team.[174] The NLI served to both bind the student to the institution[175] and end the recruitment of the student.[176]

A conference employment contract could work in a similar way, albeit with different parameters. As with any employment contract, it could be an at-will contract or a contract for a term of years. The more likely approach would be a term contract for four years, which would give the athlete security. As with the National Football League (NFL) or the National Basketball Association (NBA), the contracts could be standard subject to and consistent with a collective bargaining agreement.[177] Further, athletes would be salaried employees and not hourly wage employees. As such, conferences could avoid issues related to extreme monitoring of athlete's time as well as the need to pay overtime to athletes.[178]

The incentive of the conference and its member institutions to form a management-labor union relationship with the athletes relates to the ability to cap athlete remuneration and limit athlete movement. The current NIL model contains no caps on athlete compensation and a revenue sharing model

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174. The NCAA has abandoned the National Letter of Intent in light of the new revenue sharing model that will result from the *House* settlement. Eli Lederman, *NCAA Approves Elimination of National Letter of Intent Program*, ESPN (Oct. 9, 2024, 3:31 PM), https://www.espn.com/college-sports/story/_/id/41702974/ncaa-approves-elimination-national-letter-intent-program [https://perma.cc/6DQ4-3N7C]; Meghan Durham Wright, *DI Council Approves Changes to Notification Windows in Basketball, Football*, NCAA: MEDIA CENTER (Oct. 9, 2024, 2:26 PM), https://www.ncaa.org/news/2024/10/9/media-center-di-council-approves-changes-to-notification-of-transfer-windows-in-basketball-football.aspx [https://perma.cc/PU9F-X4Y3]; Sportse Media, *NCAA Eliminates National Letter of Intent: What It Means for College Sports*, SPORTSEPRENEUR (Oct. 9, 2024), https://sportsepreneur.com/ncaa-eliminates-national-letter-of-intent-college-sports/ [https://perma.cc/UYX3-YAGH].

175. Breaking an NLI agreement meant that some students (football, basketball, baseball, and hockey) would lose two years before playing college sports again—the current year and a year of sitting out after transferring—under the old transfer rule. William W. Berry III, Essay, *The Transfer Rules Litmus Test*, 17 VA. SPORTS & ENT. L.J. 151, 154–55 (2019).

176. *NLI Recruiting FAQs*, NATIONAL LETTER OF INTENT, https://web.archive.org/web/20241127023720/http://www.nationalletter.org/frequentlyAskedQuestions/recruiting.html [https://perma.cc/E37H-2XJ8]. In relevant part, the FAQ made clear for student-athletes that:

> [o]nce you sign an NLI, all other institutions are obligated to cease contacting you and your family members. Accordingly, you have an obligation to notify any coach from an NLI institution that you have signed an NLI. Any contact in excess of an exchange of a greeting is not permitted regardless of the conversation. The conversation does not have to result in recruiting discussion for a recruiting ban violation to occur.

Id.

177. *See, e.g.*, Martin J. Greenberg, *Drafting of Player Contracts & Clauses*, 4 MARQ. SPORTS L.J. 51, 52–53 (1993) (discussing pro contracts and their relationship to the collective bargaining agreement); Gary R. Roberts, *Interpreting the NFL Player Contract*, 3 MARQ. SPORTS L. REV. 29, 30 (1992) (discussing collective bargaining agreements in the NFL).

178. For the federal law concerning overtime pay, see 29 U.S.C. § 207(a).

ultimately might not have one either.[179] The NIL model has drained the university of gifts and fundraising both inside and outside athletics, with alumni gifts focusing on funding the collectives at many universities.[180] And ultimately, NIL contributions may diminish because of donor fatigue.[181]

A collective bargaining agreement gives the universities, via the conferences, the ability to impose a salary cap on the amount of revenue shared with the athletes. Whether a hard cap, soft cap, or even a luxury tax, this approach has been successful in curbing excessive spending in professional sports.[182] It also has promoted parity and a level of competitive balance.[183]

In addition to being able to cap the revenue shared with athletes in a manner compliant with the Sherman Act, a collective bargaining agreement would also enable the conferences and their institutions to regulate athlete transfers again without facing antitrust scrutiny.[184] Historically, the NCAA restricted the ability of athletes in revenue sports (football, basketball, baseball, and hockey) to transfer, requiring athletes to sit out for a year before resuming their athletics career.[185] Over time, an increasing number of athletes

179. The 22% cap is a short-term attempt but likely will not endure given the antitrust issues present. *See* Notice of Appeal from a Judgment or Order of a United States District Court at 2, *In re* College Athlete NIL Litigation No. 20-cv-03919 (9th Cir. filed June 11, 2025) (revealing an anticipated antitrust challenge on appeal).

180. *See, e.g.*, Wesley Meares, Lance Hunter, Martha Ginn & William Hatcher, *NIL and Higher Education: An Exploration of the Early Impact of NIL on Fundraising and Competition in Universities and Athletic Departments*, 17 J. INTERCOLLEGIATE SPORT 1, 2, 9 (Nov. 8, 2024), https://journals.ku.edu/jis/article/view/21468/20828 [https://doi.org/10.17161/jis.v17i3] (finding that 63% of respondent university officials viewed NIL as creating some form of donor fatigue, where donors are less likely to respond to university appeals for donation).

181. Noah Henderson, *NIL in 2024: The Year of Donor Fatigue?*, SPORTS ILLUSTRATED (Jan. 3, 2024), https://www.si.com/fannation/name-image-likeness/news/nil-in-2024-the-year-of-donor-fatigue-noah9 [https://perma.cc/SV9T-ZBXG]; Tiara White, *College Donors Are Fed Up with Pressure to Pay More and More Money to Attract Top Athletes*, BUS. INSIDER (June 24, 2024, 2:20 PM), https://www.businessinsider.com/how-college-sports-change-donor-fatigue-nil-recruiting-student-athletes-2024-6 [https://perma.cc/66K4-QZ2J].

182. *See, e.g.*, Jason M. Edgar, *A Salary Cap Makes Professional Sports Better*, THIRD DOWN THURSDAYS (Feb. 19, 2024), https://www.thirddownthursdays.com/article/a-salary-cap-makes-professional-sports-better [https://perma.cc/BE5M-9N74] (describing how NFL salary caps allow teams like the Detroit Lions and Cleveland Browns to have "Cinderella" seasons therefore making the NFL more exciting for fans).

183. *See id.* This has arguably been part of the NFL's immense popularity. Pete Rozelle deserves some of the credit for promoting parity, or, as he called it, "competitive balance." T.J. Simers, *Competitive Balance Is a Fitting Legacy for Rozelle*, L.A. TIMES (Dec. 14, 1996, 12:00 AM), https://www.latimes.com/archives/la-xpm-1996-12-14-sp-9055-story.html [https://perma.cc/CL93-JTYH].

184. William W. Berry III, *How Labor Unions Can Save the NCAA*, SLATE (Mar. 31, 2014, 5:00 PM), https://slate.com/business/2014/03/northwestern-football-players-allowed-to-unionize-how-labor-unions-can-save-the-ncaa.html [https://perma.cc/JZK9-8BH8].

185. Berry, *The Transfer Rules Litmus Test*, *supra* note 175 at 154.

applied for waivers to this rule and the NCAA increasingly granted them, before ultimately removing all transfer restrictions.[186]

In 2018, the NCAA opened the transfer portal, a formal process by which athletes could provide notice of re-entering the recruiting process and choosing a new institution.[187] The volume of athletes switching schools has since skyrocketed, and the availability of NIL money to induce transfers has only accelerated athlete movement.[188]

While some coaches such as Lane Kiffin (Ole Miss) and Deion Sanders (Colorado) have used the portal as a path to success, the overall effect of the portal has been negative for universities and their athletic teams in several ways. First, it has created massive disruptions for the academic progress of students, particularly those who have transferred multiple times.[189] Second, it has resulted in college athlete recruiting never ending. Although the transfer portal itself occurs in a limited time window, coaches generally must not only recruit athletes to come, but also to stay. The soft recruiting that occurs outside of the portal window is constant, meaning that there is no time in which the sole focus of the coach can be on the team itself.

The annual reshuffling of players comes with its own challenges as well. Athletes have far less time to become accustomed to playing with their new teammates, manifesting in some situations more like all-star teams than well-developed teams that know each other. Further, the threat of athletes leaving adds another level of complication to playing time decisions. Coaches must decide how to balance winning games with giving athletes enough playing time to convince them not to transfer. At the very least, this has hampered the depth of the top programs.

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186. *See id.* at 155 (describing the transfer rule exception); BERRY & LUST, *supra* note 7, at 191–93 (describing changes in the NCAA transfer rules).

187. BERRY & LUST, *supra* note 7, at 192–93; Max Olson, *What Is the College Football Transfer Portal? When Is It?*, ESPN (Nov. 15, 2024, 4:00 PM), https://www.espn.com/college-football/story/_/id/42394369/what-college-football-transfer-portal-works-dates-explained [https://perma.cc/8M4D-LGHD]. This decision does come with some degree of risk, as the athlete has to give up his or her scholarship to enter the portal with no guarantee that a new school will offer a contract or the former school will allow the athlete to resume their prior scholarship. *Id*.

188. Olson, *supra* note 187; BERRY & LUST, *supra* note 7, at 198.

189. Suyash P, *SEC Spokesman Predicts Huge Academic Loss for Transfer Portal Abusers as NIL Debate Grows Louder*, PFSN (June 14, 2024, 1:40 PM), https://www.profootballnetwork.com/mens-cbb/sec-warns-of-academic-costs-amid-transfer-portal-nil-boom/ [https://perma.cc/WEP8-6X59]. The NCAA tried to limit transfers to one without a waiver but abandoned that rule after a flood of waiver applications followed, subsequently adopting no restrictions for students meeting progress-toward-degree requirements. Meghan Durham Wright, *Division I Council Approves Changes to Transfer Rules*, NCAA: MEDIA CTR. (Apr. 17, 2024, 6:35 PM), https://www.ncaa.org/news/2024/4/17/media-center-division-i-council-approves-changes-to-transfer-rules.aspx [https://perma.cc/UR89-GECB]. A federal lawsuit alleging an antitrust violation also convinced the NCAA to abandon its limit on transfers. *See* Ohio v. NCAA, 705 F. Supp. 3d 583, 602 (N.D. W. Va. 2023) (enjoining enforcement of transfer bylaw).

From the perspective of athletes, the transfer portal and the availability of NIL money followed by revenue sharing has been a positive development both in terms of autonomy and remuneration. But that does not mean that a collectively bargained model with a salary cap and more structured transfer rules might not also benefit athletes. As with the pro sports models, a collective bargaining agreement (CBA) could result in a revenue cap higher than the 22% of the *House* settlement.[190] Such an agreement could also ensure that athletes collectively make more, rather than a few star athletes garnering the lion's share of the revenue sharing. CBAs could, for instance, create salary minimums and impose caps that require balance in pay to build a competitive roster.[191]

Similarly, more structured transfer rules could benefit athletes because they could slow the pressure to transfer and allow athletes the opportunity to develop within one system without sacrificing opportunity. Reduced transferring might also enhance and protect the ability of an athlete to pursue a degree.

Having framed this model, one where conferences would employ athletes, the next step is to examine some possible ways in which this model might work in practice. With respect to unionization, athlete unions would work best if separated by gender and by sport. In the Southeastern Conference (SEC), for instance, separate unions might exist for men's football, men's basketball, women's basketball, women's volleyball, men's baseball, and any other sport that achieved a net positive in terms of generating television revenue. The reason that different unions should only include athletes playing the same sport within the conference is that athletes from different sports have different situations with respect to the revenue they generate for the conferences.[192] As such, they are separately situated and

190. As noted, the current revenue cap negotiated in the *House* settlement is 22%, less than half of the close to 50% that professional athletes receive through their collective bargaining agreements. *See, e.g.*, Kurt Badenhausen, *NBA Players Score as Shared Revenue Grows by $250M in New CBA*, YAHOO! SPORTS (Apr. 24, 2023), https://sports.yahoo.com/nba-players-score-shared-revenue-130000564.html [https://perma.cc/JZR5-KA68] [hereinafter Badenhausen, *NBA Players Score*] (explaining the NBA's new CBA formula); Kurt Badenhausen, *The NFL's Biggest Mismatch: Owners Vs. Players in CBA Negotiations*, FORBES (Mar. 16, 2020, 8:19 AM), https://www.forbes.com/sites/kurtbadenhausen/2020/03/16/the-nfls-biggest-mismatch-owners-vs-players-in-cba-negotiations/ [https://perma.cc/A58Y-EFLX] [hereinafter Badenhausen, *The NFL's Biggest Mismatch*].

191. *See, e.g.*, Ramy Elitzur, *NFL and NHL Salary Caps Have Worked Out Well for Players*, ROTMAN INSIGHTS HUB (Aug. 2021), https://www-2.rotman.utoronto.ca/insightshub/finance-investing-accounting/salary-cap [https://perma.cc/UE4Q-BWY5] (explaining how salary caps are used to promote league parity); Helmut M. Dietl, Markus Lang & Alexander Rathke, *The Combined Effect of Salary Cap Restrictions and Revenue Sharing in Sports Leagues*, 49 ECON. INQUIRY 447, 448 (2010) (clarifying the function of salary caps and floors).

192. *See, e.g.*, Andrew Zimbalist, *Who Wins with College Sports?*, ECONOFACT, https://econofact.org/who-wins-with-college-sports [https://perma.cc/M6WL-RVBM]

competing as separate products in the market for entertainment,[193] albeit under the same conference banner.[194]

Unions would organize via the traditional democratic elections, with athletes having the option to opt out of the unions while still remaining subject to the collective bargaining agreements entered into with the conferences.[195] The collective bargaining agreements for each sport could be similar, but would need to address certain issues, including wages, hours, and benefits.[196]

In terms of wages, the most efficient approach would be to pay athletes a salary based upon the revenue generated by their sport for the conference. Athletes would receive a negotiated percentage of that revenue.[197] The conference would then allocate the percentage to the athletes. The simplest and perhaps best way to allocate this remuneration would be equally among all team members. Such an approach would prevent the conference from having to negotiate hundreds of contracts annually, as well as avoid difficult differentiations between athletes of different skills and abilities. Another approach could be to value different positions on the team at different rates, but such a choice could raise questions as to whether the athletes had enough similarity to be in the same union given their different positional responsibilities.

For the most elite athletes, this approach might slightly depress their salaries, but those athletes would be the ones likely to have a future career in professional sports. For the average athlete, this approach would maximize

(demonstrating the disparity in revenue that different sports teams earn, with football and basketball being the highest grossing).

193. *See* Am. Steel Constr., Inc., 372 N.L.R.B. No. 23, 2022 WL 17974956, at *4, 17 (Dec. 14, 2022) (holding that bargaining units must share an "internal community of interest" and listing the factors considered in that determination); Allied Chemical & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 172–73 (1971) (noting that "[s]uch a mutuality of interest serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a functionally distinct minority group of employees from being submerged in an overly large unit"). The different earning potential of student-athletes on different teams would likely reduce the "coherence" of a combined bargaining unit and make it difficult for the combined unit to adequately represent each distinct minority group.

194. It is worth noting that, in recent years, conference branding of the Power conferences, especially the Big Ten and the SEC has likely become as strong as the NCAA brand.

195. *See* 29 U.S.C. § 159(e)(1) (providing for democratic union elections); *id.* § 159(a) (providing that union representatives are the exclusive bargaining representatives for the whole unit).

196. These are the mandatory subjects of collective bargaining. *See* National Labor Relations Act, 29 U.S.C. § 151 (writing that collective bargaining encourages "practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions").

197. As noted, the current rate negotiated in the *House* settlement is 22%, less than half of the close to 50% that professional athletes receive through their collective bargaining agreements. Badenhausen, *NBA Players Score*, *supra* note 190; Badenhausen, *The NFL's Biggest Mismatch*, *supra* note 190.

their earning power during their four years as a college athlete. And for those athletes, that four-year period might be the best opportunity they have to monetize their athletic talent. Notably, in situations where the revenue sharing would not reach minimum wage, conferences should not enter employment agreements with athletes. Doing so would give rise to FLSA claims.[198]

Beyond the salaries of the employee-athletes, conferences would also want to include work hour requirements and limitations, particularly if maintaining the student-athlete university relationship described below is a priority.[199] Something similar to the NCAA approach of a four-hour maximum per day and a twenty-hour maximum per week excluding the time spent on gameday, seems reasonable. The thirty-hour-a-week threshold triggers both full-time employment status and protections under the Affordable Care Act.[200] The conference would thus need to decide whether to adopt a thirty- to thirty-five-hour work schedule (including games) and grant benefits and full-time status, or alternatively, designate the athletes as part-time conference employees, and cap the time spent (including games) below the thirty-hour-a-week threshold.[201] In reality, forcing athlete and coach cooperation with working hours might be challenging.[202]

One hybrid approach might be for the athletes to be full-time employees during the season and part-time employees outside of the season.[203] This would allow students to take a full academic schedule in the off-season and a significantly reduced schedule in-season in light of their full-time conference job as an athlete.[204] This approach, however, would only be effective where the sport in question limited its activities in the off-season semester, such that they actually were part-time, and did not require a thirty- or forty-hour-a-week commitment during the off-season semester.

Other relevant terms and conditions might relate to providing health care for athletes, not just during their time as employees, but for a period after

198. The FLSA mandates minimum wage owed based on hours worked. 29 U.S.C. § 206.

199. The NCAA rule limits the time athletes spend on "countable athletically related activities" to four hours a day and twenty hours a week in season, not counting travel and game days. 2024–25 DI MANUAL, *supra* note 61, at 218. In reality, athletes spend between thirty and forty hours a week on their sport. B. David Ridpath, *It Is Time to Re-frame College Athletes' Time Commitments*, FORBES (Jan. 26, 2016, 4:53 PM), https://www.forbes.com/sites/bdavidridpath/2016/01/26/it-is-time-to-re-frame-college-athletes-time-commitments/ [https://perma.cc/4758-VTQY].

200. *See supra* notes 142–49 and accompanying text.

201. *See supra* notes 142–49 and accompanying text.

202. See for example, Ridpath, *supra* note 199.

203. Universities already do something like this, with many faculty being nine-month employees. Angela Douglas, *Applying for an Academic Position in the US*, TIMES HIGHER EDUC. (Jan. 19, 2022), https://www.timeshighereducation.com/campus/applying-academic-position-us-basics-explained [https://perma.cc/AKU2-AHUA].

204. William W. Berry III, *Educating Athletes: Re-envisioning the Student-Athlete Model*, 81 TENN. L. REV. 795, 821–22 (2014).

the termination of their employment.[205] And other traditional employment benefits such as workers' compensation, Social Security, and retirement benefits might also be part of the conference-athlete employment benefits under the collective bargaining agreement.

Another consideration would be the contract length. Contracts should be four-year contracts, with a grievance policy under the collective bargaining agreement available for athletes seeking a fifth year based on injury, hardship, or some other unforeseen difficulty warranting an extra year of employment. The athlete and the conference could arbitrate situations where the conference did not agree with the athlete's request for a fifth year of employment.

One complication worth addressing would be the transfer rules. One possible approach would be to allow the athlete to opt-out of the contract at certain times.[206] To mitigate the chaos of the transfer portal, an ideal opt-out approach would be to allow athletes to opt out of the contract after the first year and the third year. An end of the first-year opt-out would allow athletes to escape a bad situation or take advantage of an opening in a better situation. An end of the third year opt-out would likewise give a new opportunity for an athlete who has not been able to make the starting unit before his or her contract expires. Requiring athletes to stay for two years in the middle should improve continuity and end the perpetual recruiting without unduly restricting the movement of athletes. Athletes should also receive an automatic opt-out if the head coach of their team changes.[207] The coach's ability to dictate the athlete's role on the team makes this exception an important one.

The opt-outs at these first-year and third-year intervals would also align with the current rules of professional leagues with respect to allowing college athletes in their drafts. The NBA allows college athletes to enter the draft after one year of college,[208] while the National Football League (NFL)[209] and

205. The NCAA currently provides this benefit for two years after graduation. *See* Auerbach, *supra* note 143.

206. It would also, in theory, be possible to transfer the contract to another conference, but such a model would encounter complications where the contracts in the conferences were different, which would be likely, at least in terms of remuneration.

207. The NCAA's NLI barred such movement, a policy that was unfair to athletes in that it restricted their movement but placed no restrictions on coaches. *See supra* notes 175–77 and accompanying text.

208. NBA & NPBA, 2023 NBA-NPBA COLLECTIVE BARGAINING AGREEMENT: JULY 2023 296–97 (2023), https://nbpa.com/cba/ [https://perma.cc/QFS4-P674]; Jonathan Givony, *NBA-NBPA Memo Outlines New NBA Draft Selection Requirements*, ESPN (Apr. 18, 2023), https://www.espn.com/nba/story/_/id/36224467/nba-nbpa-memo-outlines-new-nba-draft-selection-requirements [https://perma.cc/36GA-8F4F].

209. *The Rules of the Draft*, NFL FOOTBALL OPERATIONS, https://operations.nfl.com/journey-to-the-nfl/the-nfl-draft/the-rules-of-the-draft [https://perma.cc/MQZ8-Q4QC]; NFL, COLLECTIVE

Major League Baseball (MLB) allow athletes to enter the draft after their third year.[210] Unlike the NCAA's no-draft rule, which still applies to football but not basketball,[211] athletes should be able to wait to opt out of their contracts until after they know the results of the professional league draft. Athletes should have the choice to enter the professional sport in accordance with the draft or resume their conference-employee contract if they do not find the results of the draft satisfactory.

If athletes did opt out of a conference-employee contract or opt in to a conference-employee contract after transferring from another conference, the contract should only be for the term of years (three or one) remaining in the athlete's four years of eligibility. While conferences could not mandate a four-year contract across conferences, standardizing this time limit would match the four years of an undergraduate degree and help preserve the student-athlete model.[212]

Another part of the conference-employee CBA would relate to the regulation of NIL agreements. In the first instance, such NIL agreements result from the various state laws that allow them.[213] This means that any regulation related to NIL in athlete-conference contracts could not interfere with rights or requirements arising under the state law.

As discussed, the NCAA's NIL restrictions (1) bar use of NIL deals as recruiting inducements and (2) require athletes to provide benefits commensurate with the remuneration received under the NIL deal.[214] The first requirement seems both impractical and nonsensical in a revenue sharing model. It seems impossible to police the use of NIL deals as a recruiting tool. Collectives and athletes will deny that the NIL contract served as an inducement to attend the university in question. Further, it does not seem problematic to allow NIL inducements anyway because of the planned revenue sharing, whether under the *House* settlement or the model proposed in this Article. The bar against inducement related to barring pay-for-play—an NIL inducement—seems like a payment to play the sport rather than

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BARGAINING AGREEMENT 17 (2020), https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf [https://perma.cc/Y29C-8YL5].

210. *Rule 4 Draft*, MAJOR LEAGUE BASEBALL, https://www.mlb.com/glossary/transactions/rule-4-draft [https://perma.cc/C5F8-NC4C]. Under MLB rules, athletes can also enter the draft after high school and forego college. *Id.*

211. *See* Memorandum from Chris Howard, NCAA Dir. of Enf't, to NCAA Div. I Football Student Athletes with Remaining Eligibility (Nov. 21, 2023) (explaining to college football players the logistics of declaring to the draft and retaining eligibility).

212. It is true that many athletes take five or six years currently to complete a degree, but a four-year approach is a reasonable limit, especially with respect to revenue sharing.

213. BERRY & LUST, *supra* note 7, at 117.

214. *See supra* notes 20–23 and accompanying text.

compensation for use of name, image, or likeness.[215] So, a conference-employee CBA should allow the use of NIL agreements as inducements to play for a particular school.

The second requirement of the value provided equating to the NIL compensation, however, seems more legitimate in substance and more practically enforceable. The economic value of an NIL use can certainly range widely, particularly with respect to the actual use of the name, image, or likeness of an athlete. It is possible then for minor activities—appearances, use of photographs, social media posts and appearances—to be worth a significant amount of money. But the athletes must do something or provide something to earn the NIL money received from boosters and collectives. Otherwise, the NIL revenue is simply a form of booster-driven pay-for-play. Indeed, the *House* settlement provides for a new, outsourced enforcement mechanism, The College Sports Commission, to regulate NIL payments from boosters and collectives.[216]

After decades of the NCAA and its member institutions fighting to keep athletic boosters from gaining a foothold in college athletics, the passage of state NIL laws in 2021 has enabled exactly that—boosters gaining access and influence in college athletic programs. While the arrival of revenue sharing might make pure booster pay-for-play seem innocuous, it seems unnecessary for conferences to allow boosters and collectives to maintain such influence. On one level, these NIL payments amount to a sort of bribe—the boosters are literally paying for access to the athletes.

A simple requirement that athletes perform work to legitimize the compensation seems like a valuable safeguard against excessive NIL compensation. Again, athletes may not need to do much, particularly in light of the subjectivity of determining the value of using an athlete's NIL. But the boosters and the collectives must actually use the NIL in some way, not merely pay the player while receiving nothing in return.

A final helpful, albeit controversial, part of a conference-employee CBA NIL policy would relate to the transparency of such agreements. The conference-employee CBA could require athletes to disclose all NIL deals that they enter into with the conference. The conference could then publish the arrangements, including the amount of compensation paid to athletes.

This publication of athlete NIL deals and the remuneration provided would mirror the trend in college and professional sports to disclose the

215. Indeed, under NCAA amateurism requirements, such inducements can actually be criminal when they result in eligibility loss. *See* U.S. v. Gatto, 986 F.3d 104, 112, 129–30 (2d Cir. 2021) (imposing criminal sentences for defendants' inducement of athletes to attend particular schools with cash payments); Berry, *supra* note 16, at 228–35 (discussing *Gatto*).

216. Amanda Christovich, *There's a New NIL Enforcement Entity in College Sports. It's Not the NCAA*, FRONT OFF. SPORTS (June 9, 2025, 12:39 PM), https://frontofficesports.com/theres-a-new-nil-enforcement-body-in-college-sports-its-not-the-ncaa/ [https://perma.cc/HDG2-Q64C].

market for services as reflected in individual contracts. The contracts of college football coaches are public.[217] The contracts of professional athletes are public.[218] The revenue received by the conferences and subsequently distributed to the universities is public.[219]

Boosters and collectives, perhaps the individuals most likely to engage in malfeasance in the orbit of college sports, should likewise have to make their NIL contracts public.[220] A public, transparent NIL market would not only help athletes understand their market value but also allow conferences to market the possible availability of such deals as athlete remuneration beyond the revenue sharing in the conference-employee contract and the amount of the grant-in-aid.

B. Student-Athletes

At the same time that athletes would enter into an employer-employee relationship with the conference of their institution, athletes would maintain their traditional student-athlete relationship with the university.[221] This would mean that, with respect to the university, the athletes would remain both amateurs and students.

Under this model, universities could continue the same contractual relationship with athletes.[222] In this relationship, athletes receive a grant-in-aid that includes all of the athlete's educational costs, including tuition, room, board, books, cost of attendance, and *Alston* money covering other

217. *College Football Head Coach Salaries*, USA TODAY (Oct. 8, 2025), https://sportsdata.usatoday.com/ncaa/salaries/football/coach [https://perma.cc/2V96-HJR7].

218. *E.g.*, *NFL Contracts*, SPOTRAC (last updated 2025), https://www.spotrac.com/nfl/contracts [https://perma.cc/DLW2-HQD9].

219. *SEC Announces 2023-2024 Revenue Distribution*, SEC (Feb. 6, 2025), https://www.secsports.com/news/2025/02/sec-announces-2023-2024-revenue-distribution [https://perma.cc/5GZZ-HMPT].

220. *See, e.g.*, NCAA D1 COMM. ON INFRACTIONS, NEGOTIATED RESOLUTION: FLORIDA STATE UNIVERSITY (2024) (finding football coach impermissibly connected to an NIL collective with a prospective student athlete); NCAA D1 COMM. ON INFRACTIONS, MISSISSIPPI STATE UNIVERSITY PUBLIC INFRACTIONS REPORT (2013) (same); NCAA D1 COMM. ON INFRACTIONS, SYRACUSE UNIVERSITY PUBLIC INFRACTIONS DECISION (2015) (finding booster's bank account was used to directly pay student-athletes and athletic staff); NCAA D1 COMM. ON INFRACTIONS, UNIVERSITY OF ALABAMA, TUSCALOOSA PUBLIC INFRACTIONS REPORT (2002), https://www.tuscaloosanews.com/story/news/2002/02/01/ncaa-infraction-report-212002/27817664007/ [https://perma.cc/5VEB-RZH9] (finding boosters used cash, lodging, and entertainment to induce athletes to sign NLIs with the university); NCAA D1 COMM. ON INFRACTIONS, UNIVERSITY OF MIAMI PUBLIC INFRACTIONS REPORT (2013) (finding booster freely entertained student athletes at his home and yacht).

221. *See* 2024–25 DI MANUAL, *supra* note 61, at 35 (describing what makes an individual an NCAA student-athlete).

222. Indeed, the only part of the traditional relationship not currently intact is the National Letter of Intent, which the NCAA abandoned in 2024. *See supra* notes 174–76 and accompanying text.

educationally related costs.[223] Pursuant to state law, athletes could also receive compensation from third parties for use of their NIL.[224]

This approach would be similar to the Olympic model, where Olympic athletes cannot receive compensation for their actual participation in competition but can receive revenue from third parties for use of their NILs.[225] The idea would be that the institution covers the cost of an athlete's education, which the athlete can further monetize through endorsements.[226]

The two applicable NCAA rules, both designed to frame third-party payments as NIL and *not* pay-for-play, would lose much of their force and necessity under a conference-employee model in the context of the student-athlete / university relationship. The first rule, NCAA's anti-inducement rule, proscribes the use of NIL payments as an inducement to recruit an athlete to a particular institution.[227] The second rule, the use of NIL rule, requires payors to actually use the NIL in such a way that justifies the remuneration, such that the remuneration is not purely pay-for-play.[228]

The anti-inducement rule arguably violates antitrust law, as it restricts the ability of institutions to use NIL payments to compete with other schools in the market for athletes.[229] As discussed below, a CBA regulating NIL could allow conferences to impose a similar restriction without violating the

223. *See supra* note 6 and accompanying text.

224. BERRY & LUST, *supra* note 7, at 107.

225. *See, e.g.*, Alex Moyer, Note, *Throwing Out the Playbook: Replacing the NCAA's Anticompetitive Amateurism Regime with the Olympic Model*, 83 GEO. WASH. L. REV. 761, 825 (2015) (describing the Olympic model as one where athletes "are not paid for their participation" but can access the "commercial free market" for third-party endorsements); John Kealey, *Preserving Fabled Amateurism: The Benefits of the NCAA's Adoption of the Olympic Amateurism Model*, 29 J.L. & POL'Y 325, 361–62 (2020) (advocating for an Olympic model that permits compensation through third-party endorsements and performance bonuses); Maureen A. Weston, *Gamechanger: NCAA Student-Athlete Name & Likeness Licensing Litigation and the Future of College Sports*, 3 MISS. SPORTS L. REV. 77, 110 (2014) (proposing an Olympic-style model where athletes accept third-party sponsorships instead of direct pay, thereby avoiding employee status).

226. The Olympic model is not ideal in that boosters and collectives have a role in intercollegiate athletics. State laws, however, have led to this NIL-centric reality, one that institutions could have avoided had they adopted a conference-employee model with revenue sharing prior to *O'Bannon*, which led to the NIL laws in the first place. BERRY & LUST, *supra* note 7, at 111–13.

227. *See* sources cited *supra* notes 16–18.

228. *See* sources cited *supra* notes 16–18.

229. Indeed, a district court enjoined the NCAA's investigation of a $10 million NIL payment to Nico Iamaneleva. Tennessee v. NCAA, 718 F. Supp.3d 756, 766 (E.D. Tenn. 2024). *See also* Low, *supra* note 95 ("It's a deal that would have paid him in the $10 million range had he stayed four years at Tennessee.").

Sherman Act.[230] Such a restraint on trade would fall under the non-statutory labor exemption to antitrust law.[231]

Even if conferences did not include this kind of rule in their CBAs, the presence of revenue sharing agreements in a CBA would be much more likely to serve as an incentive for an athlete to choose a particular school as opposed to NIL money. Over time, the revenue from the College Football Playoff seems to be a more reliable form of income than third-party NIL deals, which depend on annual contributions from alumni and boosters.[232]

The use of the NIL rule remains important in that it ensures that boosters and collectives are doing more than just providing a third-party form of pay-for-play.[233] Athletes should have to provide their name, image, or likeness in some way to merit the compensation provided in NIL agreements.[234]

This rule becomes particularly important to saving the student-athlete model if universities decide to roll collectives into their athletic departments after the *House* settlement. If the collective is part of the athletic department, then a collective NIL payment made without any NIL value provided by the athlete would be a form of university pay-for-play. This would violate the NCAA's principle of amateurism.[235]

While saving the student-athlete model may seem futile given the revenue sharing of the *House* settlement, its value exists in its ability to provide athletes with an education and career prospects. With only a small percentage going on to play professional sports, the educational component of the student-athlete model provides athletes with a degree and career path that would be lost in a world of semi-pro intercollegiate sports.[236]

Further, higher education institutions exist primarily to educate students, not run athletic programs. If universities lose the ethic of the student-athlete, then revenue sharing will speed institutions in the direction

230. Brown v. Pro Football, Inc., 518 U.S. 231, 234 (1996); Mackey v. Nat'l Football League, 543 F.2d 606, 623 (8th Cir. 1976); Powell v. Nat'l Football League, 930 F.2d 1293, 1303–04 (8th Cir. 1989); Clarett v. National Football League, 369 F.3d 124, 143 (2d Cir. 2004).

231. *See, e.g.*, *Brown*, 518 U.S. at 235–42 (exploring the scope of the non-statutory labor exemption); *Mackey*, 543 F.2d at 613–15 (applying the non-statutory exemption to the Rozelle Rule); *Powell*, 930 F.2d at 1301, 1303 (applying the non-statutory exemption to an NFL labor dispute); *Clarett*, 369 F.3d 124 at 138–42 (applying the non-statutory exemption to the minimum age requirement).

232. After over three years of NIL fundraising, booster fatigue is becoming an issue for fundraisers. Meares et al., *supra* note 180, at 9–10.

233. Without any actual use of NIL, the boosters essentially become the rich aunt or uncle giving money to the children to pay their way into the athletic family.

234. As noted above, this is not particularly difficult in light of the subjectivity of valuing NILs in the public marketplace.

235. *See* 2020–21 DI MANUAL, *supra* note 8, at 3 (writing that college athletes "should be motivated primarily by education").

236. *See infra* note 307 and accompanying text.

of becoming a manager of a semi-pro sports franchise.[237] If the benefit of running such a sports endeavor was to fund academic units and programs, institutions might justify running non-student sports franchises, much like an ownership group that buys a professional sports team as an economic investment. If all the athletic revenue goes back into athletics, the benefit that universities get is the short-term front porch attraction of students, an important value—particularly at large public, tuition-driven institutions. Maybe the brand and the marketing are worth it, but in some ways, they transform the university from an academic institution into a sort of theme park operator.[238]

Revenue sharing does not have to eviscerate the amateur student-athlete model. Instead, the conference-employee student-athlete model can allow for remuneration while preserving education. Keeping revenue sharing remuneration separate from the university through the conference-employee model allows athletes to persist as students inside the university. The focus can still be education and academic growth, not just athletics. Antitrust law will not have killed the traditional student-athlete relationship. Intercollegiate athletics will remain part of the university and not become a marketing and entertainment adjunct to it.

C. Conferences as Preferable to the NCAA

A final implicit consequence of adopting a conference-employee, student-athlete model is the replacement, or at least the marginalization of, the NCAA, in favor of conference primacy. Such a shift makes sense for a number of reasons.

First, the NCAA lost the *Board of Regents* case in 1984.[239] *Board of Regents* held that the NCAA's restrictions on universities entering into television contracts violated the Sherman Act.[240] The conferences subsequently entered into their own television contracts, with Notre Dame entering into its own contract with the National Broadcasting Company (NBC).[241]

The consequence of this decision was that conferences, not the NCAA, control college football revenue, with the NCAA not receiving bowl or playoff money since 1984.[242] As a result, the conferences have become the

237. Some believe the NCAA and its member institutions are way too far down this path already.

238. Berry, *supra* note 185108.

239. NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984).

240. *Id.* at 119–20.

241. BERRY & LUST, *supra* note 7, at 86.

242. Virtually all of the NCAA's revenue comes from the March Madness men's and women's basketball tournaments. Eben Novy-Williams, *NCAA's Cash Cow Remains (for now) Amid*

points of control for the future of football, which largely drives intercollegiate athletics in that it has historically funded virtually every other sport except for basketball.

The strength and inherent weakness of the NCAA relates to its democratic model. It allows for each of over a thousand institutions to have a vote and participate, but over time this structure has become unwieldy. The move in 2014 to allow the Power conferences to establish "autonomy" rules about certain issues, including offering college athletes multi-year scholarships and covering the cost of attendance as part of the grant-in-aid, underscored the diversity of interests and economic resources of the NCAA's member institutions.[243]

The more recent adoption of a new NCAA Constitution in 2022 furthered this splintering.[244] The new Constitution decentralizes the NCAA's authority, delegating to each division the task of setting its own rules and shifting power to schools and conferences. This delegation allows each of the divisions to establish and enforce eligibility and academic standards.[245]

The recent conference realignments demonstrate that the conferences, and not the NCAA, own the power in college sports. The difference in the television deals between the SEC and the Big Ten as compared to the other Power conferences has driven this recent shift.[246] First, Texas and Oklahoma left the Big 12, expanding the SEC footprint and increasing the conference size to sixteen schools.[247] Then, as if in response, UCLA and USC left the Pac-12.[248] Washington and Oregon followed, resulting in a Big Ten comprised of eighteen schools and extending from coast-to-coast.[249] Colorado, Arizona, Arizona State, and Utah then left the Pac-12 for the Big-12.[250] Stanford and Cal completed the implosion of the Pac-12, leaving for

Wholesale Changes, SPORTICO (Mar. 19, 2024, 7:00 AM), https://www.sportico.com/leagues/college-sports/2024/ncaa-march-madness-revenue-billion-1234771183 [https://perma.cc/AA2S-XFEB].

243. BERRY & LUST, *supra* note 77, at 11–12.

244. *Id.* at 12; McGuire, *supra* note 6060.

245. BERRY & LUST, *supra* note 77, at 11–12.

246. *Id.* at 246–47.

247. *Id.* at 246.

248. *Id.*; Austin Curtright, *What Happened to the Pac-12? Explaining the Fall and Rebuild for Former Power Five League*, USA TODAY (Jan. 21, 2025, 11:28 AM), https://www.usatoday.com/story/sports/ncaaf/2025/01/01/what-happened-to-the-pac-12-explaining-fall-rebuild-league/77323274007/ [https://perma.cc/DWB9-BGWG].

249. Curtright, *supra* note 248; Craig Meyer, *Big Ten Conference Realignment: What Schools Has the League Added Over the Past 35 Years?*, USA TODAY (Oct. 12, 2024, 6:02 AM), https://www.usatoday.com/story/sports/ncaaf/bigten/2024/10/12/big-ten-conference-realignment-expansion-college-football/75566168007/ [https://perma.cc/HM8C-TKHD].

250. Meyer, *supra* note 249.

the Atlantic Coast Conference (ACC), along with Southern Methodist University (SMU).[251] And the Power Five became the Power Four.[252]

Like fans of the institutions moving conferences, the NCAA has remained a bystander amidst this shuffling. It has not really exerted influence over the reshuffling of schools, even though these moves have significantly compromised the concept of the student-athlete by enabling daunting travel schedules to emerge across both revenue and non-revenue sports. Schedules that have regular competitions with institutions on the opposite coast do not seem conducive to protecting athletes' time to engage in academics.

Instead, the NCAA's focus seems to continue to be to lobby Congress for an antitrust exemption after the Supreme Court declined to find one in *Alston*.[253] The NCAA and the Power 5 (now 4) have spent over $15 million in these lobbying efforts.[254] Indeed, it is possible that the NCAA will try to leverage its revenue sharing settlement in *House* into a federal law exempting the 22% cap from the Sherman Act.

Under the conference-employee, student-athlete model, the NCAA does not have to disappear. But it would, as it seems to be already doing, cede more authority to conferences to establish policies and the scope of athlete governance and regulation. In such a model, however, athletes would have a seat at the table and an opportunity to collectively bargain the parameters of their dual roles as conference-employees and student-athletes.

III. How the Conference-Employee, Student-Athlete Model Can Rescue Intercollegiate Athletics

The conference-employee, student-athlete model solves each of the three core problems of the status quo (and *House* settlement)—antitrust, labor law, and Title IX. As discussed, it also provides universities the opportunity to save the concept of student-athlete.

A. The Non-Statutory Labor Exemption

The central antitrust problem with the *House* settlement and NCAA regulations more generally is that they constitute restraints on trade which limit the competition between institutions.[255] The *House* settlement caps the

251. *Id.*; BERRY & LUST, *supra* note 77, at 88.

252. Curtright, *supra* note 248. Clemson and Florida State have sued to escape the ACC's contract, presumably to join the SEC, but their efforts have been unsuccessful to date. *See supra* note 173.

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

254. Amanda Christovich, *'A Breathtaking Lobbying Campaign': The NCAA's Sophisticated Effort to Save Amateurism*, FRONT OFF. SPORTS (May 18, 2024, 12:59 AM), https://frontofficesports.com/a-breathtaking-lobbying-campaign-the-ncaas-sophisticated-effort-to-save-amateurism/ [https://perma.cc/R2T3-CNRR].

255. *See* discussion *supra* subpart I(A).

amount of revenue sharing available to college athletes at 22% percent of the average revenue earned by the universities in the Power conferences.[256] This cap, like the grant-in-aid cap that the *House* plaintiffs challenged, is still a cap that constitutes an unreasonable restraint of trade.[257] There is no evidence that a cap at 22%, as opposed to 25% or 33% promotes the competition of the product of college football in the market for entertainment.

Antitrust law, then, poses an existential threat to college sports even *after* the *House* settlement. That is because the revenue sharing model still violates the Sherman Act, as probably do the other NCAA rules and regulations.[258]

Federal law, however, does provide insulation from antitrust law. The Supreme Court has developed a non-statutory labor exemption to address the inherent conflict between antitrust law and labor law.[259] Under this doctrine, the decisions of management and labor unions in entering collective bargaining agreements are immune from antitrust law.[260]

The Court's decision in *Brown v. Pro Football*[261] is instructive. In *Brown*, the NFL and its players association had begun to negotiate a new collective bargaining agreement after the expiration of the prior agreement in 1987.[262] In March 1989, the NFL adopted Resolution G-2, a plan that would permit each club to establish a "developmental squad" of up to six rookie or "first year" players who, as free agents, did not make the regular roster of any team.[263] With CBA negotiations ongoing, the League proposed a salary of $1,000 per week for players on the developmental squad, an amount that the players association rejected.[264] With the impasse continuing into May 1990, the League unilaterally implemented the Resolution G-2 program, distributing a uniform developmental league contract with the $1,000 salary to the players and also threatened to take away draft choices from any team that did not follow the resolution.[265]

256. In re College Athlete NIL Litigation, No. 20-cv-03919, 2025 WL 1675820, at *25 (N.D. Cal. June 6, 2025).

257. *See, e.g.*, *Alston*, 141 S. Ct. at 2166–69 (Kavanaugh, J., concurring) (arguing that the NCAA's business model is anticompetitive).

258. As noted above, the settlement should bar the current athletes entering into the settlement from later bringing antitrust suits. But it is not clear that the parties can use the settlement to block antitrust challenges in perpetuity.

259. Antitrust law bars collective action; labor law protects it. *Compare* 15 U.S.C. § 1 (declaring restraint of trade illegal), *with* 29 U.S.C. § 151 (asserting the legality of collective bargaining and free association).

260. *See* cases cited *supra* note231 231.

261. 518 U.S. 231 (1996).

262. *Id.* at 234.

263. *Id.*

264. *Id.*

265. *Id.* at 235.

A group of 235 developmental squad players then sued the League and its clubs, alleging that the $1,000 cap violated the Sherman Act.[266] The players won a $30 million verdict (courts treble antitrust damages), but the court of appeals reversed, and the Supreme Court also ruled for the NFL.[267] While the salary restraint clearly violates antitrust law, the Court has developed a non-statutory exemption to the Sherman Act in cases involving labor unions and disputes.[268]

On their face, the Sherman Act[269] and the NLRA[270] are federal statutes which have antithetical purposes.[271] The Sherman Act prohibits unreasonable restraints of trade, which include employers coming together to restrict competition.[272] The NLRA provides for and promotes collective bargaining, which, in multi-employer leagues like the NFL,[273] results in restraints of trade.[274]

The Supreme Court, then, absent guidance from Congress, must choose which statute receives priority—labor or antitrust. And the Court has chosen labor law.[275] The Court in *Brown* explained why. First, there had been a history of courts using antitrust laws to solve labor disputes, which was part of Congress's rationale for adopting the labor laws in the first place.[276] Perhaps more importantly, this approach logically makes the most sense.[277] As the *Brown* Court explains:

> it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable.[278]

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266. *Id.*

267. *Id.*

268. *Id.* at 236–37231; *see also* cases cited *supra* note 231231.

269. 15 U.S.C. §§ 1–7.

270. 29 U.S.C. § 151.

271. *Brown*, 518 U.S. at 236–37.

272. 15 U.S.C. § 1; *see* Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (explaining that a restraint of trade must merely regulate rather than suppress competition).

273. Interestingly, the NFL has tried to argue in other contexts that it is a single entity, immunizing it from antitrust law. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 187–88 (2010). But the Court rejected this defense, finding that the NFL was not a single entity, but a joint venture involving thirty-two franchises. *Id.* at 200.

274. *Brown*, 518 U.S. at 236–37.

275. *Id*. at 236–38; Connell Constr. Co. v. Plumbers, 421 U.S. 616, 622 (1975); Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689–91 (1965).

276. *Brown*, 518 U.S. at 236–37; *Meat Cutters*, 381 U.S. at 709–10 (Goldberg, J., concurring); Marine Cooks v. Panama S.S. Co., 362 U.S. 365, 370, n. 7 (1960); ARCHIBALD COX, LAW AND THE NATIONAL LABOR POLICY 3–8 (1960).

277. *Brown*, 518 U.S. at 237.

278. *Id.*

In other words, allowing antitrust liability will make forming labor unions and negotiating collective bargaining agreements impossible.[279] As such, the presence of a collective bargaining agreement provides a shield against antitrust claims.[280]

The Court in *Brown* had to go one step further in deciding whether the non-statutory exemption applied to unilateral acts made by management during an impasse in negotiations.[281] The Court held that it did, particularly because the "conduct took place during and immediately after a collective-bargaining negotiation."[282]

Turning back to the NCAA, one can see the value of unions[283] in light of the series of antitrust attacks it has recently faced.[284] Without labor unions and the non-statutory labor exemption, any caps that the NCAA and its member institutions place on athlete compensation are agreements that likely violate the Sherman Act.[285] But with labor unions, these restrictions become negotiated terms of a collective bargaining agreement. This means that conferences, through agreements with athletes, can set policies that benefit both the institutions and the athletes.

The insulation that the NCAA, universities, and athletes seek to achieve through the *House* settlement seems uncertain, particularly with respect to individuals who are not currently college athletes. While it is clear the *House* settlement can bind current athletes and perhaps even recruits, it is not clear that the court, through the settlement, can preclude future athletes from bringing antitrust claims. At the very least, the NCAA and its member institutions face years of litigation, and even then, will probably face antitrust liability for imposing a salary cap of 22% of the average revenue of the Power conferences.

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279. *Id.*; *see also* cases cited *supra* note 231. Interestingly, the NFL Players Association later adopted the successful strategy of decertifying the union and then suing under the Sherman Act, even though their ultimate intent was to reform the union. Powell v. Nat'l Football League, 764 F. Supp. 1351, 1356–59 (D. Minn. 1991). In the *Brady* case, the NFL filed an unfair labor practice claim challenging the decertification, but the NLRB did not rule on that issue prior to the case settling. Brady v. Nat'l Football League, 644 F.3d 661, 667–68 (8th Cir. 2011). *See* Lester Munson, *NFL Lockout Question: Was It Worth It?*, ESPN (July 26, 2011, 3:00 AM), https://www.espn.com/espn/commentary/story/_/page/munson-110725/nfl-lockout-settlement-questions-answers [https://perma.cc/3QE2-JJK5] (discussing the merits of the settlement).

280. *Brown*, 518 U.S. at 237–38.

281. *Id.* at 240–42. The Eighth Circuit reached a similar decision prior to the decision in *Brown*. Powell v. Nat'l Football League, 930 F.2d 1293, 1301–04 (8th Cir. 1989).

282. *Brown*, 518 U.S. at 250.

283. Berry, *supra* note 185.

284. *E.g.*, In re College Athlete NIL Litigation, No. 20-cv-03919, 2025 WL 1675820, at *1 (N.D. Cal. June 6, 2025); Alston v. NCAA, 141 S. Ct. 2141, 2144 (2021); O'Bannon v. NCAA, 802 F.3d 1049, 1052 (9th Cir. 2015); Tennessee v. NCAA, 718 F. Supp. 3d 756, 759 (E.D. Tenn. 2024); Pavia v. NCAA, 760 F. Supp. 3d 527, 531 (M.D. Tenn. 2024); Choh v. Brown Univ., 735 F. Supp. 3d 117, 123 (D. Conn. 2024); Ohio v. NCAA, 706 F. Supp. 3d 585, 590 (N.D. W. Va. 2023).

285. *See* discussion *supra* subpart I(A).

A non-statutory labor exemption, however, would provide such certainty and make litigation far less likely. A case involving former Ohio State running back Maurice Clarett demonstrates how extensive the non-statutory labor exemption protection can be.[286] Clarett was a star running back as a freshman on Ohio State's 2002 national championship team.[287] After getting into trouble with the NCAA and losing his eligibility, Clarett applied to enter the NFL draft early.[288] The NFL denied his entry.[289]

Clarett sued and claimed that the age restriction on the NFL draft violated the Sherman Act.[290] While the rule clearly restrained trade, the question before the court was whether the non-statutory labor exemption insulated the NFL from antitrust liability.[291] In an opinion by then-Judge Sonia Sotomayor, the court held that the NFL's rule fell within the scope of the non-statutory labor exemption, precluding Clarett from bringing his antitrust claim.[292]

The court's rationale related to the primacy of labor law over antitrust law.[293] The sanctity of collective bargaining agreements was such that the court was unwilling to subject the CBA to external attack from antitrust claims.[294] The degree to which a CBA is the product of such an intensely bargained negotiation should insulate it from third parties in almost all situations.[295]

Also relevant to the court was the overall impact of its decision.[296] The rule adopted in the CBA did not foreclose Clarett from entering the draft forever.[297] Rather it required him to wait a year, with the justifications for the

286. Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004).

287. Steve Helwagen, *Remembering 2002: National Title Game Win Over Miami Was 20 Years Ago Today*, 247SPORTS: BUCKNUTS (Jan. 3, 2023, 11:36 AM), https://247sports.com/college/ohio-state/longformarticle/ohio-state-buckeyes-football-won-national-championship-in-fiesta-bowl-over-miami-hurricanes-in-2002-season-202034093/ [https://perma.cc/4TYE-7NDJ].

288. *Clarett*, 369 F.3d at 126.

289. *Id.*

290. *Id.*

291. *Id*.

292. *Id.* at 138–42. While Judge Sotomayor did not save Maurice Clarett, she did "save" baseball, at least at the time, with her decision that essentially ended the strike in 1995. Silverman v. MLB Player Rels. Comm., Inc., 880 F. Supp. 246, 261 (S.D.N.Y. 1995).

293. *Clarett*, 369 F.3d at 138–42.

294. *Id.* at 143.

295. *See id.* at 142 (writing that the CBA itself clarifies that the union and NFL reached an agreement as to how eligibility is handled).

296. *Id.* at 143.

297. *Id.* at 126.

rule being reasonable.[298] In other words, the restraint did not keep Clarett from entering the NFL; it merely delayed it.[299]

This is the kind of reach the *House* settlement is seeking with respect to insulation from antitrust. But labor law provides a much more solid foundation than the settlement of an antitrust claim, particularly with respect to third parties whose interests may arise at a later date. Under a conference-employee model, then, labor unions can eliminate the antitrust problem of the NCAA and its member institutions. A collective bargaining agreement would allow the universities in a conference to set a cap on the revenue shared without violating the Sherman Act. But as discussed above, such a CBA is only possible with a conference-employee model, unless a number of states provide a right for public sector employees to bargain with state employers.[300]

B. Private Employees

As discussed, universities can only set caps on revenue sharing if the non-statutory labor exemption applies. But that requires a union, and many states bar public employees from unionizing, meaning that only some athletes can unionize.[301]

The conference-employee model, however, remedies this problem by making all college athletes employees of a private entity: an athletic conference. There is no state law impediment to college athletes forming a union as employees of an athletic conference.

Indeed, unions do exist in states that do not provide for public sector employee collective bargaining.[302] Just not public unions.[303] And as professional sports have shown, unions work reasonably well in the context of athletic employment. Part of the reason unions work well in athletics is that the athletes are generally not replaceable; there are a limited number of people with the talent and physical ability to play sports at a Division I level, particularly in the Power conferences.

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298. *Id.*

299. *Id.* at 141. Clarett did go through the NFL draft, and the Denver Broncos drafted him, but cut him at the end of training camp. Assoc. Press, *Timeline: The Rise and Fall of Maurice Clarett*, ESPN (Aug. 9, 2006, 10:54 PM), https://www.espn.com/nfl/news/story?id=2545204 [https://perma.cc/83A3-G8QT].

300. Such a cascade of change is possible. The widespread adoption of NIL laws is a recent example as is the widespread adoption of sports betting laws after the *Murphy* case. BERRY & LUST, *supra* note 7, at 294–95.

301. CJLE: LAB, *supra* note 149.

302. *See, e.g.*, *Union Affiliation by U.S. State*, WIKIPEDIA, https://en.wikipedia.org/wiki/Union_affiliation_by_U.S._state [https://perma.cc/PD5D-TWDM] (showing that unions exist in every state regardless of whether there is public sector collective bargaining).

303. CJLE: LAB, *supra* note 149.

Athletes would not need to form unions to bargain with their universities, as students at Northwestern, Dartmouth, USC, and Notre Dame have tried.[304] Instead, the conference-employee model sets up a structure where forming a union is not a litigation battle, but rather an expected framework that benefits all involved.[305]

In addition to overcoming the barrier of public employee collective bargaining in some states, the conference-employee, student-athlete model establishes a better employment arrangement for athletes than simply being employees of their universities. Athletic administrators, academic administrators, and university presidents continue to resist both athlete unionization and university employment of athletes.[306] This is because if athletes are employees, it threatens the concept of the student-athlete as well as the need to even pursue a degree (as opposed to maximizing the athlete's employment and opportunity for professional league advancement). It also complicates matters for institutions because they will slot athletes in with the tens of thousands of other employees through the human resources department. As discussed, this will also require institutions to shoulder the expense of the benefits packages athletes will receive, which often adds a sizeable percentage to the overall cost of the employee at some institutions. Indeed, it is only a matter of time before faculty senates start passing resolutions complaining about the pay disparity between university employee-athletes and full, chaired professors.

A conference-employee model would separate out the compensation and employment from the university and allow the athlete-university relationship to persist as it has for decades, as an amateur student-athlete relationship. This "amateurism" does not mean athletes do not receive compensation; rather, it means that the compensation that the university provides is not for employment but for education.

Under such an approach, athletes would not need to be university employees. Their conference-employee CBA would both provide a separate way to receive compensation and to give athletes a say in negotiating the terms and conditions of their conference employment. With universities participating in conference governance, the institutions would be able to shape the CBA in a way that makes room for the student-athlete as opposed to the university-employee revenue sharing model, which could have the effect of extinguishing it. With ninety-eight percent of athletes "going pro" in something besides sports, moving toward a semi-pro intercollegiate sports

304. BERRY & LUST, *supra* note 7, at 235–43.

305. It is worth noting that under the NLRA, the decision to form a union would be a democratic one, in which a majority of similarly situated athletes would decide to unionize.

306. Some even believe that the settlement will allow pay-for-play without requiring athletes to be employees, but once athletes receive a paycheck, particularly one for tens or hundreds of thousands of dollars, this argument seems increasingly dubious.

model because of the requirements of antitrust law is not the best path forward.[307]

C. Private Association

Just as the absence of state laws providing for public sector employee collective bargaining are not an impediment to conference-employee unions, Title IX will also not be a barrier to revenue sharing based on money generated as opposed to gender. While Title IX applies to universities as institutions that receive federal funding, it does not apply to conferences.

In *Smith v. NCAA*,[308] the Court held that Title IX does not apply to the NCAA.[309] This is because the NCAA is a private entity, not a public entity, or alternatively, an entity receiving federal funding.[310] The same is true for athletic conferences. Title IX does not apply to athletic conferences because they are private and do not receive federal funding.

The consequence of escaping Title IX is significant for revenue sharing. Under the conference-employee, student-athlete model, institutions must still follow Title IX by achieving proportionality by gender in their allocation of scholarships or otherwise fall under the safe harbors of OCR regulations.[311]

It is not clear whether Title IX requires that the athlete revenue sharing from the *House* settlement be equal between the genders.[312] The OCR has issued a statement that it must be, but it remains to be seen whether the Trump OCR will continue that position and whether that determination is within the power of the OCR.[313] Whatever the decision, litigation is likely to ensue, particularly after the decision in *Loper Bright*.[314]

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307. Karen Weaver, *What College Athletic Departments Should Do to Level the Playing Field for Black Athletes Who Don't Go Pro*, FORBES (Apr. 16, 2021, 10:55 AM), https://www.forbes.com/sites/karenweaver/2021/04/16/what-college-athletic-departments-should-do-to-level-the-playing-field-for-black-athletes-who-dont-go-pro/ [https://perma.cc/PU8G-VJNG]; Rob Barber, *NCAA Student-Athlete Commercial* (YouTube, Apr. 2, 2011), https://www.youtube.com/watch?v=9UzO4DJBoWw [https://perma.cc/9PSW-Y4TQ]; Dan Levy, *NCAA Is Looking for a Marketing Makeover, Here Are Some Terrible Ideas*, BLEACHER REP. (June 7, 2018), https://bleacherreport.com/articles/1143312-ncaa-is-looking-for-a-marketing-makeover-here-are-some-terrible-ideas [https://perma.cc/6PBT-CHGP].

308. 525 U.S. 459 (1999).

309. *Id.* at 470.

310. Indeed, almost all of the NCAA's funding comes from the NCAA March Madness men's and women's basketball tournaments. *See supra* note 242.

311. Proportionality requires that the breakdown of scholarships by gender match the breakdown of students by gender. If the institution cannot achieve proportionality, it may still satisfy the regulatory requirements of the OCR by demonstrating movement toward proportionality or demonstrating that the institution has met the interest of the students in participating in college sports. *See supra* note 52 and accompanying text.

312. *See* sources cited *supra* note 56.

313. *See* FACT SHEET: ENSURING EQUAL OPPORTUNITY, *supra* note 5656.

314. *See* Loper Bright v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling Chevron deference); *see* discussion *supra* note 57.

The conference-employee, student-athlete model would make such a determination academic because Title IX does not apply to conferences. While such a decision might favor male athletes in the short term, it is entirely possible that at least some women's sports will generate more revenue than men's in the near future.[315]

Conclusion

This Article has offered a novel approach to the antitrust conundrum facing college athletics, after the NCAA paid a $2.78 billion settlement and adopted a revenue model that does not solve its problems.[316] As discussed, antitrust, labor and employment, and Title IX problems still remain even if the Ninth Circuit accepts the settlement.

In light of that situation, this Article has proposed a conference-employee, student-athlete model. This model would have conferences employ athletes and share revenues through collective bargaining agreements. These agreements would give athletes a say in the terms of their employment, the ability to better protect their health and safety, and the opportunity to negotiate for a greater share of revenue. Further, a conference-employee CBA could end the chaos of the transfer portal and adopt a more reasonable model that allows for athlete movement but ends perpetual recruitment.

Finally, this model solves all three of the problems remaining after *House*. It solves antitrust by using the non-statutory labor exemption to protect the terms of the revenue sharing agreement. It uses labor law to end the attempts at university employment and university labor unions by creating a conference-athlete CBA. It also circumvents the absence of state laws protecting the right of public employees to collectively bargain with state employers. Finally, the conference-employee, student-athlete model solves the Title IX problem because conferences are not subject to Title IX, as they are not federally funded institutions.

In sum, antitrust law has left college sports in chaos. This model provides a solution. One can only hope that administrators and college presidents alike will entertain such reform rather than continue to blindly hope that Congress will save the day.

315. *See* sources cited *supra* note 169.

316. *See* Baker, *supra* note 3 (acknowledging that significant challenges remain post-*House*).